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**PAROLE IN SOUTH AFRICA:
IS IT RIGHT OR A PRIVILEGE?
THE THEORY AND PRACTICE OF PAROLE IN
SOUTH AFRICAN CORRECTIONAL CENTRES
WITH A SPECIFIC FOCUS ON THE NATURE OF
PAROLE UNDER THE CORRECTIONAL
SERVICES ACT 8 OF 1959 (REPEALED) AND THE
CURRENT CORRECTIONAL SERVICES ACT 111
OF 1998**

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It is hereby declared that the opinions expressed and conclusion drawn in this study are those of the author and do not necessarily reflect in any way the views of the abovementioned persons.

JJ MOSES
March 2009

DECLARATION

I, JACOBUS JOHANNES MOSES, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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Abstract

The principal focus of this research centres around the question whether parole, as it is understood and practised in South Africa, is a right or a privilege.

The essential question of this thesis is whether a prisoner acquires an enforceable right to be released on parole after having served the non-parole period or the statutorily determined minimum period of imprisonment. The focus is on the status of the prisoner and the process relating to his/her continued incarceration in the period starting from when his or her non-parole period has ended to the actual date of his or her release from prison according to the sentence imposed on him by the sentencing judge / magistrate.

In addressing this question, in a South African context, reference is made, by way of comparison, to the practice of parole nationally, and internationally, including America, Canada, Australia, India, England and the European continent insofar as it falls under the jurisdiction of the European Court of Human Rights.

Parole deals with persons who, having gone through the three stages of criminal justice system, namely the investigative stage, the trial stage and the post-trial stage, have been convicted and sentenced to imprisonment.

The theory and practice of parole has traditionally been the predominant domain of the Department of Correctional Services, its institutions and officials.

Since the introduction of the (Interim) Constitution Act 200 of 1993 and the (Final) Constitution 108 of 1996, the post-trial rights of an accused person, including a prisoner - which would therefore include parole, gradually started to attract the focus of academics and jurists, as accused persons, including prisoners, were starting to progressively assert their rights.

A discernable trend is noted, in respect of the rhetoric and practice of parole, internationally and also nationally, namely a progressive awareness, realisation and appreciation that parole can no longer be regarded as simply a privilege, given to a prisoner at the whim of the Head of Prison or a Commissioner of Prisons, in a manner similar to how a father would treat and/or reward his errant child.

Parole is a multi-staged process which starts with the imprisonment of a person and which culminates in the release of a prisoner before the end of his or her actual term of imprisonment. Decisions regarding the prisoner are intermittently taken at each stage of the process. During this process, prisoners acquire and have rights and obligations vis-à-vis the State, as represented by the Department of Correctional Services, its various organs and officials, including the Correctional Supervision and Parole Board (CSPB), Correctional Supervision and Parole Review Board (CSPRB) and the Court acting in terms of the applicable provisions of the 1998 Correctional Services

Act. These organs of state also have rights and obligations vis-à-vis the prisoner in this process, and is particularly obliged to act strictly within the parameters allowed by the 1998 Correctional Services Act and the Constitution.

There is international recognition for the fact that to award good time credits and/or remissions - the determination whereof differs from country to country - to a prisoner, as a reward for his/her good, positive and/or industrious conduct in prison, created at the very least a "liberty interest". It is argued that in South Africa, those credits which were allocated to prisoners in terms of s 22A of the 1959 Correctional Services Act and which are retained for prisoners sentenced before 1 October 2004, when the 1998 Correctional Services Act came into operation, and which advance a prisoner's assessment date for parole, similarly creates at the very least "a liberty interest".

Moreover, since each prisoner has an enforceable right to be assessed and considered, and an enforceable right to be assessed and considered fairly, lawfully and reasonably, and to a fair, lawful and reasonable decision regarding parole eligibility, this can found in a given situation a legitimate expectation on the part of the prisoner to be released on parole before the expiry of the actual prison term imposed on such a prisoner.

In South Africa the legitimate expectation of the prisoner to be released on parole is based, firstly, on a long-standing practice of early (parole) release of prisoners within the correctional services system. This practice is also now constitutionally acknowledged and elevated to a constitutional

requirement without which the sentence of life imprisonment in South Africa (and in Namibia) would have been unconstitutional. This legitimate expectation is also created by the policies of the Department of Correctional Services (DCS) and the structure of the 1998 Correctional Services Act in terms whereof early release on parole, as a substantive benefit, is expressly authorised and promised to a prisoner who complies with the applicable eligibility requirements.

The remission and/or credits so awarded to a prisoner become part of his/her enforceable rights which both inform, and form part of, that legitimate expectation of the prisoner to be released on parole before the expiry of his or her actual term of imprisonment.

As such, it is an enforceable right which the prisoner has against the DCS. Once parole, in the form of conditional release, is granted to a prisoner, it cannot be cancelled unfairly, unlawfully and/or unreasonably, or in breach of such a parolee's constitutionally guaranteed rights.

ABBREVIATIONS

A/AD	Appellate Division of the Supreme Court of South Africa, now SCA
ACC	Allahbad Criminal Cases in India
AHRJ	African Human Rights Journal
AIR	All India Law Reports
All ER	All England Law Reports
All SA	All South African Law Reports
A Crim L	Australian Criminal Law Reports
BCLR	Butterworths Constitutional Law Reports
CA	Court of Appeal
CC	Constitutional Court
CCC	Canadian Criminal Cases
CLJ	Commonwealth Law Journal
CSOB	Correctional Services Order, Part B
CSPB	Correctional Supervision and Parole Board
CSPRB	Correctional Supervision and Parole Review Board
EHRR	European Human Rights Reports
GG	Government Gazette
HC LB	High Court Luknow Bench in India
HKLJ	Hong Kong Law Journal
HL	House of Lords
ICCPR	International Covenant on Civil and Political Rights
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
Nm S	Namibian Supreme Court
PAJA	The Promotion of Administrative Justice Act, 3 of 2000
Proc	Proclamation
R	Regulations
Ref	Reference Number
RSA	Republic of South Africa
QLD S Ct	Queensland Supreme Court
SA	South African Law Reports
SACC	South African Journal for Criminal Law and Criminology
SACJ	South African Criminal Justice Journal
SACR	South African Criminal Law Reports
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SA Public	South African Public Law Journal
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
Tas S Ct	Tasmania Supreme Court
THRHR	Tydskrif vir Hedendaagse Romeins Hollandse Reg
US SCt	United States Supreme Court

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CHAPTER 1

INTRODUCTION

1.1 The research question

The nature of parole and its theoretical premise has received little or no attention in the South African criminal justice jurisprudence thus far. In those cases where the issue of parole was considered, the commentators and the high courts have either elected not to deal with that question specifically¹, or have simply assumed that parole is merely a privilege².

The main focus of this research centres around the question whether parole, as it is understood and practised in South Africa, is a right or a privilege. This question has not only arisen in the South African criminal justice system³. It has also arisen and been referred to in America⁴, Canada⁵, Australia⁶, England⁷, India⁸ and in Europe⁹.

¹ See, generally, Graser 'Parole in South Africa' Ph.D Dissertation (1982); See, generally, Sloth-Nielsen 'A Matter of Social Justice: A Review of Parole' (1986) 10 SACC 29; Graser 'Parole in South Africa: Attitudes and Opinions of Judicial Officers, Prison Personnel and Aftercare Social Workers' (1985) 9 SACC 29; Van Zyl Smit *South African Prison Law and Practice* (1992) 368; Van Zyl Smit 'Prisoners' Rights' in *South African Human Rights Year Book* (1994) 268–280. See also *S v Tsoeb* 1996 (1) SACR 390 (NmS) 398–399 A-C, wherein Mahomed CJ, who subsequently after 1994 became the first black Chief Justice of the Republic of South Africa under a democratic constitution, referred to it as 'the nagging question' without expressing any firm opinion on it or pronouncing any judgment thereon.

² *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C); *Combrink and Another v Minister of Correctional Services and Another* 2001 (3) SA 338 (D); *S v Nkosi* 1984 (4) SA 94 (T); *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *Goldberg and Others v Minister of Prisons* 1979 (1) SA 14 (AD).

³ Moses 'Parole: Is it a Right or a Privilege' (2003) 19 SAJHR 263 *et seq*; Lidavho 'Suggestions on the Application of the Bifurcated Placement Policy of the Department of Correctional Services' (2006) 19 SACJ 212 at 216–217 where the author refers to the unreported case of *Ngwenya and Others v Minister of Correctional Services and Others* (n 14) dated 2 June 2004, case number 03/29540 (WLD) 2003.

The essential question of this thesis is whether a prisoner acquires an enforceable right to be released on parole after having served the non-parole period or the statutorily determined minimum period of imprisonment. The central focus therefore is on the status of the prisoner and the process relating to his or her continued incarceration in the period starting from when his or her non-parole period has ended to his or her actual release date according to the prison sentence imposed by the sentencing judge or magistrate.

1.2 A brief history of the evolution of parole

The word 'parole' is derived from the French *parole d'honneur*, which means 'to honour' or 'word of honour'¹⁰ (to be distinguished from probation, from the Latin '*probare*' – to prove¹¹) which refers in its historical context to the French practice of releasing captured soldiers (prisoners of war) on their pledge (word of honour) not to resume hostilities against France upon their release.

⁴ *Morrissey v Brewer* 1972 (408) US 471. This is also discussed in more detail in Chapter 5 *infra*. See also Carney *op cit* (n 11), 306–308; Abadinsky *op cit* (n 10) 267–271.

⁵ *Mooring v Canada (National Parole Board)* 1995 (93) CCC (3d) 415, 437. This is also discussed in more detail in Chapter 5 *infra*.

⁶ *Parole Board Ex Parte Palmer* 1993 (68) A Crim R 324 (QLD SC) 330–331. This is also discussed in more detail in Chapter 5 *infra*.

⁷ *Doody v Secretary of State for the Home Department and Others* 1993 (3) All E.R. 92 (HL) 100–103. This is discussed in more detail in Chapter 5 *infra*.

⁸ *Dualat v State of UP* (Allahbad High Court) Lucknow Bench 1999 (38) ACC 899 at 903–905. This is discussed and referred to in more detail in Chapter 5 *infra*.

⁹ *Campbell & Fell v United Kingdom* 1984 (7) EHRR 165 paras 72–73.

¹⁰ Abadinsky *Probation and Parole: Theory and Practice* (2006) 206–207; Graser 'Parole in South Africa' (n1) 41

¹¹ Carney *Probation and Parole: Legal and Social Dimensions* (1977) 80, 135–140.

Parole evolved from a system of prison reforms developed in the mid-1800s by and accredited to one Captain Alexander Maconochie who, in the 1800s, was an officer in the British Royal Navy¹². In 1840 he became Governor of Norfolk Island, a very small island to which the worst convicted criminals at the time were sent¹³. It is here that he implemented his five staged programme of reduced incarceration based on a system of marks which a convict could earn, that culminated in the conditional release of the convicts on the famous 'ticket of leave'¹⁴. These five stages of passage consisted of (i) strict custody of the convict upon admission to the penal colony of Norfolk Island; (ii) labour on government gangs; (iii) limited freedom on the island, within a prescribed area; (iv) the ticket of leave; and, (v) full restoration of liberty¹⁵.

This philosophy was shared and expanded upon by Sir Walton Crofton, who became the head of the Irish prison system in 1854¹⁶. Crofton, who shared Maconochie's vision that a prison should not only be purely punitive in nature but also reformatory, is accredited for introducing the ticket of leave system into the Irish prison system¹⁷. Crofton's 'Intermediate System', as he referred to the ticket of leave system, similarly required the convict to progress from strict imprisonment in the

¹² Abadinsky *op cit* (n 10); Carney *op cit* (n 11) 135--140.

¹³ Abadinsky *op cit* (n 10); Carney *op cit* (n 11) 135-140.

¹⁴ Abadinsky *op cit* (n 10); Carney *op cit* (n 11) 135-140.

¹⁵ Abadinsky *op cit* (n 10); Carney *op cit* (n 11) 135-140.

¹⁶ Abadinsky *op cit* (n 10) 206; Carney *op cit* (n 11) *ibid*.

¹⁷ Abadinsky *op cit* (n 10) *ibid*; Carney *op cit* (n 11) *ibid*.

initial phase, intermediate imprisonment in the middle phase, and ticket of leave with supervision in the culminating stage¹⁸. This 'Intermediate System' consisted of (i) conditional release of a prisoner; (ii) community involvement; (iii) supervision; and, (iv) revocation for breach of the conditions of the 'Ticket of Licence', as it was referred to in Ireland¹⁹.

It is argued that Crofton's system contains 'the basic ingredients' or 'the essential elements' of contemporary parole, namely (i) conditional release into the community; (ii) under supervision; (iii) with community involvement to effect social integration; and, (iv) revocation of parole as the ultimate negative penalty²⁰.

1.4 The statutory evolution of parole in South Africa

The first statutory reference in the Republic of South Africa, to conditional release of prisoners before their sentence expires was contained in The Prisons and Reformatories Act 1911²¹, which was introduced shortly after Unionisation in 1910²². Thus provision was made for remission of part of an inmate's sentence subject to good behaviour, and the introduction of a system of probation that allowed for the early release of inmates, either

¹⁸ Abadinsky *op cit* (n 10); Carney *op cit* (n 11) *ibid*.

¹⁹ Abadinsky *op cit* (n 10) 205-206; Carney *op cit* (n 11) 138-139; Gottfredson and Gottfredson 'Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion' (1988) 3 *Law, Society and Policy* 229.

²⁰ Abadinsky *op cit* (n 10) 206-207; Carney *op cit* (n 11) *ibid*; Gottfredson and Gottfredson *op cit* (n 19) *ibid*.

²¹ Act No 13 of 1911.

²² White Paper on Corrections in South Africa, DCS (February 2005) 43.

directly into the community or through an interim period in a work colony or similar institution²³. Despite these provisions, however, it is noted that the systematic application of parole within the South African criminal justice system in general, and its penal system in particular, only really started to be implemented in the early 1950's²⁴. The entire Act 13 of 1911 was replaced by the Prisons Act 8 of 1959, labelled as 'brand new prison legislation'²⁵. This "new Act" was criticised on various grounds²⁶ *inter alia*, that it 'did not give essence to the internationally accepted meaning of the word parole since it still required of paroled prisoners to enter into employment agreements with employers (mainly farmers) at ridiculously low remuneration or else remain in prison'²⁷.

Section 1 of the Prisons Act, 1959²⁸ - which later became the Correctional Services Act, 1959²⁹ - did not contain a definition of parole until 1993. It did, however, contain the clause 'release on parole' which was defined as 'the release of any prisoner on parole in terms of Section 67'³⁰.

²³ White Paper on Corrections in South Africa *op cit* (n 22) 43–44.

²⁴ Graser *op cit* (n 1. n 10).

²⁵ *Ibid* 85.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ 8 of 1959.

²⁹ 8 of 1959.

³⁰ Section 1 read with s 67 of the Prisons Act 8 of 1959. Section 67 reads as follows:

Release on probation or parole –

(1) The Commissioner may -

(a) if the total period of imprisonment to be served by a prisoner under one or more sentences is less than 2 years; or

(b) on the authority of the State President or of the Minister granted under any provision of any law in respect of a prisoner serving any period of imprisonment,

In 1990 the term 'daily parole' was inserted into the Prisons Act, 1959³¹ by the insertion of a new section, s 92A, which authorised the Commissioner to grant daily parole to any prisoner on such conditions and for such periods as he saw fit. The Commissioner was also authorised in terms of this section to cancel such daily parole at any time.³²

In 1991 the name of the Prisons Act was changed to the Correctional Services Act and any reference to the Prisons Service was to be construed as a reference to 'Department of Correctional Services'.³³

The Correctional Services and Supervision Matters Amendment Act 122 of 1991 is of historical importance in that it introduced for the first time into the South African legislative framework, and more particularly its criminal justice system, the concept of correctional supervision. The latter was both a new sentencing option for courts of law and a release option at the disposal of the Commissioner of Correctional Services in terms

and irrespective of whether the imprisonment was imposed with or without the option of a fine, release such prisoner before the expiration of the period in question either on probation or on parole for such period and on such conditions as may be specified in the warrant or release.

(2) If any prisoner so released on probation or on parole completes the period thereof without breaking any condition of their release, he shall no longer be deemed to be liable to any punishment in respect of the conviction upon which he was sentenced.

³¹ 8 of 1959.

³² Section 1(b) of the Prisons Amendment Act 92 of 1990 read with s 27, which inserted the definition of daily parole and s 92A in the Prisons Act 8 of 1959.

³³ In terms of s 33 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991. The latter Act 122 of 1991 commenced on 15 August 1991.

whereof a prisoner sentenced by a court of law to imprisonment can be released from prison under correctional supervision (as a probationer)³⁴.

The definition of 'release boards' was also deleted and it was replaced with 'correctional boards' which was defined as 'a correctional board appointed under section 5'³⁵.

It was only in 1993 that a definition of the word 'parole' was inserted into the renamed Correctional Services Act, 1959³⁶, with the simultaneous deletion of the definition of 'release on parole'. Parole was henceforth defined as meaning '[t]he conditions under which a prisoner may be placed in terms of section 65'³⁷.

The release system as contained in Chapter VI of the Prisons Act 1959³⁸, which was effectively introduced in 1980, including its parole provision³⁹, was completely overhauled and effectively changed by the Correctional Services Amendment Act, 1993⁴⁰ which, in its stead,

³⁴ Section 276(1)(h) of the Criminal Procedure Act 51 of 1977, and s 276(1)(i) of the Act 51 of 1977 as amended by s 41 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991; see also *S v R* 1993 (1) SA 476 (A); 1993 (1) SACR 209 (A) where the introduction of correctional supervision as a sentencing option has been described as ushering in a new phase in the South African criminal justice system.

³⁵ Section 1(a) and s 1(c) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

³⁶ 8 of 1959.

³⁷ Section 1(d) of the Correctional Services Amendment Act 68 of 1993. Section 65 of the Correctional Services Act makes provision for the release of prisoners and placement of prisoners on parole.

³⁸ 8 of 1959.

³⁹ Section 67 of the Prison Act 8 of 1959.

⁴⁰ 68 of 1993.

introduced a new release system which was contained in a new Chapter VI⁴¹.

The definition of parole was changed yet again with the promulgation of the new and current Correctional Services Act 1998⁴² ('the 1998 Correctional Services Act'), which in turn not only introduced a new release system under Chapter VI, but also repealed the old Correctional Services Act 8 of 1959 ('the 1959 Correctional Services Act'). The 1998 Correctional Services Act was gradually implemented with the simultaneous repeal of the corresponding provisions of the 1959 Correctional Services Act. The last and remaining provisions of the 1998 Correctional Services Act came into effect on 1 October 2004 with the simultaneous repeal of the last and remaining provisions of the 1959 Correctional Services Act⁴³.

⁴¹ Subsections 1-27 of the Correctional Services Amendment Act 68 of 1993, which became ss 61-72 of the 1959 Correctional Services Act as amended; see also Van Zyl Smit 'Prisoners' Rights' *South African Human Rights Yearbook* 5 (1994) 268-270, 279-280 for a brief description of the salient aspects of this new release system introduced by the 1993 Amendment Act; see also Van Zyl Smit 'South Africa' in Van Zyl Smit and Dünkel (eds) *Imprisonment Today and Tomorrow International Perspectives on Prisoners' Rights and Prison Conditions* 2ed (2001) 589-608.

⁴² 111 of 1998.

⁴³ Correctional Services Act 111 of 1998 as amended by Proclamation No R38 *Government Gazette* 26626 of 3 July 2004 which repeals the following provisions of the Correctional Services Act 8 of 1959. With effect from 31 July 2004: ss 2, 3, 3A, 6 to 9, 9A, 9G, 10 to 13, 13A, 13B, 14 to 19, 21, 22, 22B, 23, 24, 26 to 28, 30, 34, 41, 42, 42A, 43 to 48, 48A, 49 to 55, 57 to 60, 73, 74, 74A, 75 to 77, 79 to 83, 85 to 89, 89A, 90, 91, 94; and With effect from 1 October 2004: ss 1, 5A, 5C, 22A, 31, 32, 32A, 33, 62, 63, 64A to 64C, 65 to 70, 84, 84A to 84E, 89B, 92, 92A, 93, 95. The following provisions of the Correctional Services Act 111 of 1998 commenced, in terms of the aforesaid Proclamation, on 31 July 2004: ss 2, 4, 6 to 49, 96, 98, 99 to 102, 131 to 133; and on 1 October 2004: ss 50 to 82 (the new Chapter VI), 134, 136, 137.

The Parole and Correctional Supervision Matters Amendment Act No 87 of 1997, which date of commencement was set as 1 October 2004 in terms of Proclamation R.38 in *Government Gazette* 26626 of 30 July 2004, was also repealed by the same Proclamation except ss 20 to 23 thereof.

The definition of parole under the 1998 Correctional Services Act is that it means 'a form of community corrections contemplated in Chapter VI'. 'Community corrections' is defined as meaning '... all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department'⁴⁴. The term 'daily parole', as it was known under the 1959 Correctional Services Act was also deleted and replaced with the term 'day parole', which means 'a form of community corrections contemplated in Section 54'⁴⁵. The term 'correctional supervision' is also defined as meaning 'a form of community corrections contemplated in Chapter VI'⁴⁶.

In terms of the current legislation, parole can therefore be considered as a form of conditional release of prisoners into the community, before the expiry of their sentences, subject to, and on the basis of an undertaking by the parolee that he/she will not abscond and will comply with such conditions imposed and prescribed by the Correctional Supervision and Parole Board, the Commissioner of Correctional Services or the Court, as the case may be.⁴⁷ Such parolees will also remain subject to the supervision of a supervision committee⁴⁸ until the lawful termination or expiry of the prisoner's remaining term of imprisonment or his / her period of parole. In this sense, the South African penal system

⁴⁴ Section 1 of the Correctional Services Act 111 of 1998.

⁴⁵ Section 1 of the Correctional Services Act 111 of 1998.

⁴⁶ Section 1 of the Correctional Services Act 111 of 1998 as amended.

⁴⁷ Section 52 read with s 39 and s 73 of the Correctional Services Act 111 of 1998

⁴⁸ Section 58 of the Correctional Services Act 111 of 1998.

has to a large extent incorporated the basic ingredients of Crofton's 'Intermediate System' consisting of (i) conditional release into the community, (ii) under supervision, (iii) with community involvement to effect social integration, and (iv) revocation of parole for breach of the conditions of parole.⁴⁹

1.4 The rationale and philosophy underlying parole

Parole is today generally and universally recognised as an important part of the sound administration of penal institutions and, in particular, the rehabilitation of offenders⁵⁰. Its existence in modern penal administrations can be justified primarily by reason of its role in fostering rehabilitation by gradually facilitating the move from confinement in an artificially created environment (prison) to social reintegration and resocialisation⁵¹. It is also justified on the basis that it creates the necessary restraint to keep the parolee away from committing further offences, and also serves the function of deterrence by the mere fact that the parolee knows that breach of a condition or the commission of a criminal offence may result in his /

⁴⁹ Abadinsky *op cit* (n 10) *ibid* (1997 edition: p 158); Carney *op cit* (n 11, n 17) *ibid*.

⁵⁰ Articles 10(1) and 10(3) of the International Covenant on Civil and Political Rights (ICCPR) which finds expression in the United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted on 30 August 1965, in particular Rule 60 read with Rule 61 thereof. See also White Paper on Corrections in South Africa *op cit* (n 22). See also Abadinsky *op cit* (n 10, n 17 – 1977 Edition) Preface, 7 169, 171–173, 201, 246, 258 and 400 with reference to the US Supreme Court case of *Morrissey v Brewer* 408 US 471, 92 S. Ct (1972); Abadinsky *op cit* (n 10) 223; Gottfredson and Gottfredson *op cit* (n 19) 176–177; Carney *op cit* (n 11) *ibid*; Hudson *Penal Policy and Social Justice* (1993) 141, 143, 144, 164–165; Graser *op cit* (n 1) 57–58.

⁵¹ Prison Information Bulletin No 16 *op cit* (n 52); Cohen *op cit* (n 52).

her re-incarceration⁵². From the perspective of the prison administration, it fulfils the very important role of creating the incentive for prisoners to obey the rules and to give their co-operation⁵³.

Parole is also recognised as a mechanism to address the overcrowding of prisons – described as the greatest problem facing correctional decision makers⁵⁴, by reducing the prison population. By doing so it also saves the community the added costs of housing an inmate who in any event may be capable of leading a productive, self-sufficient life outside prison, but subject to the necessary parole conditions⁵⁵. This is a pertinent consideration in South Africa where overcrowding of prisons is a real and serious problem⁵⁶.

Though not always recognised, parole can fulfil the role of an equaliser and/or fine tuner of two or more different sentences imposed by a court of law, where there is a large disparity in order to reduce that sentencing disparity⁵⁷. This is possible because the parole board (or similar authority)

⁵² Gonsa, *The Organisation of Imprisonment, The Treatment of Prisoners and the Preparation of Prisoners for Release*, in *Prison Information Bulletin* No 16 (1992) 14–15; Cohen *The Law of Probation and Parole* (1999) 1.2–1.15; Graser *op cit* (n 1, n 10) 62.

⁵³ Gonsa, *The Organisation of Imprisonment, The Treatment of Prisoners and the Preparation of Prisoners for Release*, in *Prison Information Bulletin* No.16 *op cit* (n 52). Cohen *op cit* (n 52)

⁵⁴ Gottfredson and Gottfredson *op cit* (n 19) 213, 219.

⁵⁵ Abadinsky *op cit* (n 10, 17) *ibid*, 245; Carney *op cit* (n 11, 17) 259; Hudson *op cit* (n 50) 138–139, 143; Graser *op cit* (n 1, n 10) 61–62.

⁵⁶ See the Annual Report of the Judicial Inspectorate of Prisons: by Justice Nathan Erasmus, Annual Report 2006/2007; 30, para 2.1. See also Annual Report of the Inspectorate of Prisons: Annual Reports 2001/2002; 2002/2003; 2003/2004; 2004/2005; 2005/2006; Lidovho *op cit* (n 3) 216–217; 219–221.

⁵⁷ Gonsa (Director-General of the Austrian Prison Administration) 'The Organisation of Imprisonment, the Treatment of Prisoners and the Preparation of Prisoners for Release' (1992)

may have more information concerning the particular prisoner at its disposal, after a period of imprisonment, than the sentencing court when assessing a prisoner's eligibility for parole.

Moreover, as the parole board (or similar authority) can decide on parole in a less emotionally charged atmosphere, it could be in a better position than the sentencing court to determine an appropriate period for the prisoner to be incarcerated⁵⁸. Parole also provides the necessary degree of community protection given adequate conditions of parole and the effective monitoring and supervision of the parolee⁵⁹.

The rationale of parole, including its underlying philosophical premise, has increasingly become subject to restrictive efforts, including legislative, judicial and administrative actions⁶⁰. This restrictive approach has been evidenced in what is referred to as bifurcation: the split between tougher measures for the really serious or dangerous offender and a more lenient approach towards the 'ordinary' offender⁶¹.

16 *Prison Information Bulletin* Council of Europe 14–15; Cohen *The Law of Probation and Parole* (1999) 1.2–1.15; Gottfredson and Gottfredson *op cit* (n 19) 243–245.

⁵⁸ Gonsa *op cit* (n 57), Cohen *op cit* (n 57); Gottfredson and Gottfredson *op cit* (n 19, 57).

⁵⁹ Gonsa *op cit* (n 57), Cohen *op cit* (n 57); Gottfredson and Gottfredson *op cit* (n 19, 57) 246. See also White Paper on Corrections in South Africa *op cit* (n 22) chap 4, 71–73; Graser *op cit* (n1, n 10). See also Sloth-Nielsen *op cit* (n 1) 41, who, in South Africa under the prevailing Apartheid political system in the 1980s, advocated the total abolition of parole as it was practiced at the time, but also conceded that '[p]arole is ... an essential component of the rehabilitative process' (p 30).

⁶⁰ Gottfredson & Gottfredson *op cit* (n 19) 232–234; Hudson *op cit* (n 50) 34, 43, 52–53 and 139; Sloth-Nielsen *op cit* (n 59) 41.

⁶¹ Hudson *op cit* (n 50) 34; Lidovho *op cit* (n 3) 214–216, 224–226; for a discussion of bifurcation within the South African criminal justice context.

Another noticeable trend which has been characterised with this restrictive approach is that terms of imprisonment have become increasingly longer, with accompanying ineligibility for parole⁶².

In England, this restrictive approach towards parole has ensured that terms of imprisonment pronounced in court in respect of an offender, are actually served in prison, which in turn has contributed to and been blamed for prison overcrowding and prison uprisings⁶³. In California, in the United States of America (USA), parole has been abolished and only good time remission is allowed⁶⁴. Bifurcation is also operative in the USA and is evidenced by paroling decisions which operate, so as to require more severe sanctions – in terms of longer time to be served in prison – for offences perceived to be more serious or harmful than others⁶⁵.

This restrictive approach is indicative of the view that the broader right of society to safety and immunity from criminal harm must transcend the rights of the minority of criminals who display the proclivity to recidivate⁶⁶. The commentators, however, correctly recognise the fundamental dilemma and challenge as the human inability to predict future behaviour with such precision as to enable the relevant decision-making body to

⁶² Hudson *op cit* (n 50); Lidovho *op cit* (n 3).

⁶³ Hudson *op cit* (n 50) 53, 138–139, 141–143.

⁶⁴ Hudson *op cit* (n 50) 43. This good time remission would be the South African equivalent of special remission of sentence provided for in s 80 of the Correctional Services Act 111 of 1998. See also the discussion of remission of sentence in South Africa in Chapter 2 *infra*.

⁶⁵ Gottfredson and Gottfredson *op cit* (n 19) 234. Abadinsky *op cit* (1977 edition) 391–392. See also Carney *op cit* (n 11) 198–199 who propagates the total abolition of parole boards and for the paroling functions to be performed by courts of law, in the American context.

⁶⁶ Abadinsky *op cit* (1977 edition) (n 10) 177, 391–392; Carney *op cit* (n 11) 187, 324–325.

protect society and to ensure its safety⁶⁷. This dilemma creates a tension between the demand to protect society, on the one hand, and the need for rehabilitation of the prisoner by assisting him or her to become eligible for, and to be released on, parole, on the other hand⁶⁸. This tension could be resolved by striking a careful balance between these competing demands and conflicting rights⁶⁹. This could be achieved by finding a system of weighting the most important factors (which Gottfredson *et al* refer to as 'the right determinants'⁷⁰) and to devise a rating chart or formula in accordance with a standardised system which parole board members could apply at the decision-making stage in order to promote fairness and equity in the parole release process⁷¹. This presumably would address the lack of consistency and uniformity in the parole decision-making process and contribute towards more consistency⁷².

However, as Barbara Hudson⁷³ has forcefully and correctly pointed out, there is an inescapable conflict between trying to treat people fairly and treating acts consistently. This is in addition to other tensions that exist such as between treating inmates/offenders fairly and the demands of crime control and public policy⁷⁴. Her suggestion to resolve this conflict

⁶⁷ Carney *op cit* (n 11) 67, 329; Abadinsky *op cit* (n 10) and (n 64), Hudson *op cit* (n 50) 43 *et seq*.

⁶⁸ Carney *op cit* (n 11) 324; Abadinsky *op cit* (n 65) 389–391; Hudson *op cit* (n 50) 43 *et seq*.

⁶⁹ Abadinsky *op cit* (n 65) 391; Carney *op cit* (n 11) 324.

⁷⁰ Abadinsky *op cit* (n 10) *ibid* (1977 edition), 77. Gottfredson and Gottfredson *op cit* (n 19), (n 62) 234.

⁷¹ Abadinsky *op cit* (n 65) (1977 edition), 137, 177–178, 389; Carney *op cit* (n 11) 188–192, 199–200 argues that inconsistency in parole decision-making undermines the legitimacy of the whole paroling process.

⁷² Carney *op cit* (n 11) 206–207.

⁷³ Hudson *op cit* (n 50) 81.

⁷⁴ Hudson *op cit* (n 50) 81.

and tensions is to utilise 'the principle of proportionality based on the grounds of fairness'⁷⁵.

According to Gottfredson *et al*⁷⁶, the contemporary approach, in the USA, towards parole is that it entails a complex system of competing values, including those values reflected in legislative, judicial and administrative decisions, which all interact to determine the time finally to be served in prison by the inmate. In this competing value laden parole process, the authors propagate the concept of a rational parole decision which they define as 'that decision among those possible for the decision maker, which in the light of the information available, maximises the probability of the achievement of the purpose of the decision maker in that specific and particular case'.⁷⁷

The objective of this, according to the authors, is to achieve both fairness and justice⁷⁸ in the parole decision making process which consists of 'three generic classes'⁷⁹, namely (1) the decision when to release the inmate from custody, i.e the discretionary release component; (2) the series of decisions relating to supervision, including the conditions to be imposed, i.e the supervision component; and (3) decisions about whether or not to revoke parole, i.e. the revocation component.

⁷⁵ Hudson *op cit* (n 50) 81.

⁷⁶ Gottfredson and Gottfredson *op cit* (n 19) 332.

⁷⁷ Gottfredson and Gottfredson *op cit* (n 19, 62) 4.

⁷⁸ Gottfredson and Gottfredson *op cit* (n 19, 62) 240–241. The authors draw a distinction between fairness – which is not the same as justice, but includes equity, and justice which includes fairness 'but is more demanding'.

⁷⁹ Gottfredson and Gottfredson *op cit* (n 19, 62) 9.

At each of these interrelated stages of the parole decision making process, the decision maker is confronted with the usual, sometimes conflicting values reflected in the demands of the criminal justice system, including the penal system, for punishment, societal protection and the rehabilitation of the offender⁸⁰. In this sense, the aims of parole and sentencing are similar⁸¹.

Rationality in parole decision making requires diligent research and data collection to improve the quality of available information utilised for decision making purposes: 'If more rational decision making in corrections is to be achieved, data concerning offenders, treatment and outcomes must be more systematically and reliably collected and analysed than heretofore'⁸².

Despite the restrictive approaches adopted towards contemporary parole, there seems to be broad consensus internationally that there remains a need for parole, within the broad criminal justice systems in the world, and that it forms an integral part of our respective penal systems, but that methods and mechanisms need to be found to improve the efficacy and efficiency of parole throughout the penal systems in the

⁸⁰ Gottfredson and Gottfredson *op cit* (n 19, n 65) 7 and 232.

⁸¹ Gottfredson and Gottfredson *op cit* (n 19, n 65) 231. See also Graser *op cit* (n1, n 10) 57.

⁸² Gottfredson and Gottfredson *op cit* (n 19) 3, 213.

world⁸³. In Southern Africa, and South Africa in particular, it is the operation and possibility of parole that saves the sentence of life imprisonment from being declared unconstitutional⁸⁴, in violation of a person's right against cruel, inhumane and degrading punishment⁸⁵

1.5 Locating parole within the framework of the South African justice system

Parole forms part of the corpus of law described as Prison Law⁸⁶. It has an internal dimension, which largely refers to the law relating to life in prison, as well as an external dimension, which refers to the law governing the period of incarceration⁸⁷. Prison law includes the Correctional Services Act, 1998⁸⁸, including the Regulations and policies promulgated and issued in terms of the Act, which create the terrain within which prisoners seek to enforce their rights. Prison law also refers to and overlaps with the branches of public law (of which administrative law traditionally forms the core⁸⁹), criminal law and constitutional law⁹⁰. According to Van Zyl Smit⁹¹,

⁸³ Gottfredson and Gottfredson *op cit* (n 19); Carney *op cit* (n 11); Hudson *op cit* (n 50, 55); Abadinsky *op cit* (n 10) (1977 Edition) 158, 400 *et seq* (2000 edition) chapter 14. See also the cases regarding parole in the different jurisdictions referred to in Chapters 4 and 5 *infra*.

⁸⁴ *S v Tcoelb* (n 1); *S v Makwanyane and Another* (n 1) paras 123 and 134; *S v Bull and Another*; *S v Chavulla and Others* 2002 (1) SA 535 (SCA) 552 (para 23); *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 521–523; *S v Siluile and Another* 1999 (2) SACR 102 (SCA) 106–107.

⁸⁵ Section 12, read with s 9 and s 10 of the Constitution of the Republic of South Africa, Act 108 of 1996.

⁸⁶ Van Zyl Smit *South African Prison Law and Practice* (1992) 53–54; 55–99. See also Van Zyl Smit *op cit* (n 1).

⁸⁷ Van Zyl Smit *South African Prison Law and Practice* (1992) 53–54; 55–99. See also Van Zyl Smit *op cit* (n 1).

⁸⁸ No 111 of 1998.

⁸⁹ *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA* 2000 (2) SA 674 (CC) 696, para 45.

the impact of imprisonment on the relationship between the state and its citizens is of importance for constitutional law and prisoners' rights. There is a fundamental tension within that relationship, manifested by the fact that imprisonment authorises the state to limit or indeed violate certain rights of the citizen⁹². Yet at the same time the constitution empowers the citizen to claim certain protection against the state, and particularly that the state should fulfil its specific obligation, namely to respect, protect, promote and fulfil the rights in the Bill of Rights, which it is legally obliged to perform⁹³. Van Zyl Smit⁹⁴ argues furthermore that the fundamental relationship between the state and its citizens who are imprisoned, in South African law, cannot be derived directly from a constitutional blueprint: 'They have to be sought in the course of the analysis of the specific powers and duties of the state and of the impact that these have on the rights of the imprisoned citizen'⁹⁵.

The tension that exists within the relationship between the state and its imprisoned citizens is acutely manifested in the assessment and consideration of prisoners for parole and the ultimate decision whether or not to release such prisoners on parole.

⁹² Van Zyl Smit *op cit* (n 86) 53–54; 55–59.

⁹³ Van Zyl Smit *op cit* (n 86) 58.

⁹⁴ Van Zyl Smit *op cit* (n 86) 58.

⁹⁵ Van Zyl Smit *op cit* (n 86) 58.

⁹⁶ Section 7(2) of the Constitution of the Republic of South Africa. Act 108 of 1996, read with ss 8 – 39 thereof. Van Zyl Smit *op cit* (n 86) 68.

⁹⁷ Van Zyl Smit *op cit* (n 86) 68.

The assessment and consideration of prisoners for parole and the ultimate decision whether or not to grant parole fundamentally affect the lives of the prisoners. It also affects the interests of the broader society inasmuch as parole, as part of its objectives, seeks to reintegrate the prisoner / parolee into society⁹⁶. Such an assessment and consideration and decision therefore constitutes the exercise of a public power⁹⁷. It must therefore comply with the current empowering legislation which is the 1998 Correctional Services Act and which by virtue of s 136 thereof will necessarily also involve a consideration of the relevant provisions of the 1959 Correctional Services Act⁹⁸. In addition, such assessment, consideration and decision must, in order to withstand constitutional scrutiny, comply with the constitutional requirements and principles such as the rule of law, which incorporates the principle of legality and with the Bill of Rights⁹⁹. Since such assessment, consideration and decision constitute administrative actions, they must also comply with the

⁹⁶ See Carney *op cit* (n 11, n 66–68); Hudson *op cit* (n 50, 51, 68); Gottfredson and Gottfredson *op cit* (n 19, n 70). White Paper on Corrections in South Africa *op cit* (n 2).

⁹⁷ *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC). See also *Minister of Correctional Services and Others v Kwakwa and Another* 2002 (4) SA 455 (SCA).

⁹⁸ By virtue of the transitional provision, s 136 of the 1998 Correctional Services Act, the administration of correctional services throughout South Africa was, until 1 October 2004 (when the 1959 Correctional Services Act was repealed *in toto*), being conducted within the framework of two distinct sets of legislation, namely the applicable provisions of the previous Correctional Services Act 8 of 1959 ('the 1959 Correctional Services Act') with its rules, regulations and policies, and the current Correctional Services Act 111 of 1998 ('the 1998 Correctional Services Act') with its rules, regulations and policies, in terms of Proc No R.20 GG 19778 of 19 February 1999, Proc No R.79 GG 20259 of 1 July 1999, Proc No R.117 GG 20619 of 18 November 1999, and Proc No R.4 of 2000 GG 20892 of 18 February 2000. See also Proc No R.38 of 2004 GG 26626 of 30 July 2004. The 1998 Correctional Services Act was gradually put into operation with the corresponding abolition and repeal of the corresponding parts of the 1959 Correctional Services Act. The remainder of the 1998 Correctional Services Act was finally promulgated with effect from 1 October 2004 with the corresponding repeal of the remainder of the 1959 Correctional Services Act in terms of Proc No R.38 of 2004 GG 26626 of 30 July 2004.

⁹⁹ Section 1C of the Constitution Act 108 of 1996 read with Chapter 2 thereof: see also *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the RSA supra* (n 89), para 40.

requirements of administrative justice¹⁰⁰, which include lawfulness, reasonableness and fairness. The fact that such an assessment or consideration or decision must comply with the Constitution does not mean that the common law does not find application anymore. In contrast, it has been repeatedly stated that the common law still finds application and, although subject to the Constitution, must be developed consistently with it¹⁰¹. Such an assessment, consideration and/or decision is therefore subject to review on any of the well known common law review grounds which have now been given statutory force¹⁰². It (the assessment, consideration and/or decision) can therefore be reviewed and set aside if it is shown that the decision-making authority did not apply his / her / its mind to the relevant issues in accordance with the applicable law, where there was *mala fides* and/or bias on the part of the decision-maker, or where the decision-maker acted arbitrarily or capriciously, where the decision was arrived at as a result of an unwarranted adherence to a fixed principle or to further an ulterior motive or where relevant considerations were ignored and/or irrelevant considerations taken into account, or where the decision itself was grossly unreasonable

¹⁰⁰ Section 33 of the Constitution, 108 of 1996, ss 1, 3, 4 and 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). See also Chapter 5 *infra* where it is argued that the assessment and consideration of prisoners and the decisions based thereon regarding parole form part of a multi-staged decision-making process and, as such, constitute administrative action within the purview of PAJA 3 of 2000.

¹⁰¹ *Pharmaceutical Manufacturers of SA In re Ex Parte President of South Africa supra* (n 89) paras 45 to 51; *Bato Star (Pty) Ltd v MEC for Environmental Affairs & Others* 2004 (4) SA 490 (CC) 506 para 25. See also *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2002 (3) SA 472 (SCA) at 479 (para 14). See also *Roman v Williams NO* 1998 (1) SA 270 (C).

¹⁰² See s 6 of the Promotion of Administrative Justice Act 3 of 2000.

in the circumstances¹⁰³. In addition, such an assessment, consideration and decision must comply with the common law principles of procedural fairness and natural justice of which the *audi alteram partem* is an important principle¹⁰⁴.

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¹⁰³ Section 6 of the Promotion of Administrative Justice Act (PAJA) 3 of 2000. See also *Johannesburg Stock Exchange v Witwatersrand Nigel Limited* 1988 (3) SA 132 (A) at 152 A–E. C Hoexter *Administrative Law in South Africa* (2007) 13, 28–29, 108, 111–114.

¹⁰⁴ *Administrator, Transvaal and Others v Traub and Others* 1999 (4) SA 731 (A) at 758 D–E; *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10 G–I; *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231 G–H and *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA) at 479–480. C Hoexter *Administrative Law in South Africa* (2007) 119.

1.6 Conclusion

In this chapter, the historical context of the evolution and development of the concept and practice of parole is given. I have also indicated how those developments have influenced the theory and practice of parole in South Africa, and how, within the South African historical context, that theory and practice have evolved. I focus on the rationale and the philosophy underlying the concept of parole, focussing specifically on recent developments, theoretically and practically, which question the rationale for the continued practice of parole or, at the very least, try to neutralise its impact. The relevance thereof for parole in South Africa is that similar trends are discernable, which are either reflected in certain judgments which try to avoid the implementation of parole in respect of certain prisoners¹⁰⁵ or by harsher legislation (the minimum sentence legislation).¹⁰⁶

Having placed parole within its historical context, the latter part of this chapter seeks to locate parole within the context of the South African criminal justice system in general and the penal system in particular. The intention behind this was that it would lay the basis for moving from the

¹⁰⁵ *S v Bull and Another; S v Chavulla & Others* 2002 (1) SA 535 (SCA).

¹⁰⁶ See s 51 of the Criminal Law Amendment Act 105 of 1997 which came into operation on 1 May 1998 in terms of Proclamation R43 (GG 18879) of 1 May 1998. See also s 276B of the Criminal Procedure Act 51 of 1977 as amended by the Correctional Services and Parole Amendment Act 87 of 1997, which expressly makes provision for courts to fix and impose non-parole periods. See also *S v Bull and Another; S v Chavulla and Others* (n 105); see also *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA).

more general (in this chapter) to the more specific aspects of parole (in Chapters 2, 3 and 4).

Chapter 2 focuses on the specific provisions of the empowering legislation¹⁰⁷ which deal with the various ways of releasing imprisoned citizens, including parole. The chapter considers the qualitative difference between parole and the other forms of release, notably correctional supervision, as well as certain similarities. It also demonstrates the particular focus area of this thesis which is those prisoners who find themselves in the parole (risk / security) period, i.e. that period after the statutory minimum period or the non-parole period has been served, and within which the risk and security considerations regarding the prisoner's eligibility for parole become important – hence also the name risk/security period.

Chapter 3 focuses specifically on the practice of parole in South Africa, how it has evolved and changed over the years, the role of the various participants, namely the prisoner, correctional officials, Case Management Committee, the Correctional Supervision and Parole Board, the Correctional Supervision and Parole Review Board and the Court, and a comparative analysis of the practice of parole under the now repealed 1959 Correctional Services Act¹⁰⁸, the repealed 1997 Correctional Services and Parole Amendment Act¹⁰⁹, and the current 1998 Correctional

¹⁰⁷ The Correctional Services Act 111 of 1998.

¹⁰⁸ The Correctional Services Act 8 of 1959.

¹⁰⁹ Act 87 of 1997.

Services Act¹¹⁰. The chapter also demonstrates that the practice of parole has changed dramatically over the last decades since its introduction in 1911¹¹¹. It also demonstrates that whereas in form the legal position of a prisoner has been improved under the 1998 Correctional Services Act, as opposed to the 1959 Correctional Services Act, in substance that may not necessarily be the case.

It also demonstrates that, whereas the parole board only had an advisory function under the 1959 Correctional Services Act, it now has an independent status, theoretically at least, and can take decisions regarding the placement of prisoners on parole and/or make recommendations in respect of those prisoners sentenced to life imprisonment or having been declared dangerous criminals, to the Court and/or the Minister of Correctional Services and/or the Commissioner of Correctional Services, as the case may be.

Chapter 4 is a descriptive analysis of the rights and remedies of prisoners who form the subject matter of the practice of parole. In this chapter it is argued that parole is a multi-staged process during which rights and obligations are conferred on prisoners and correctional officials, including the applicable decision-making authority in respect of parole, with the ultimate objective being the release, albeit conditional, of the prisoner on parole. The specific rights and obligations are identified

¹¹⁰ The Correctional Services Act 111 of 1998.

¹¹¹ As discussed in this Chapter 1.

because it ultimately forms a reservoir of rights and/or remedies on which a prisoner may and can rely or depend during this multi-staged decision making process regarding parole. These rights and/or remedies could ultimately serve as the basis for a legitimate expectation to be harboured by such prisoner to be released on parole before the expiry of his or her prison sentence.

Chapter 5 is a conceptual analysis of parole. It continues to build on that analysis of parole as being a multi-staged process. It analyses the concept of parole within that context. This chapter also considers, by way of a comparative analysis, the concept of legitimate expectation. It is argued that a legitimate expectation, as part of the duty to act fairly, has both a procedural dimension and a substantive dimension. In addition, and in the South African context, a substantive legitimate expectation is created both in terms of the structure of the **empowering legislation** - the 1998 Correctional Services Act¹¹² - and the policies of the Department of Correctional Services - as reflected *inter alia* in the Department's White Paper in 2006¹¹³ - both of which make express provision for early release of prisoners on parole, should such a person be eligible therefore. This is tantamount to an express promise of a substantive benefit to a prisoner in the form of early release on parole upon reaching certain goals and/or complying with certain requirements. Such a substantive legitimate expectation is also created by the **practice** of parole as it is identified in

¹¹² Act 111 of 1998.

¹¹³ The White Paper on Correctional Services *op cit* (n 22) *ibid*.

the earlier chapters, which display a long-standing practice of early release of prisoners on parole before the expiry of their actual terms of imprisonment, after having served pre-determined minimum periods in prison. This legitimate expectation, comprising of a procedural dimension as well as a substantive dimension, and which could coincide with a substantive legitimate expectation, can indeed, given the particular circumstances of the case, be enforced as of right by the prisoner against the correctional authority (the DCS, CSPB, CSPRB and/or the Court) to be released on parole before the expiry of such a prisoner's actual term of imprisonment.

In the conclusion, all these various threads which form part of the same chain are pulled together, focussing specifically on the practical implementation of this concept of parole within the South African penal system in particular.

CHAPTER 2

THE RELEASE OF SENTENCED PRISONERS

2.1 Introduction

This chapter focuses on those provisions of the 1998 Correctional Services Act¹ which make provision for the various ways of release of imprisoned citizens, including parole, and how it relates to or differs from parole. The primary focus being on parole as one of the different release mechanisms for prisoners, a brief comparative analysis is made of the non-parole periods (punitive periods) and parole periods (the risk/security periods) and how that impacts on, and creates a tension within, the executive/judiciary relationship. The existence and imposition, and hence the legality of non-parole periods, followed by parole periods, has been confirmed in South Africa by the highest courts.² It has also been given statutory force and effect.³ Therefore, the particular focus area of this research is the parole period and the prisoners who find themselves in that period, the various roleplayers with whom these prisoners interact, the dynamic of that interaction and relationship and the dynamic of the parole process during that period. These will be dealt with in the following chapters.

¹ Act 111 of 1998.

² *S v Mhlakaza & Another* 1997 (1) SACR 515 (SCA); *S v Bull & Another*, *S v Chavulla and Others* 2002 (1) SA 535 (SCA).

³ See s 276B of the Criminal Procedure Act 51 of 1977 as amended by the Correctional Services and Parole Amendment Act 87 of 1997, which expressly makes provision for non-parole periods of imprisonment followed by parole periods.

2.2 Sentences

The criminal courts in South Africa are authorised to impose appropriate sentences upon persons convicted of having committed a criminal offence in accordance with the objectives of punishment. In the context of South African criminal jurisprudence and penal practice these objectives are deterrence, retribution, rehabilitation and reformation⁴. In achieving these objectives, the court is guided by three cardinal principles also referred to as the triad, namely the nature and seriousness of the offence; the interests of the community and society at large; and the personal circumstances and factors of the offender.⁵

The following sentences may be imposed by the court upon convicted criminals:

2.2.1 Imprisonment, which could either be direct or of which the court could suspend the whole or any part thereof conditionally for a period not exceeding 5 years⁶. Where, however, a court has imposed a minimum sentence of imprisonment (which ranges

⁴ See *R v Karg* 1961 (1) SA 231 (AD) 236 A–C. See, generally, Rabie and Strauss *Punishment: An Introduction to Principles* (1985) 12, 22, 49, 51–59, 90–91 and 271–276; Steytler *Constitutional Criminal Procedure* (1998) 407–420; Du Toit *Straf in Suid-Afrika* (1981) 102–106; Du Toit et al *Commentary on the Criminal Procedure Act* (1993) 28–8 to 28–53.

⁵ See *S v Zinn* 1969 (2) SA 537 (A); *S v Lister* 1993 (2) SACR 22 (A); *S v Slabbert* 1998 (1) SACR 646 (SCA); *S v Botha* 1998 (2) SACR (SCA); *S v Malepe* 1991 (1) SACR 114 (A); *S v Nkosi* 1993 (1) SACR 709 (A).

⁶ Sections 276(1)(b) and 297(1)(b) and 297(4) of the Criminal Procedure Act 51 of 1977 as amended.

between 5 years and life imprisonment) upon a person who has been convicted of committing a serious offence⁷, the suspension of the operation of such sentences or any part thereof is expressly prohibited⁸;

2.2.2 Discretionary life sentence, which would refer to imprisonment of a convicted criminal for life but where the discretion of the court is retained⁹;

2.2.3 Mandatory life sentence, which refers to those sentences of life imprisonment which the High Court in South Africa is obliged to impose if it has convicted a person of an offence of either murder or rape with aggravating circumstances¹⁰.

2.2.4 Imprisonment for an indefinite period imposed on a person who has been declared a dangerous criminal by either a Regional Court or a High Court (Magistrate's Courts do not have this jurisdiction)¹¹.

⁷ As referred to in s 51 of the Criminal Law Amendment Act 105 of 1997.

⁸ See s 51(4) of the Criminal Law Amendment Act 105 of 1997 which came into operation on 1 May 1998 in terms of Proclamation R43 (GG 18879) of 1 May 1998.

⁹ See s 276(1)(b) read with s 283 of the Criminal Procedure Act 51 of 1977. See also Du Toit et al, *op cit* (n 4) (Service 25) 28.20 and the references referred to therein.

¹⁰ As set out and referred to in Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. The offences which are referred to in Part 1 of Schedule 2 are murder under certain circumstances and rape under certain circumstances as set out therein. See s 276(b)(1) of the Criminal Procedure Act 51 of 1977 read with s 51(1) of the Criminal Law Amendment Act 105 of 1997.

¹¹ See s 276(1)(b) read with s 286A and s 286B of the Criminal Procedure Act 51 of 1977.

The court which declares a person a dangerous criminal is obliged to sentence such a person to undergo imprisonment for an indefinite period and is furthermore authorised to direct that such a person be brought back to court on the expiration of a period of imprisonment determined by it, which period shall not exceed the jurisdiction of that court.¹²

In *S v Bull & Another; S v Chavulla & Others*¹³ the Supreme Court of Appeal set aside the direction of the trial court that the accused, all of whom have been found to be dangerous criminals, remain in prison for a period of between 30 years and 50 years, after which they were to be brought before court for reconsideration of their sentences. The Supreme Court of Appeal set aside these sentences and directions of the trial court and replaced these with sentences of life imprisonment for all the accused on the basis *inter alia* that the direction by the trial court constituted, in essence, a heavier punishment than a sentence of life imprisonment in which case as a rule people were being released on parole after

¹² See s 286B of the Criminal Procedure Act 51 of 1977 as amended. See also *S v T* 1997 (1) SACR 496 (SCA) in which case a 23 year old first offender was convicted of having brutally raped and sodomised a 15 year old virgin girl over a period of approximately 5 hours. After hearing evidence it was established that he was suffering from mixed personality disorder and was sentenced by the trial court nonetheless to life imprisonment. On appeal the Supreme Court of Appeal held that the procedure and punishment set out in ss 286A and 286B were ideally suited to matters where the crime was not so serious as to warrant life imprisonment, but where the appellant represented a danger to society sufficiently serious to warrant his incarceration for an indefinite period and where the possibility exists that his condition could improve to such an extent where he would no longer be considered to constitute such a danger to society. The court of appeal referred the matter back to the trial court with a direction that the latter considered acting in terms of s 286A and thereafter impose an appropriate sentence. See also *S v Bull & Another; S v Chavulla & Others* 2002 (1) SA 535 (SCA) at 552–554 in which case the constitutionality, *inter alia*, of these sections 286(A) and 286 (B) was challenged. In confirming the constitutionality thereof as well as the constitutionality of a sentence of life imprisonment, the court held that was it not for the possibility of parole a sentence of life imprisonment in South Africa would otherwise have been unconstitutional as being in contravention of s 12, read with s 9 and s 10 of the Constitution of South Africa 1996.

¹³ 2002 (1) SA 535 (SCA).

approximately 20 years. The Supreme Court of Appeal emphasized the fact that a sentence to undergo imprisonment for life is the most severe sentence which, but for the fact that such a person may be released on parole, would probably have fallen foul of the provisions of the Constitution as a cruel, inhumane and degrading form of punishment¹⁴.

Other sentences include:

2.2.5 Periodical imprisonment, which punishment the court can impose upon a person having been convicted of any offence other than an offence in respect of which the law / any law prescribes a minimum punishment. Such period of periodical imprisonment must not be less than 100 hours and not more than 2000 hours¹⁵.

2.2.6 Declaration of a person who habitually commits offences and against whom the community should be protected as an habitual criminal, which sentence can only be imposed by a high court or a regional court and where such a court is of the opinion that imprisonment is warranted for a period exceeding 15 years¹⁶;

2.2.7 The court may also commit a person who has been convicted of an offence to any institution established by law such as a rehabilitation

¹⁴ *S v Bull and Another; S v Chavulla & Others* (n 12) at 554.

¹⁵ See s 276(1)(c) read with s 285(1) of the Criminal Procedure Act 51 of 1977.

¹⁶ See s 276(1)(c) read with s 286 of the Criminal Procedure Act 51 of 1977.

centre for alcoholics and/or drug addicts, or, in the case of a juvenile between the ages of 18 and 21 years, to be sent to a reform school¹⁷;

2.2.8 The court may impose a fine for any offence punishable by a fine and, as an alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction¹⁸;

2.2.9 Correctional supervision, which has been referred to as a novel form of punishment which includes a wide variety of measures which have in common that they are all applied outside of prison, for example monitoring, community service, house arrest, placement in employment etc¹⁹. Section 276(A) of the Criminal Procedure Act, 1977²⁰ provides that where a sentence of imprisonment has been imposed not exceeding 5 years, or where the remainder of the term of imprisonment to be served by a prisoner is less than 5 years, that it can be converted into correctional supervision. It further provides that correctional supervision as a form of punishment may only be imposed after a

¹⁷ As defined in s 1 of the Child Care Act No 74 of 1983. See s 276(1)(e) of the Criminal Procedure Act 51 of 1977.

¹⁸ See s 276(1)(f) read with s 287 of the Criminal Procedure Act 51 of 1977. See also the general principles enunciated in various cases as discussed by Du Toit et al *op cit* (n 4, n 9) (Service 23, 1999), 28–26A, 26B and 27.

¹⁹ See s 276(1)(h) read with s 276A of the Criminal Procedure Act 51 of 1977. See also *S v R* 1993 (1) SA 476 (A), 1993 (1) SACR 209 (A).

²⁰ 51 of 1977.

report of a probation officer or correctional official has been placed before the court²¹; and

2.2.10 Imprisonment from which such a person may be placed under correctional supervision by the Commissioner of Correctional Services in his discretion or by the court on application by the Commissioner²².

2.3 Different forms of release

As a general rule, prisoners sentenced to terms of imprisonment should be released when they have served their sentences as imposed by the court²³. Failure to do so could lead to such a prisoner having recourse to the court on the basis that his/her constitutional rights to freedom and against arbitrary and unlawful detention have been violated²⁴. The court who has been approached in such circumstances may grant the appropriate relief which could include a declaration of rights²⁵ or an *interdictum de homine libero exhibendo* to secure the release of such prisoner whose right to freedom has been infringed or threatened²⁶. The one exception to this general rule is in the case of a sick prisoner whose sentence has expired but whose release is certified by a medical officer as

²¹ In terms of s 276A(1) and (3). See also *S v R* 1993 (1) SA 476; 1993 (1) SACR 209 (A).

²² See s 276(1)(i) read with s 276A(2) and (3) of the Criminal Procedure Act 51 of 1977.

²³ See s 65(1) of the Correctional Services Act 8 of 1959, which was repealed by and substituted with s 73(1) of the Correctional Services Act 111 of 1998.

²⁴ See s 12, s 35(2)(d), s 34 and s 38 of the Constitution Act 108 of 1996. Steytler *op cit* (n 4) *ibid*.

²⁵ Section 38 of the Constitution Act 108 of 1996.

²⁶ *Ibid*. See also Van Zyl Smit *South African Prison Law and Practice* (1992) 345.

being likely to result in his death, impairment of his/her health or to be a source of infection to others. In such cases, such a person may be detained temporarily until such time as his/her release is authorised by the medical officer²⁷.

The date of expiry of any sentence of imprisonment of a prisoner who escapes from lawful custody, extradited in terms of the Extradition Act, 1962²⁸ and returns to the Republic of South Africa, or who is unlawfully discharged is postponed by the period by which such sentence was interrupted²⁹. A prisoner who has been released erroneously from prison may be arrested on a warrant of arrest issued by the Commissioner and such prisoner, upon re-admission to prison, is to serve the rest of his or her sentence³⁰.

Sentences are served in such order as the Commissioner may determine, unless the court specifically otherwise directs or unless the court directs that such sentences shall run concurrently³¹. When a person receives more than one term of imprisonment, each sentence must be served consecutively, the one after the other, unless the court specifically directs that some or all of these sentences shall run concurrently³². Any determinate sentence of imprisonment to be served by any person runs

²⁷ See s 73(2) of the Correctional Services Act 111 of 1998.

²⁸ Act 67 of 1962.

²⁹ See s 39(3) of the Correctional Services Act 111 of 1998.

³⁰ See s 39(6) of the Correctional Services Act 111 of 1998.

³¹ See s 39(2)(a) of the Correctional Services Act 111 of 1998.

³² See s 280 of the Criminal Procedure Act 51 of 1977, read with s 39(2) of the Correctional Services Act 111 of 1998.

concurrently with a life sentence or an indeterminate sentence served in consequence of such an accused person being declared an habitual criminal or a dangerous criminal³³. Where a person has been sentenced to one or more life sentences, and one or more indeterminate sentences, in consequence of him/her being declared an habitual criminal or a dangerous criminal, they shall also run concurrently³⁴. The placement or release of a dangerous criminal can only take place after the expiry of a specified period of imprisonment imposed by the trial court and such person is brought back to the court for assessment and reconsideration of an appropriate sentence and/or to be released on correctional supervision, parole or day parole, by the court³⁵.

The prison term which the criminal court has imposed constitutes the maximum release date. Despite the general rule that prisoners serve their full sentences, sentenced prisoners may be released before the maximum release date³⁶. Such early release may occur as a result of:

- (a) The President exercising his executive authority to pardon or reprieve an offender or to remit any part of a prisoner's sentence or to authorise the placement of any prisoner on parole or correctional supervision on such conditions as may be recommended by the

³³ See s 39(2)(a)(i) of the Correctional Services Act 111 of 1998.

³⁴ See s 39(2)(a)(ii) of the Correctional Services Act 111 of 1998.

³⁵ In accordance with s 286B of the Criminal Procedure Act 51 of 1977 as amended.

³⁶ See Chapter VII (ss 73–82) of the Correctional Services Act 111 of 1998. See also Correctional Services Order B, Chapter VI(1A)(24).

applicable Correctional Supervision and Parole Board (CSPB), or the court in the case of a prisoner serving a life sentence³⁷;

- (b) Special remission of sentence³⁸;
- (c) Correctional supervision³⁹;
- (d) Day parole, which is defined as 'a form of community corrections contemplated in section 54'⁴⁰;
- (e) Correctional supervision or parole on medical grounds⁴¹;
- (f) Parole, which was defined⁴² as 'the conditions under which a prisoner may be placed in terms of section 65', which has subsequently been repealed and substituted with s 1 of the 1998 Correctional Services Act, wherein it is defined as 'a form of community corrections contemplated in Chapter VI'⁴³; and

³⁷ See s 84(2)(j) of the Constitution Act 108 of 1996; s 82 of the Correctional Service Act 111 of 1998.

³⁸ Section 80 of the Correctional Services Act 111 of 1998.

³⁹ In terms of s 276(1)(i) read with s 276A(2) and (3) of the Criminal Procedure Act 51 of 1977, read with s 73(5)(a)(i) and s 75 of the Correctional Services Act 111 of 1998.

⁴⁰ See s 1 of the Correctional Services Act 111 of 1998, read with s 73(5)(a)(ii) and s 75(1) of the Correctional Services Act 111 of 1998.

⁴¹ See s 79 of the Correctional Services Act 111 of 1998.

⁴² In terms of s 1 of the Correctional Services Act 8 of 1959.

⁴³ See s 1 read with Chapter VI of the 1998 Correctional Service Act.

- (g) Payment of a fine, which was coupled with imprisonment upon non-payment thereof⁴⁴.

2.3.1 Powers of the President

In terms of s 66 of the 1959 Correctional Services Act⁴⁵, the State President had the authority to authorise the placement of any prisoner on parole at any time. The State President furthermore had the authority to authorise the unconditional release of any prisoner at any time. In addition, the State President had the power to remit any part of any prisoner's sentence. This part of the sentence remitted by the State President is also referred to as 'amnesties'⁴⁶.

Section 70 of the 1959 Correctional Services Act⁴⁷ deals with the power

⁴⁴ Section 287 read with s 289 of the Criminal Procedure Act 55 of 1977. See also the general principles referred to by Du Toit et al *op cit* (n 4) in their discussion of these provisions (Service 23, 1999) 28–26A, 28–26B.

⁴⁵ The Correctional Services Act 8 of 1959. Section 66 reads as follows:

66. Placement on parole and unconditional release of prisoners, and remission of sentence by the State President

(1) Notwithstanding anything to the contrary in any law contained, the State President may at any time authorise the placement on parole or unconditional release of any prisoner and may remit any part of a prisoner's sentence.

(2) In any case where a placement on parole or release contemplated in subsection (1) of any prisoner is justified and urgent, the Minister may authorise the immediate placement on parole or release of the prisoner concerned, subject to any conditions which he may determine, in anticipation of the State President's approval; Provided that the Minister shall as soon as possible inform the State President of his decision and the conditions determined by him in anticipation of the State President's approval.

⁴⁶ See Correctional Services Orders Part B, Chapter VI (2). See also the unreported case in the Cape of Good Hope Provincial Division of *Floris Johannes Jacobus O'Kennedy (Applicant) v Commissioner of Correctional Services (First Respondent) and the Officer Commanding, Pollsmoor Maximum Prison (Second Respondent)* Cape Provincial Division Case No 5247/1995, at 8–12, particularly 12.

⁴⁷ The Correctional Services Act 8 of 1959.

of the State President to pardon or relieve offenders⁴⁸.

This authority of the President is dealt with in s 82 of the 1998 Correctional Services Act⁴⁹. It is apparent that, unlike s 66(1) of the 1959 Correctional Services Act, its counterpart under s 82(1) of the 1998 Correctional Services Act does not authorise the President to grant unconditional release to any prisoner. The President may only authorise 'placement on correctional supervision or parole of any sentenced prisoner'. In addition, what is now required is that when the President authorises such release; either on parole or under correctional supervision it will be subject to those conditions which may be recommended by the CSPB or the Court – the latter in the case of prisoners sentenced to life imprisonment.

Despite these powers of the President to pardon or relieve offenders in terms of s 82(2) of the 1998 Correctional Services Act⁵⁰, the President's power is not unfettered. Any presidential decree, decision and/or action must still comply with the common law requirements of

⁴⁸ Section 70, as amended by s 17 of Act 58 of 1978 and substituted by s 21 of Act 68 of 1993, provides as follows:

70 Saving of State President's power to pardon or relieve offenders

Nothing in this Act shall affect the power of the State President to pardon or relieve offenders.

⁴⁹ '82.(1) Despite any provision to the contrary, the President may-

(a) at any time authorise the placement on correctional supervision or parole of any sentenced prisoner, subject to such conditions as may be recommended by the Correctional Supervision and Parole Board under whose jurisdiction such prisoner may fall or, in the case of a prisoner serving a life sentence, by the court; and

(b) remit any part of a prisoner's sentence.

(2) Nothing in this Act affects the power of the President to pardon or relieve offenders.'

⁵⁰ This aspect is dealt with in terms of s 70 of the Correctional Services Act 8 of 1959, and s 82(2) of the Correctional Services Act 111 of 1998.

procedural fairness, including adhering to the *audi alteram partem* rule. It must furthermore also comply with the principle of legality and the principle of constitutionality.⁵¹

2.3.2 Special remission

The Commissioner had the authority, in terms of s 68 of the 1959 Correctional Services Act to remit a part of a prisoner's sentence but only in the event of a prisoner having rendered highly meritorious service and furthermore only to a maximum of two years. The Commissioner was authorised in terms s 68 of this Act to grant such special remission to a prisoner either unconditionally or subject to such conditions which he/she may determine⁵².

⁵¹See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (1) SA 132 (AD); *Minister of Justice, Transkei v Gemi* 1994 (3) SA 28 (TK AD) 31–33; *Administrator, Transvaal & Others v Traub & Others* 1989 (4) SA 731 (AD) 761–761; *Nortje & 'n Ander v Minister van Korrektiewe Dienste en andere* 2001 (3) SA 472 (SCA) 479 E–F; *Pharmaceutical Manufacturing Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), para 78; 2000 (3) BCLR 241 (CC); *Minister of Correctional Services v Kwakwa & Another* 2002 (4) SA 445 (SCA), para 36.

⁵² This section, with the heading 'Special Remission of Sentence by Commissioner', reads as follows: '68. Notwithstanding any provision to the contrary the Commissioner may grant to a prisoner who has rendered highly meritorious service a special remission of sentence not exceeding two years either unconditionally or on such conditions as he may determine...'. The corresponding section under the 1998 Correctional Services Act, is s 80, which reads as follows:

Special remission of sentence for highly meritorious service

80(1) A Correctional Supervision and Parole Board may, on the recommendation of the Commissioner, grant to a prisoner, except to a prisoner serving a life sentence or a sentence, in terms of section 286A of the Criminal Procedure Act, who has acted highly meritoriously, special remission of sentence not exceeding two years either unconditionally or subject to such conditions as the Board may determine.

(2) Special remission in terms of this section may not result in the prisoner serving less than a stipulated non-parole period or half of his or her original sentence.

Whereas the Commissioner had the authority to grant the special remission under the 1959 Correctional Services Act that authority under the 1998 Correctional Services Act vests in the Correctional Supervision and Parole Board. The Commissioner now only has an advisory function in terms of making appropriate recommendations to the CSPB. Under the 1998 Correctional Services Act, furthermore, unlike under s 69 of the 1959 Correctional Services Act, prisoners sentenced to life imprisonment and those declared dangerous criminals in terms of s 286A of the Criminal Procedure Act, 1977⁵³ are expressly excluded from being considered for this special remission.

A further condition of special remission under the 1998 Correctional Services Act is that it may not result in the fact that a prisoner, if granted such special remission, would not serve his or her non-parole period (the penal term⁵⁴) of imprisonment. Such remission must also not result in the prisoner serving less than half of his or her term of imprisonment. None of these conditions were required in terms of s 68 of the 1959 Correctional Services Act.

Therefore, the 1998 Correctional Services Act is clearly much more onerous than the 1959 Correctional Services Act in respect of the granting of special remission to prisoners.

⁵³ Act 51 of 1977.

⁵⁴ Per Lord Mustill in the English case of *Doody v Secretary of State for the Home Department & Others* 1993 (3) All E.R. 92.

2.3.3 Credits and remission

'Credits' is defined as 'the days and months contemplated in s 22A(2)'⁵⁵. The objective of this system of allocating credits to prisoners was to encourage them to conform with prison rules and regulations and to become actively involved in programmes which are aimed at treatment, training and rehabilitation⁵⁶.

The Institutional Committee under the 1959 Correctional Services Act (the equivalent of the Case Management Committee under the 1998 Correctional Services Act) was authorised to allocate credits and, in allocating credits, could take into account any relevant factors which could benefit such a prisoner⁵⁷. The Institutional Committee, however, could not award to any prisoner credits amounting to more than half of the period of imprisonment which such a prisoner had served⁵⁸. These credits could only be allocated at 6 monthly intervals⁵⁹. A prisoner who had been sentenced to imprisonment for 6 months or less would be deemed to have been awarded the maximum number of credits, ie credits equalling 3 months, being not more than half of his period of imprisonment. The Institutional Committee, however, had the authority

⁵⁵ See s 1 read with s 22A of the Correctional Services Act 8 of 1959.

⁵⁶ See s 1 read with s 22A of the Correctional Services Act 8 of 1959.

⁵⁷ See s 1 read with s 22A of the Correctional Services Act 8 of 1959.

⁵⁸ See s 22A(1)(a) of the Correctional Services Act 8 of 1959.

⁵⁹ See s 22A(1)(b) read with s 62(1) of the Correctional Services Act 8 of 1959.

to award such a prisoner fewer credits⁶⁰. The number and days earned as credits by a prisoner had the effect that it could result in the prisoner's consideration date for possible placement on parole being advanced by the number of credits earned⁶¹. Credits could not be demanded as of right by any prisoner, nor could it result in the prisoner's sentence being shortened by the number of credits that such a prisoner may have earned whilst in prison⁶². Remission of sentence on the other hand has the effect that the prisoner's term of imprisonment which he/she must serve will and must be shortened by that part of the sentence remitted. Thus a prisoner who has been granted special remission of sentence for meritorious service for a period of two years will have the period that he or she is supposed to serve shortened by the two years received as remission. That remission, once granted to a prisoner, at once becomes an enforceable right in the hands of the prisoner vis-à-vis the prison authorities⁶³.

The question which then arises is whether remission of sentence granted either by the President or by the Correctional Supervision and Parole Board, as the case may be, does in fact alter a sentence lawfully imposed upon a prisoner by a court of law. In other words, is judicial independence being compromised by the provisions under both the 1959

⁶⁰ See s 22A(1)(c) of the Correctional Services Act 8 of 1959.

⁶¹ See s 22A(2) of the Correctional Services Act 8 of 1959.

⁶² See Correctional Service Orders Part B, Chapter VI(2)(a)(i)-(iv). Section 22A of the Correctional Services Act 8 of 1959 was inserted by s 9 of the Correctional Services Amendment Act of 1993, and has been repealed by s 4 of the Parole and Correctional Services Amendment Act 87 of 1997, a provision which has never been put into operation.

⁶³ Section 80 of the Correctional Services Act 111 of 1998.

Correctional Services Act and the 1998 Correctional Services Act authorising members of the executive (the President/CSPB) to remit part of a prisoner's sentence which has been imposed by the Court. In an incisive analysis of the nature of remission and the effect thereof on the sentence of a prisoner imposed by the Court, Rose-Innes J⁶⁴ came to the following conclusion:

"The intention of the remission, in my opinion, was not to alter the period of the sentences imposed upon prisoners by the courts, but to require that a portion of such sentences be served outside prison, and that that intention must relate to the portion of the sentences which has not yet been served on 27 April 1995 (the date) when the Presidential Act was issued."⁶⁵

This approach is correct and the principle is similarly applicable to parole and its effect on sentences imposed by the courts.

Thus, remission of sentence, just as the granting of parole, does not amount to an alteration by executive or administrative decree, of a sentence of imprisonment lawfully imposed by a court of law⁶⁶. It merely has the effect that a portion of that sentence imposed by the Court will be served, not in prison but outside prison. Such remission or parole will therefore logically apply only in respect of that part of the prison sentence which such a prisoner must still serve.

⁶⁴In an unreported case in the Cape of Good Hope Provincial Division of *Floris Johannes Jacobus O'Kennedy (Applicant) v Commissioner of Correctional Services (First Respondent) and the Officer Commanding, Pollsmoor Maximum Prison (Second Respondent)* Cape Provincial Division Case No 5247/1995, at 8–12, particularly 12.

⁶⁵*Ibid*, 12 [emphasis added].

⁶⁶*Ibid*. See also *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 520.

Remission of sentence will naturally also advance the consideration date for placement on parole of a prisoner by that part of the sentence remitted.

2.3.4 Correctional supervision

Correctional supervision as a novel form of punishment was introduced into South African criminal law and penal practice by s 22 of the Correctional Services and Supervision Matters Amendments Act 122 of 1991.

Correctional supervision as a penal concept in South African criminal law has its origin in the quest to achieve the philosophical objectives of punishment, namely deterrence, restitution, rehabilitation and reformation, albeit outside prison itself⁶⁷. It aims to achieve these objectives in accordance with the triad as set out in *S v Zinn*⁶⁸, involving the interests of the community, the nature of the offence committed and the personal circumstances of the offender. These objectives need to be achieved within the framework of South Africa's societal conditions, including the practical constraints and considerations such as the limited resources available, the physical shortages of prisons and other correctional facilities with the resultant overcrowding of prisons, and the ever increasing number of incarcerated sentenced and unsentenced prisoners. The term

⁶⁷ *S v R* (n 21).

⁶⁸ *S v Zinn* (n 5) 372.

'correctional supervision' is a collective term for a wide variety of measures by which a convicted person can be punished and which have in common that they are all applied outside of prison⁶⁹.

The essential and most important feature of correctional supervision as a legitimate form of punishment is that it is served outside prison, within the community, for a specified time, pursuant to an order by a competent court of law, and which punishment is subject to certain lawful conditions imposed by the Court, and executed and/or modified in the sense of relaxed - by the Commissioner and/or his delegated official.⁷⁰

Section 22 of Act 122 of 1991 introduced correctional supervision, and made it part of the 1959 Correctional Services Act. This was accompanied by a simultaneous change of name of the Act from the Prisons Act to the Correctional Services Act. This was also accompanied by several other changes in nomenclatures: the term warder was replaced with correctional officials, the Department of Prisons became the Department of Correctional Services⁷¹. Correctional supervision was simultaneously introduced into the Criminal Procedure Act, 1977⁷², by ss 41 and 42 of Act 122 of 1991. Section 41 of Act 122 of 1991 introduced ss 276(1)(h) and (i) of the Criminal Procedure Act, 1977⁷³, both of which

⁶⁹ *S v R* *supra* (n 21) at 220 G–I. See also *S v Omar* 1993 (2) SACR 5 (C) at 13 – B–D.

⁷⁰ See *S v R* (n 21); *S v Ndaba* 1993 (1) SACR 637 (A) 641G–642I, and *S v Omar* (n 69) *ibid*.

⁷¹ See s 33(1), read with s 1(c) and 1(d) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

⁷² 51 of 1977.

⁷³ 51 of 1977.

came into operation in respect of the whole of the Republic of South Africa on 1 April 1993. Section 276A of the Criminal Procedure Act, 1977⁷⁴ was introduced by s 42(1) of Act 122 of 1991 and came into operation on 1 June 1993⁷⁵.

The newly introduced s 276A of the Criminal Procedure Act, 1977⁷⁶ deals with the imposition of correctional supervision and the conversion of imprisonment into correctional supervision and vice versa. It provides that where a sentence of imprisonment has been imposed not exceeding five years, or where the remainder of the term of imprisonment to be served by a prisoner is less than five years, that it can be converted into correctional supervision by the court, upon application by the Commissioner⁷⁷. It further provides that correctional supervision may only be imposed after a report of a probation officer or correctional official has been placed before the court⁷⁸. The court may also, after a prisoner's sentence of imprisonment has been converted by the court to correctional supervision, and upon application by the Commissioner, reconsider that conversion, and cancel the correctional supervision and re-impose the original

⁷⁴ 51 of 1977.

⁷⁵ The relevant part of s 276 of the Criminal Procedure Act reads as follows:

276. Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely -

(a) . .

(h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

⁷⁶ Act 51 of 1977.

⁷⁷ Section 276A(2) and (3) of the Criminal Procedure Act 51 of 1977.

⁷⁸ Section 276A(3)(c)(iii) of the Criminal Procedure Act 51 of 1977. See also *S v R* (n 21).

sentence to be served (the remainder thereof)⁷⁹.

Chapter VIIIA as part of the 1959 Correctional Services Act has since been repealed and substituted with the relevant provisions of the 1998 Correctional Services Act. Correctional supervision is dealt with in the 1998 Correctional Services Act, under Chapter VI, which deals with **community corrections**. The provisions of ss 276(1)(h) and (i) and s 276A of the Criminal Procedure Act, 1977⁸⁰ have not been repealed and must now be read in conjunction with the relevant provisions of the 1998 Correctional Services Act, more particularly Chapter VI thereof.

Therefore, s 276(1)(i) of the Criminal Procedure Act 51 of 1977, insofar as it refers to the Commissioner, will have to be read as meaning the Commissioner in the case of a prisoner sentenced to no more than 12 months imprisonment, and the Correctional Supervision and Parole Board (CSPB) in all other cases of imprisonment exceeding 12 months and imposed in terms of this section or in accordance with s 276A of the Criminal Procedure Act, 1977⁸¹.

In the seminal judgment of *S v R*⁸² Kriegler AJA states that the legislature, by introducing correctional supervision, has clearly distinguished between two types of offenders, namely those who ought to

⁷⁹ Section 276A(4) of the Criminal Procedure Act 51 of 1977.

⁸⁰ 51 of 1977.

⁸¹ See Chapter VI, s 73 read with s 75 of the Correctional Services Act 111 of 1998.

⁸² *Supra* (n 21).

be removed from society by means of imprisonment and those who, although deserving of punishment, should not be so removed from society. The legislature has also, by the shift in emphasis from imprisonment to rehabilitation, unequivocally indicated that punishment, whether it be rehabilitative or highly punitive in nature, is not necessarily or even primarily attainable by means of imprisonment. The fact that the legislature has expressed itself so clearly, and that the executive is prepared to supply the necessary administrative backing, makes it the duty of judicial officers to use these ample means at their disposal:

... in die besonder moet daar ingesien word dat daar nou gevoelige straf toegemeet kan word sonder gevangesetting, met al die bekende nadele aan laasgenoemde verbonde vir beide die prisonier en die breë gemeenskap. Vonnis van korrektiewe toesig kan teweens so saamgestel word dat dit vir die veroordeelde meer beswaar as kort termyn gevangenisstraf – ingevolge Artikel 276A(1)(b) van die Strafproseswet mag 'n Hof immers korrektiewe toesig vir 'n tydperk van soveel as drie jaar opleë.⁸³

2.3.4.1 Procedural requirements for correctional supervision

The procedural requirements for the consideration and imposition of correctional supervision are envisaged as follows⁸⁴.

⁸³ Kriegler AJA in *S v R* *supra* (n 21), at 221I–J and 222A. Translation taken from Headnote of the case:

In particular it must be realised that the punishment can now be imposed without resorting to imprisonment with all its known advantages for both prisoner and the broader community a sentence of correctional supervision can be finely tuned in such a way that it is much more punitive for the offender as short term imprisonment – in terms of Section 276A(1)(b) of the Criminal Procedure Act a Court may in fact impose correctional supervision for a period of as long as three years.

⁸⁴ See generally *S v R* *supra* (n 21) at 224I–J to 225A–C and *S v Ndaba* 1993 (1) SACR 637 (A) at 641G–642I, also a judgment by Kriegler AJA, as he then was.

A report concerning the accused must be formulated by a correctional official in terms of s 276A(1)(a) of the Criminal Procedure Act⁸⁵. This correctional official would, as a rule, be an official in the Department of Correctional Services or attached thereto, serving under the direction and authority of the Commissioner of Correctional Services⁸⁶. But this report can also be prepared and formulated by a qualified social worker or probation officer. The person preparing the report must investigate the circumstances of the accused, and his or her suitability for placement under correctional supervision. In this process the correctional official will ordinarily conduct interviews with every relevant person who could contribute towards a fair assessment and recommendation, including the accused, his or her parents and family members, the investigating officer who has investigated the criminal offence of which the accused had been convicted, as well as the circumstances surrounding it, the victim of the offence (or the prejudiced party) and/or family members of such victim. Pursuant to such an assessment, the correctional official would then, in his or her report, make a recommendation to the Commissioner, and the latter to the Court in those instances where the Court, and not the Commissioner, is empowered to impose correctional supervision. Such a recommendation would also propose applicable conditions for correctional supervision to which such a person, referred to as the probationer, would be subject. These proposed conditions would include monitoring,

⁸⁵ Act 51 of 1977.

⁸⁶ See s 1 of the Correctional Services Act 8 of 1959, now repealed; See also s 1 of the Correctional Services Act 111 of 1998.

community service, house arrest, seeking and/or taking up employment, and/or remaining in employment, payment of compensation or damages to victims, financial contribution towards any treatment such a probationer may be referred to undergo, etc.⁸⁷

Where the Court is to consider and impose correctional supervision, the report must be handed in at the proceedings, usually as an exhibit. The correctional official must not only testify as to the contents of such report, but also ought to motivate the contents thereof. The accused would then be entitled to cross-examine such correctional official and to tender and/or produce evidence from his or her side. The Court is also entitled to, *mero motu*, call witnesses to testify in assisting it to come to a fair and just decision concerning whether or not to impose correctional supervision.⁸⁸

The main enquiry remains whether correctional supervision is appropriate in the circumstances, but it is also important for the Court to investigate the appropriateness and the formulation of any one of its components.⁸⁹ Kriegler AJA cautions⁹⁰ against the Court abdicating its important and traditional judicial role as sentencing authority and against abdicating it in favour of the executive authority, although the Court will no

⁸⁷ See s 84 of the Correctional Services Act 8 of 1959, which is now repealed. See s 52 of the Correctional Services Act 111 of 1998.

⁸⁸ See *S v Ndaba*, *supra* (n 70).

⁸⁹ See *S v R* *supra* (n 19); *S v Ndaba* *supra* (n 70).

⁹⁰ In both *S v R* *supra* (n 19); *S v Ndaba* *supra* (n 70) at 642 G–H. *S v Omar* *supra* (n 69) at 14–16.

doubt be assisted and guided by the Department of Correctional Services.

2.3.5 Parole, probation and correctional supervision

A person subject to correctional supervision (the latter term which is incorporated in and under the term community corrections⁹¹), is referred to in South African criminal law as a probationer⁹². The term probationer is derived from the Latin *probo-are avi, atum (vt)*, which means to approve, make acceptable, recommend, prove⁹³.

Probation and correctional supervision in the context of South African penal law practically means the same. Probation or correctional supervision is one form of a sentence imposed by the Court. The Court is and remains in control with regards to the imposition of and the execution of its order of probation or correctional supervision. The execution and monitoring of this punishment imposed by the Court is usually done by the Commissioner and/or his duly delegated representatives who make appropriate recommendations to the Court. But it is the Court who imposes the sentence and who lays down the conditions of that sentence.

⁹¹ Under Chapter VI of the Correctional Services Act 111 of 1998.

⁹² See s 276A of the Criminal Procedure Act 51 of 1977, s 84 of the Correctional Services Act 8 of 1959 as amended by the Correctional Services and Supervision Matters Amendment Act 122 of 1991: see also Chapter VI of the Correctional Services Act 111 of 1998. See also *S v R* (n 21); *S v Ndaba* (n 70) and *S v Omar* (n 69).

⁹³ *N Fullwood Cicero on Himself, Selections from the Works of Cicero illustrating his Life and Character* (1975) 108. See also (in the American context) *Carney Probation and Parole: Legal and Social Dimensions* (1977) 80, 81–84, who explains the difference between parole and probation, in the American context, in simplistic terms as '... probation is a pre-prison disposition, whereas parole is a post-prison disposition, instituted after a portion of the sentence has been served in a penal institution' (p 84, emphasis in the original).

Those conditions could be positive conditions in the form of orders, as well as negative conditions, directing the probationer to refrain from certain conduct.

Parole, in terms of the 1959 Correctional Services Act was the explicit domain of the Commissioner which he or she ordered in the exercise of his or her discretion. In the case of murderers and/or life sentenced prisoners, it was the Minister who had that prerogative. The Commissioner or the Minister, as the case may be, could also lay down conditions which would govern the release of a specific prisoner on parole, which conditions must have been accepted by the particular prisoner. Yet conditions imposed on parolees were mainly negative in that they directed a prisoner, at pains of reimprisonment, to refrain from certain conduct. The reason for imposing only negative conditions on parolees, by the Commissioner/Minister, could have been as a result of the lack of resources to oversee the functioning and daily activities of such a parolee.

Since the commencement of Chapters IV, VI and VII of the 1998 Correctional Services Act⁹⁴, the newly established Correctional Supervision and Parole Boards (CSPB's) will, as the name indicates, deal with both correctional supervision (probation) and parole. These CSPBs will also, in contrast with the former Parole Boards, which only had an advisory role, take over the decision-making competencies of the

⁹⁴ On 1 October 2004 – see n 43 Chapter 1.

Commissioner and/or his/her delegated officials regarding correctional supervision or parole for prisoners, except in respect of prisoners sentenced to less than 12 months imprisonment and those sentenced to life imprisonment and those declared as dangerous criminals. These latter categories of prisoners fall within the authority and prerogative of the Court, the former within the prerogative of the Commissioner⁹⁵.

There is nothing in the 1998 Correctional Services Act which precludes the Commissioner, the Correctional Supervision and Parole Board and/or the Correctional Supervision and Parole Review Board from imposing positive conditions (as orders) on any parolee or probationer, subject, of course, to the three principles set out above, namely the principle of fairness, the principle of legality (that such imposed conditions must be fair, not *ultra vires* the powers of the said CSPB and/or Commissioner and/or Correctional Services Parole Review Board) and not be *contra bonis mores*, and subject further to the principle of reasonableness, which includes proportionality and rationality⁹⁶.

⁹⁵ Sections 286A and 286B of the Criminal Procedure Act 51 of 1977 as amended, and ss 75(1) and 75(7) of the Correctional Services Act 111 of 1998.

⁹⁶ *Roman v Williams* NO 1998 (1) SA 270 (C); 1997 (9) BCLR 1267 (C) 1278 F-I; *Nortje & Another v Minister of Correctional Services & Others* (n 51); *Minister of Correctional Services v Kwakwa & Another* (n 48); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa* (n 51). *Bato Star (Pty) Ltd v MEC for Environmental Affairs and Others* 2004 (4) SA 490 (CC) 506 para 25; Hoexter *Administrative Law in South Africa* (2007) 27-28. These principles and requirements are discussed in more detail in Chapter 5 *infra*.

2.3.6 Parole on medical grounds

In terms of the 1959 Correctional Services Act every prisoner, from the time of his/her reception to serve a sentence at any particular prison, was assessed on a continuous basis by an institutional committee that derived its powers and functions from, and which acted in terms of, s 62 read with s 5A of the 1959 Correctional Services Act.

The Parole Board, created in terms of s 5C of the 1959 Correctional Services Act, considered, *inter alia*, whether a prisoner was eligible to be placed on parole and prepared a report and made recommendations in that respect to the Commissioner or his duly delegated official⁹⁷. In preparing its report and making recommendations regarding the eligibility for parole of a particular prisoner, the Parole Board had regard to all relevant information, including the assessment reports of the institutional committee. The report and recommendations were based upon all relevant information, including the contributions of those of its members representing the various components of the prison dealing regularly with the prisoner and, importantly, the prisoner himself / herself.

It is clear from the relevant statutory provisions under the 1959 Correctional Services Act that the Commissioner, or his duly delegated official, enjoyed a wide discretion to place a prisoner serving a

⁹⁷ In terms of s 63 read with s 65 of the Correctional Services Act 8 of 1959.

determinate sentence on parole after considering the report and recommendations of the Parole Board. In the case of possible parole on medical grounds in terms of s 69 of the 1959 Correctional Services Act, a recommendation by the medical officer was also expressly provided for. What must also be kept in mind is that each prison has a medical section which was invariably represented on the Parole Board ⁹⁸.

The Parole Board must assess and consider the prisoner's application for release on parole on medical grounds and/or the recommendation of the medical official and/or district surgeon and the comment and recommendation, of the head of the prison regarding such an application. This assessment and consideration by the Parole Board must be done so as to advise the delegated official and/or the Commissioner in such cases regarding the following:

- (a) The identification of the most suitable after-care institution and accommodation, which would include the prisoner's family, which

⁹⁸ Section 69 provides as follows:

69. Placement on parole on medical grounds

A prisoner serving any sentence in a prison -

(a) Who suffers from a dangerous, infectious or contagious disease; or

(b) Whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman, her advanced pregnancy,

may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.

This section must be read with Chapter VI(5)(e)(i) of Correctional Service Order Part B (CSOB), which order regulates the practical implications and implementation of the provisions of s 69 of the 1959 Correctional Services Act. Chapter VI(5)(e) thereof sets out important guidelines for placing prisoners on parole on medical grounds. In terms of this section, the medical officer or district surgeon must complete the 'medical report regarding prisoner (G337)' in duplicate, whereafter it must be submitted to the head of the prison for his or her comment, if any, and recommendation. The particular recommendation and/or the application to be released on parole on medical grounds is then forwarded to the Parole Board.

would also facilitate multi-disciplinary participation and to ensure that the institution and/or after-care accommodation provides a written undertaking to that effect⁹⁹; and

- (b) Whether such release would not bring the administration of justice into disrepute and further advise upon the possible options for conditional release which could be made applicable to such a prisoner.¹⁰⁰
- (c) The administrative procedures entail the following: the medical reports regarding the prisoner Form G337, must be accompanied by recent expert and specialist medical reports by a medical practitioner other than the one to which the medical official and/or district surgeon has referred the prisoner in accordance with his/her authority. The person or institution which had agreed to accommodate the prisoner and to take care of him/her must confirm that undertaking in writing. A comprehensive and complete profile report, Form G326, must accompany the recommendation and/or application as contained in the medical report of the prisoner (Form G337) and related documentation¹⁰¹.

The Correctional Service Order Part B further provides, *inter alia*, that

⁹⁹ Correctional Service Order, Part B (abbreviated CSOB) VI(5)(e) (n 98).

¹⁰⁰ Chapter VI(5)(e)(i)(aa) of the Correctional Service Order, Part B (CSOB).

¹⁰¹ *Ibid.*

the following factors should be kept in mind when considering a prisoner's placement on parole on medical grounds, namely:

- (d) An injudicious placement may foil the objectives of punishment of the sentencing authority;
- (e) In all cases where there is doubt as to the terminal nature of the illness, and where the life expectancy is short, it is advisable that the placement on medical grounds be considered on a conditional basis¹⁰²;
- (f) The costs attendant on such after-care of the prisoner ought not to be the most determining factor in the assessment and consideration whether or not to place such a prisoner on parole on medical grounds¹⁰³; and
- (g) In all cases of placement of prisoners on parole on medical grounds, proper care, after-care and medical treatment must be a pertinent and clear condition of such release¹⁰⁴.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Pursuant to the provisions of s 69 and Chapter VI(5)(e) of the CSOB, a circular was issued by the Provincial Commissioner: Western Cape with Reference 1/8/3 and dated 23 December 2001 with the heading 'Re: Placement / Release on Medical Grounds; Western Cape Province'. The purpose of the circular was stated in terms that:

1. It has come to this office's attention that Management Areas and Prisons in this Province is not up to date with the procedure of compiling applications for release or placement of prisoners on medical grounds. This office deemed it necessary to address this matter urgently.

The circular then proceeds to deal with the applicable procedures in applications of this nature, as

The question of the release of a prisoner on medical grounds in terms of s 69 of the 1959 Correctional Services Act, as well as the Standing Orders and particularly the last mentioned circular, paragraph (e) thereof, were pertinently considered by the Cape of Good Hope Provincial Division, in the matter of *Stansfield v The Minister of Correctional Services & Three Others*¹⁰⁵. In this case the Applicant was diagnosed as suffering from small cell lung carcinoma (lung cancer) for which he received medical treatment, including chemotherapy.

The medical opinion of the medical official appointed by the Respondents (the Minister), was that with such treatment the Applicant (Mr Stansfield) had, at the time, approximately 6 to 8 months to live, a 1 year survival of less than 20 per cent and a 2 year chance of survival of

follows (emphasis added):

3. When preparations are being made for an application for release or placement on medical grounds, the following administration aspects are important and must be followed at all times (See Order – B IV(5)(e)(ii)):

(a) The form G337 must be accompanied by a recent professional and expert report of a second medical doctor whom the prisoner was referred to after the medical official / district surgeon exercised his / her competency in terms of the applicable regulations (two medical reports must accompany Form G337 of which one must be from a specialist physician).

(b) The Head of the Prison must see to it that s E and F of the G337 Form are completed correctly and sufficient comments must be given by the relevant officials.

(c) The person or institution undertaking to provide after-care, accommodation and care (meaning that for a full 24 hours the needs of the prisoner are to be cared for) must confirm this undertaking in writing.

(d) A fully completed Form G326 must accompany the recommendation/request per medical report on prisoner (G337) and related documents as prescribed (NB: This profile report G326 does not cancel the profile report date in the G369 register unless the prisoner was placed out/released on medical grounds before this date).

(e) The authority who takes the decision on medical release or placement must be satisfied that the prisoner is terminally ill. If the medical doctors do not indicate the state of the prisoner as such, or in any other case where he/she (decision maker) is not convinced of the state of the prisoner, the relevant documents and his/her comments can be forwarded to the next level for a decision.

¹⁰⁵ 2004 (4) SA 43 (C).

less than 10 per cent. Based on this diagnosis, the Applicant applied to the Parole Board for his placement on parole on medical grounds, which application was heard by the Parole Board on 13 June 2003. The medical officer had also recommended that the prisoner be released on medical grounds.

The Applicant made his application whilst serving a 6 year prison sentence after having been found guilty on a charge of fraud in that he fraudulently misrepresented to the Receiver of Revenue that he was only liable to pay R327 460,00 as income tax, whereas in fact and in truth he owed the Receiver the amount of R2 628 472,63, representing a difference of R2 301 012,63. Having pleaded guilty in the regional court in Cape Town, and having been sentenced to 6 years direct imprisonment, he subsequently appealed to the High Court of the Cape Provincial Division in respect of his sentence. This appeal was subsequently dismissed by the High Court.

At the time of his application for placement on parole on medical grounds, he had served less than a third of his 6 years imprisonment. This was his second such application, the first one being unsuccessful, the Parole Board having recommended a further date for his assessment and consideration, also referred to as his profile date.

After consideration of Mr Stansfield's application to be released on

medical grounds, the Parole Board refused to recommend his immediate release on parole at that stage and recommended that he only be reconsidered for possible placement on parole some four months later on 1 October 2003. This recommendation was made on 13 June 2003. The delegated official, who was the Third Respondent in this application, after considering the recommendations of the Parole Board, including the medical reports and opinions, came to the conclusion that it would not be expedient to release the Applicant at that stage and refused the Applicant's application for release on parole on medical grounds. One of the main reasons underlying this decision of the delegated official seemed to be the fact that the Applicant was physically far from being bedridden and that he was not in the final phase of terminal illness. It was in this context that he also did not accept the recommendation of the Parole Board, who was the Fourth Respondent in this matter, that the Applicant only be considered for possible placement on parole on 1 October 2003. His decision was that the Applicant's situation would be monitored daily and his application for release be reconsidered automatically if it was justified by any deterioration in his physical condition.

The delegated official (Third Respondent) was clearly also guided by the aforesaid circular dated 21 December 2001¹⁰⁶ in terms of which the stage of the illness is an important aspect which had to be considered¹⁰⁷.

¹⁰⁶ See n 60.

¹⁰⁷ See affidavit of P Mans, Third Respondent, 104 to 109 of the Record of the High Court case, paras 16–28.

The circular confirms that it is required that the condition of the prisoner must be terminal in the sense that death must be imminent. This seems to be more in line with the provisions of s 79 of the 1998 Correctional Services Act¹⁰⁸.

It was argued on behalf of the Applicant *inter alia* that since these provisions had not been enacted at the time of the application and since the directive as set out in the circular of 21 December 2001 clearly reflects the requirements of s 79 of the 1998 Correctional Services Act which were not requirements in terms of the then prevailing provisions of s 69 of the 1959 Correctional Services Act, that the delegated official, in taking that aspect into consideration, had acted *ultra vires* and misconceived his authority and took into consideration unauthorised and/or irrelevant factors such as contained in paragraph (e) of the circular.

On 4 August 2004 the High Court (Van Zyl J) after having heard argument on behalf of both Applicant and the Respondents, ordered that the Applicant be released from prison forthwith.

The Court found, *inter alia*, that the Third Respondent had:

¹⁰⁸ Section 79 of the Correctional Services Act 111 of 1998 which, since October 2004 has replaced s 69 of the Correctional Services Act 8 of 1959, reads as follows (emphasis added):

Correctional supervision or parole on medical grounds

79. Any person serving any sentence in a prison and who, based on the written evidence of the medical practitioner treating that person, is diagnosed as being in the final phase of any terminal illness or condition may be considered for placement under correctional supervision or on parole, by the Commissioner, Correctional Supervision and Parole Board or the Court, as the case may be to die a consolatory and dignified death.

"... misinterpreted the relevant provisions of section 69 of the Act by reading into it non-existent requirements, or by allowing himself to be wrongly influenced by departmental guidelines and the provisions of an Act that had not yet become operative. By misinterpreting the concept of 'physical condition' he could not apply his mind properly to the expediency of placing the applicant on parole on medical grounds"¹⁰⁹.

This led Van Zyl J to reach the conclusion:

"... that the third respondent's decision to refuse the applicant parole on medical grounds was, objectively, so irrational and unreasonable that the inference must necessarily be drawn that he failed to apply his mind to the relevant facts and circumstances. He clearly misconstrued and misinterpreted section 69 of the Correctional Services Act 8 of 1959 by allowing himself to be influenced by extraneous guidelines not included in or required by the said section"¹¹⁰.

On this basis, *inter alia*, Van Zyl J concluded that Applicant's release on parole on medical grounds was:

"clearly expedient with reference to his physical condition. The applicant is fully entitled to spend the remaining portion of his life ensconced in his own home in the consolatory embrace of his family. When the time comes for him to pass on, he must be able to do so peacefully and in accordance with his inherent right to human dignity".¹¹¹

This suggests that once a prisoner's medical condition has reached such a stage where his/her release on parole on medical grounds is expedient with reference to his physical condition, he/she is fully entitled to be released. A prisoner, in these circumstances, therefore acquires an enforceable right to be released on parole on medical grounds.

The judgment further suggests that such a prisoner's inherent right to

¹⁰⁹ Stansfield (n 105) para 115.

¹¹⁰ Stansfield (n 105) para 130.

¹¹¹ Stansfield (n 105) para 132.

dignity would be violated if he/she is not released from prison on medical parole. It furthermore suggests that to die in a prison, in such circumstances, would in itself be a violation of a prisoner's inherent right to dignity¹¹².

In the circumstances, the Commissioner (or his duly delegated official), the Correctional Supervision and Parole Board or the Court, as the case may be, must in general consider the report and recommendations by the Institutional Committee¹¹³ and, in addition, the recommendation of the medical officer in cases of parole on medical grounds, before exercising the discretion to place a prisoner on parole on medical grounds¹¹⁴. It is also clear that while the report and recommendations of the Institutional Committee/Case Management Committee, and where applicable, the 'written evidence of the medical practitioner treating that person', are necessary and important factors to be considered the ultimate authority and responsibility for placing prisoners serving determinate and indeterminate sentences on parole on medical grounds vests solely in the Commissioner (or his duly delegated official)¹¹⁵, the Correctional Supervision and Parole Board¹¹⁶ or the Court¹¹⁷, as the case may be.

¹¹² The Respondents noted an application for leave to appeal, which was refused by the Court. The respondents subsequently abandoned an application to the Supreme Court of Appeal for leave to appeal. On 5 October 2004 it was reported that the Applicant passed away and he was subsequently buried on 9 October 2004.

¹¹³ Which is known under the Correctional Services Act 111 of 1998, as the Case Management Committee.

¹¹⁴ *Stanfield v Minister of Correctional Services and Others* (n 105); sections 79 and 136 of the Correctional Services Act 111 of 1998.

¹¹⁵ For those prisoners serving a term of 12 months or less in terms of s 93 of Act 111 of 1998.

¹¹⁶ For all prisoners except those sentenced to life or indeterminate sentences in terms of s 73 of Act 111 of 1998.

This power must be exercised within the confines of the applicable statutory provisions.

The Judicial Inspectorate stated in its annual report for the period 1 April 2002 to 31 March 2003¹¹⁸, that out of a total prison population of 179 398, in 2002, only 88 prisoners were released on medical grounds. The comparative total for 2003 was 117 (0,07 per cent of the prison population)¹¹⁹, and for 2004 a mere 76¹²⁰. The report draws a distinction between 'unnatural' deaths in prison, namely those deaths due *inter alia* to violence and suicide, and 'natural' deaths on the other hand, ie those deaths due to illness. In 1995 there were 60 unnatural deaths recorded, compared to 54 in 2002 and 56 in 2003 and 29 in 2004¹²¹. The natural death rate in 1995 stood at 1.65 per 1 000 prisoners. This has increased dramatically to 7.75 per 1 000 prisoners in 2002 and 9.1 per 1 000 prisoners in 2003, 2004 and 2005¹²². The main cause of death in prisons during 2002 appears to be HIV/AIDS.¹²³

This *inter alia* led the Inspecting Judge of the Judicial Inspectorate, to urge the authorities to make more use of the provisions for the release of

¹¹⁷ For those prisoners sentenced to life imprisonment or indeterminate sentences in terms of s 73 of Act 111 of 1998.

¹¹⁸ An annual report to the President of the Republic of South Africa and the then Minister of Correctional Services by the Inspecting Judge of Prisons is required in terms of s 90 of the Correctional Services Act 111 of 1998.

¹¹⁹ See Judicial Inspectorate Report for 2003/4: 17–18.

¹²⁰ See Judicial Inspectorate Report for 2004/5: 15.

¹²¹ See Judicial Inspectorate Report for 2004/5 16, 72.

¹²² See Judicial Inspectorate Report for 2004/5 16, 31–32.

¹²³ See Judicial Inspectorate Report for 2004/5 19–20.

terminally ill prisoners:

“ The numbers of such releases on parole, having remained fairly steady since 1996 despite the large increase in deaths, almost doubled to 88 in 2002 ... That is gratifying, but it is felt that many more could be released bearing in mind the 1389 “natural” deaths in prison in 2002.

More use of the provisions for the release of terminally ill prisoners is called for, as well as putting into operation Section 79 of the Act”.¹²⁴

However, despite the commencement of s 79 of the 1998 Correctional Services Act, the number of prisoners released on medical parole in 2004/5 in fact decreased since 2002 from 88 to 76. This led to the Judicial Inspectorate to state that the provisions of s 79 are ‘... too restrictive and urges reconsideration ...’ thereof¹²⁵.

2.4 THE DETERMINATION OF NON-PAROLE PERIODS (PUNITIVE PERIODS) AND PAROLE PERIODS (THE RISK / SECURITY PERIOD): BALANCING EXECUTIVE POWER AND JUDICIAL INDEPENDENCE

2.4.1 The European Approach

In **Germany**, it is a fundamental principle of prison law to have a legal framework within which prisoners, including those serving life sentences, be considered for release, in accordance with their recognised doctrine of

¹²⁴See Judicial Inspectorate Report for 2004/5 (n 112) 20. Section 79 of the Correctional Services Act 111 of 1998, commenced on 1 October 2004.

¹²⁵Judicial Inspectorate Report 2004/5: 29. According to the 2006/7 Judicial Inspectorate Report the number of terminally ill prisoners released on medical grounds in terms of s 79 of Act 111 of 1998 increased from 64 in 2005 to 70 in 2006, at p 42-43 thereof.

the *Rechtsstaat*, and the recognition of the inherent dignity of the individual¹²⁶. Despite the fact that a prisoner must serve his or her prison sentence or, in the case of a prisoner sentenced to life, may be detained indefinitely, every prisoner must be considered for release regularly and in accordance with clearly established guidelines¹²⁷. This requirement of consideration of prisoners at regular intervals to assess their eligibility for parole led to the amendment of the German penal code by the introduction of s 57(a) which provides for the reconsideration of all sentences of life imprisonment after 15 years have been served¹²⁸.

Under **English law**, the position is largely the same since England is also bound by the provisions of the EU Convention for the Protection of Human Rights and Fundamental Freedoms which was made part of their domestic law in terms of the Human Rights Act of 1998¹²⁹. Accordingly, the approach adopted by the European Court of Human Rights in their interpretation of art 5, more particularly art 5(4) of the Convention for the Protection of Human Rights & Fundamental Freedoms¹³⁰ are binding on and have been followed by English courts¹³¹.

¹²⁶ Zyl Smit *South African Prison Law and Practice* (1992) 379.

¹²⁷ Zyl Smit *South African Prison Law and Practice* (1992) 379.

¹²⁸ Van Zyl Smit *South African Prison Law and Practice* (1992) 379.

¹²⁹ Van Zyl Smit *op cit* (n 128) 379. See also Wade & Forsyth *Administrative Law* (2000) 8th Edition 371–373.

¹³⁰ Article 5(4) of the EU Convention entitles a prisoner 'to take proceedings by which the lawfulness of his detention shall be decided by a court and his release ordered if the detention is not lawful.'

¹³¹ Van Zyl Smit *op cit* (n 26, n 126) 379. See also *Regina (Giles) v Parole Board and Another* (HL E) 2004 (1) AC at 20 D–F.

The position, until 2002, was that in cases where the court has a discretion to impose a life sentence (discretionary life sentence), only the sentence is pronounced in open court¹³². However, a minimum period which must be served before the prisoner is considered for release on licence (parole) is proposed by the trial judge to the Home Secretary, who in consultation with the Lord Chief Justice, determines the minimum term of imprisonment (the tariff) to be served¹³³. This procedure, according to Van Zyl Smit¹³⁴ has been criticised by academic writers who argued that the minimum period should be set by the trial judge in open court and that, once completed, a prisoner should be automatically entitled to be considered for parole by a court or tribunal applying the standards of due process.

This latter approach in terms whereof the minimum period should be set and pronounced by, and in, the court, was clearly endorsed by the European Court of Human Rights¹³⁵ and accepted and applied by the House of Lords in England¹³⁶.

¹³² Van Zyl Smit *op cit* (n 26, n 126) 379. *Regina (Anderson) v Secretary of the State for the Home Department* 2002 (4) All E.R. 1089 (HL).

¹³³ Van Zyl Smit *op cit* (n 26, n 126) *ibid*.

¹³⁴ Van Zyl Smit *op cit* (n 26) 379–380.

¹³⁵ See *Thynne, Wilson & Gunnell v United Kingdom* 1991 (13) EHRR 666–699, in which case the applicants, each of whom had received a discretionary life sentence, complained about the lack of a regular judicial scrutiny of the lawfulness of their continued detention. They relied, in support of their contentions, on the provisions of art 5, in particular art 5(4) of the Convention in terms whereof they are entitled to approach the court in order to determine the lawfulness of their continued detention at reasonable intervals. In the course of its judgment, the European Court of Human Rights indicated (at p 693, para 73) that it was unpersuaded that it was impossible to disentangle the punitive and security components of life sentences, discretionary and indeterminate as it is. Having found that the punitive periods of the discretionary life sentence had expired in respect of each of the applicants, the court further found that they were entitled to a full hearing by a court or similar body to have the lawfulness of their continued detention and/or

In *Regina (Giles) v Parole Board and Another*¹³⁷, the applicant was sentenced to an extended indeterminate term of imprisonment for the protection of the public. As a long-term prisoner, and in accordance with the applicable legislation, he was eligible for release after serving one half of his sentence on recommendation of the Parole Board and was eligible for release on license after serving two thirds of his sentence. He, however, instituted judicial proceedings for a declaration that he was entitled to an oral hearing before the Parole Board upon the expiry of the punitive part of his sentence and at regular intervals thereafter for the Parole Board to decide whether it remained necessary to detain him in order to protect the public.

He contended furthermore that, if that criterion (ie that he is not assessed by the Parole Board at regular intervals) was not met, he be released on the grounds that his continued detention after the punitive period of his sentence had expired, would constitute arbitrary detention contrary to art 5(4) of the Convention for the Protection of Human Rights

the lawfulness of any re-detention determined by that court or tribunal at reasonable intervals (at p 694, para 76). See also *Hussain v United Kingdom* 1996 (22) EHRR 1 wherein the European Court of Human Rights held that there had been a violation of art 5(4) of the Convention because the applicant who had been detained at 'Her Majesty's pleasure' was unable, after the expiry of his punitive period, to bring the case of his continued detention before a court. The court decided that the applicant was entitled, under art 5(4), to have the issue of his dangerousness to society, a characteristic susceptible to change with the passage of time, decided by a court at reasonable intervals (at p 25, para 56). See also *Stafford v United Kingdom* 2002 (35) EHRR 1121 at 1146–1147, para 87.

¹³⁶ In the United Kingdom, see *Regina (Anderson) v Secretary of State for the Home Department* 2002 (4) All E.R. 1089 (HL). See also *Regina (Giles) v Parole Board and Another* HLE (n 131) above.

¹³⁷ *Supra* (n 131 above).

and Fundamental Freedoms incorporated into English law by the Human Rights Act of 1998. That declaration was granted by the review court (court *a quo*) but, on appeal by the Parole Board, it was set aside by the court of appeal. The appeal of the prisoner to the House of Lords against this decision was dismissed on the ground that under the jurisprudence of the European Court of Human Rights, detention in accordance with the lawful sentence of imprisonment for a determinate period imposed by a judge on a prisoner for an offence of which he had been convicted was justified under art 5(1) of the Convention, without the need for further reviews of detention under art 5(4)¹³⁸.

In the course of its judgment, the court of appeal also points out the similarities between discretionary life sentences and indeterminate sentences in that **there is a punitive element and a protective or security element**¹³⁹. In both cases it can be said that the factors which justified the protective or security element are susceptible to change with the passage of time, hence the need to have an assessment and/or determination once the preventative phase is entered, by the court, at regular intervals to determine whether that characteristic (namely dangerousness) is still there¹⁴⁰. The crucial difference between determinate sentences and discretionary life sentences is that in the latter instance 'the effect of a discretionary life sentence was to put the prisoner

¹³⁸ *Regina (Giles) v Parole Board and Another* (n 131) paras 27–28.

¹³⁹ *Regina (Giles) v Parole Board and Another* (n 131) paras 27–28.

¹⁴⁰ *Regina (Giles) v Parole Board and Another* (n 131) paras 27–28.

at the disposal of the State ... This was because it conferred on the Secretary of State the responsibility of determining when the public interest permitted the prisoner's release'¹⁴¹.

The court distinguishes this case from the European Court decision in *Hussain v United Kingdom*¹⁴² in which it was held that there had been a violation of art 5(4) of the Convention because the applicant, who had been detained indeterminately (at Her Majesty's pleasure) was unable, after the expiry of his punitive period, to bring the case of his continued detention before a court. In that case the court decided that the applicant was entitled under art 5(4) to have the issue of his dangerousness to society, a characteristic susceptible to change with the passage of time, decided by a court at reasonable intervals¹⁴³. This requirement, according to Lord Hope of Craighead in *casu*¹⁴⁴ would be met in terms of English law '... by a review of the protective element at reasonable intervals conducted by a judicial body at an oral hearing under the rules of the Parole Board'¹⁴⁵. Ultimately, the court found that this requirement in terms of art 5(4) of the Convention was not applicable in the case of a determinate sentence such as the instant case, where the length of the sentence is determined by the sentencing court at the outset.

¹⁴¹ *Regina (Giles) v Parole Board and Another* (n 131) paras 27–28.

¹⁴² (1996) 22 EHRR 1.

¹⁴³ *Ibid* para 33.

¹⁴⁴ *Regina (Giles) v Parole Board and Another* HL (E) (n 131).

¹⁴⁵ *Regina (Giles) v Parole Board and Another* HL (E) (n 131) para 33.

"... Where, in other words, the length of time that is needed to satisfy the protective element is incorporated in the Court's decision and not left to the Executive"¹⁴⁶.

The court summarised the basis for its finding as follows:

"Where the decision about the length of the period of detention is made by the Court at the close of judicial proceedings, the requirements of art 5(1) are satisfied and the supervision required by art 5(4) is incorporated in the decision itself. ... But where the responsibility for decisions about the length of the period of detention is passed by the Court to the Executive, the lawfulness of the detention requires a process which enables the basis for it to be reviewed judicially at reasonable intervals".¹⁴⁷

In South Africa, the minimum periods of imprisonment for a convicted and sentenced prisoner, the time when and the intervals of which such a prisoner must be considered for parole, and the appropriate body (the Commissioner of Correctional Services, or the Correctional Supervision and Parole Board, or the court), to make that determination, are statutorily determined and constitutionally guaranteed¹⁴⁸.

¹⁴⁶ *Regina (Giles) v Parole Board and Another* HL (E) (n 131) p 28, para 33.

¹⁴⁷ *Regina (Giles) v Parole Board and Another* HL (E) (n 131) p 30, para 40.

¹⁴⁸ See s 276B of the Criminal Procedure Act 51 of 1977, as amended by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997, which came into operation on 1 October 2004, and which makes provision for courts to impose as part of its sentence, a non-parole period. This section provides that if a court sentences a convicted person to a period of imprisonment of two years or longer the court may, as part of the sentence, fix a period during which such person shall not be placed on parole. For a discussion of this section, see Du Toit et al *Commentary on the Criminal Procedure Act* (2008, Service 41) 28-10M, 28-10T, 28-10U, 28-10V. See also s 73 of the Correctional Services Act 111 of 1998 (which deals with the length and form of sentences and sets the minimum periods of detention for prisoners before they can be considered for any form of community corrections including parole, day parole or correctional supervision); ss 74, 75, 76 and 77 of Act 111 of 1998, which describe the Correctional Supervision and Parole Boards, the Correctional Supervision and Parole Review Board, the powers and functions of these respective bodies, which includes the power to decide whether or not to place a prisoner on parole, day parole or under correctional supervision, to recommend to the court – in respect of dangerous criminals and those sentenced to life imprisonment – whether or not to release those prisoners on parole, day parole or correctional supervision; and/or to review, in the case of the CSPRB, any such decision or recommendation of the CSPB. Section 789 read with s 73(5)(a)(ii) and s 73(6)(b)(iv) and (v) of Act 111 of 1998, which set out the powers of the court in respect of dangerous criminals and/or those sentenced to life imprisonment; s 45 of Act 111 of 1998 which makes provision for the preparation of prisoners for placement release and integration into society, in peremptory terms, and s 38 of Act 111 of 1998 which provides for the

The tension between the judicial supervision and executive authority was also the focus in *Regina (Anderson) v Secretary of State for the Home Department*¹⁴⁹. In this case, the House of Lords decided that:

"Since the imposition of sentence was part of a trial for the purposes of the right to a fair hearing by an independent and impartial tribunal guaranteed by art 6(1), and since tariff fixing was legally indistinguishable from the imposition of a sentence, the tariff was required to be set by an independent and impartial tribunal; and that since, as a member of the Executive, the Secretary of State was neither independent of the Executive nor a tribunal, it followed that he should play no part in fixing the claimant's tariff"¹⁵⁰.

The House of Lords therefore found the provisions of the empowering domestic legislation which entrusts that authority to the Secretary of State in respect of the release of prisoners serving mandatory life sentences to be incompatible with the provisions of the Convention and granted the relief of the appellant to that extent¹⁵¹.

2.4.2 The South African approach

The early release of prisoners results in the actual date of release of such a prisoner differing materially from the actual term of imprisonment

assessment of prisoners – in peremptory terms – for *inter alia* such a prisoner's '... needs regarding reintegration into society' (s 38(1)(i) of Act 111 of 1998). See also s 12 – freedom and security of the person: s 34 (access to courts); and s 35 (arrested, detained and accused persons) of the Constitution Act 108 of 1996. See also the discussion under the heading 'The South African Approach' *infra* (chapter 2), chapter 3 (*infra*), under the heading 'Parole in terms of the Correctional Services Act 111 of 1998' *et seq.* See also Van Zyl Smit *op cit* (n 26, n 126) *ibid*.

¹⁴⁹ *Supra* (n 136 above).

¹⁵⁰ *Supra* (n 135) para 2 of the headnote.

¹⁵¹ *Supra* (n 136) paras 30-31, 32, 59-61, 81-87.

imposed by the courts, the latter being the maximum release date of a prisoner. This creates a tension between the judicial independence of the sentencing court on the one hand, and the executive and administrative powers exercised by the Department of Correctional Services and its functionaries, as well as the Correctional Supervision and Parole Boards (CSPB) performing their functions and executing their duties¹⁵². The early release of sentenced prisoners also clearly illustrates this tension in that, while criminal courts can set maximum sentences, they could not until recently¹⁵³ determine what minimum period of imprisonment should actually be served. In *S v Mhlakaza & Another*¹⁵⁴, Harms JA pertinently dealt with it in the following terms:

"The net effect of all this is that all sentences of imprisonment imposed by courts are, in a sense, indeterminate sentences. The function of the sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served. A life sentence is thus a sentence that may, potentially, amount to imprisonment for the rest of the prisoner's natural life; and a sentence of 47 years may, potentially, be for the full period. ...

The lack of control of courts over the minimum sentence to be served can lead to a tension between the Judiciary and the Executive because the Executive action may be interpreted as an infringement of the independence of the Judiciary. ... Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that

¹⁵² See the unreported case in the Cape Provincial Division of the High Court, case number 5247/1995 of *Floris Johannes Jacobus O'Kennedy v Commissioner of Correctional Services and others*, where this tension in the context of remission of sentences was clearly demonstrated and addressed by the court. See also *S v Mhlakaza & Another* 1997 (1) SACR 515 (SCA); *S v Botha* 2006 (2) SACR 110 (SCA).

¹⁵³ With the introduction of ss 286A and 286B of the Criminal Procedure Act 51 of 1977, as amended by s 21 of the Criminal Matters Amendment Act 116 of 1993, read with s 51 of the Criminal Law Amendment Act 105 of 1997, which came into operation on 1 May 1998 in terms of Proclamation R43 (GG 18879) of 1 May 1998; and s 276B of the Criminal Procedure Act 51 of 1977, as amended by s 22, the Parole and Correctional Supervision Amendment Act 87 of 1997, which came into operation on 1 October 2004. These sections are dealt with *infra*.

¹⁵⁴ 1997 (1) SACR 515 (SCA) at 520 H–J.

jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons must be detained ... courts should refrain from attempts, overtly or covertly to usurp the functions of the Executive"

This tension was also explicitly acknowledged and referred to in *S v Botha*¹⁵⁵ in which Ponnau AJA (as he then was) described a recommendation by the trial court that the accused should serve at least two thirds of his effective term of 21 years imprisonment, as "an undesirable judicial incursion into the domain of another arm of State, which is bound to cause tension between the Judiciary and the Executive".

The Legislature has addressed this tension by the introduction of, firstly, s 276B of the Criminal Procedure Act, 1977 as amended¹⁵⁶ and secondly, ss 286A and 286B of the Criminal Procedure Act, 1977 as amended¹⁵⁷.

¹⁵⁵ *Supra* (n 152) paras 25-26.

¹⁵⁶ This section was inserted by s 22 of the Parole and Correctional Supervision Amendment Act 87 of 1997 which finally came into operation on 1 October 2004, and which reads as follows:

"276B Fixing of non-parole-periods

(1)(a) If a Court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the Court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the Court directs that the sentences of imprisonment shall run concurrently, the Court shall, subject to subsection (1)(b), fix the non-parole period in respect of the effective period of imprisonment."

See also *S v Williams*; *S v Papier* 2006 (2) SACR 101 (C) paras 10 -14 wherein the Court describes this section as effectively neutralising the approach adopted by the Supreme Court of Appeal in *S v Botha supra* (n 152). See also *Du Toit et al op cit* (n 148) 28-10D.

¹⁵⁷ By s 51 of the Criminal Law Amendment Act 105 of 1997.

2.4.2.1 **Section 276B of the Criminal Procedure Act, 1977 as amended**¹⁵⁸

Section 276B(1)(a) and (b) gives the Court the discretion ("... the court may ...") to impose a non-parole period as part of its sentence of imprisonment of a convicted offender. That discretion can only be exercised, however, when the jurisdictional requirement is met, namely "... if a Court sentences a person convicted of an offence to imprisonment for a period of two years or longer"¹⁵⁹. The exercise of that discretion is limited to imposing a non-parole period of not more than two thirds of the term of imprisonment imposed by the Court, or 25 years, whichever is the shorter¹⁶⁰.

Sub-section (2) thereof is more drastic. It authorises the Court, in peremptory terms¹⁶¹ to impose a non-parole-period where (a) the Court has convicted an offender of two or more offences, (b) the Court imposes direct imprisonment, and (c) the Court directs that the sentences of imprisonment shall run concurrently.

All three these jurisdictional requirements must be present before the Court can exercise this authority granted to it in terms of ss (2). The exercise of this power by the Court is also limited to imposing a non-

¹⁵⁸ See Du Toit et al *op cit* (n 148) for a discussion of this section with reference to applicable case law. See also *S v Williams; S v Papier* 2006 (2) SACR 101 (C) paras 10-14; *S v Mshumpa & Another* 2008 (1) SACR 126 (E) para 87 and *S v Pakane & Others* 2008 (1) SACR 518 (SCA) paras 46 – 47. See also n 156.

¹⁵⁹ See s 276B(1)(a) of the Criminal Procedure Act 51 of 1977 as amended.

¹⁶⁰ See s 276B(1)(b) of the Criminal Procedure Act 51 of 1977 as amended.

¹⁶¹ See s 276B(2) of the Criminal Procedure Act 51 of 1977 as amended: "... the Court shall ...".

parole-period of not more than two thirds "... of the effective period of imprisonment"¹⁶² or twenty five years, whichever is the shorter¹⁶³.

Section 276B¹⁶⁴ was referred to in *S v Williams; S v Papier*¹⁶⁵ where the Court described it as having neutralised the approach adopted by the Supreme Court of Appeal in *S v Botha*¹⁶⁶. This section was also applied in *S v Mshumpa & Another*¹⁶⁷ where the Court, relying on its provisions, imposed a 13 year non-parole-period of a total effective sentence of 21 years' imprisonment.

In a subsequent case of *S v Pakane & Others*¹⁶⁸, the first reported Supreme Court of Appeal decision invoking the provisions of s 276B, the Court, with reference to the approach and reservations expressed in *S v Botha*¹⁶⁹ and *S v Mhlakaza & Another*¹⁷⁰, described this section as reflecting the Legislature's intention "... to address precisely the concerns raised therein¹⁷¹ by clothing sentencing courts with power to control the minimum or actual period to be served by a convicted person (although controversy may nevertheless still remain in other aspects alluded to in

¹⁶² See s 276B(2) of the Criminal Procedure Act 51 of 1977 as amended.

¹⁶³ As prescribed in s 276B(1)(b) of the Criminal Procedure Act 51 of 1977 as amended.

¹⁶⁴ Of the Criminal Procedure Act 51 of 1977 as amended.

¹⁶⁵ *Supra* (n 263).

¹⁶⁶ *Supra* (n 152) paras 25 - 26.

¹⁶⁷ *Supra* (n 163) para 87.

¹⁶⁸ 2008 (1) SACR 518 (SCA).

¹⁶⁹ *Supra* (n 152).

¹⁷⁰ *Supra* (n 152 & 154).

¹⁷¹ In *Botha supra* (n 152) and in *Mhlakaza supra* (n 152 and 154).

Mhlakaza, such as positive tensions between sentencing objectives and public resources)"¹⁷².

In this case the Supreme Court of Appeal ordered that the Second Appellant serve a non-parole-period of not less than ten years of an effective 15 years imprisonment¹⁷³.

Despite this acknowledgment that s 276B does indeed create a heightened tension between the judiciary and the executive, by sanctioning judicial intervention in imposing non-parole-periods, that tension is resolved on the basis that courts will, guided by the reservations expressed in *S v Botha*¹⁷⁴ and in *S v Mhlakaza*¹⁷⁵, invoke these provisions only in exceptional circumstances, and only in those cases where the abovementioned jurisdictional requirements are present¹⁷⁶.

The provisions of s 276B of the Criminal Procedure Act, 1977¹⁷⁷ are also not in conflict with the provisions of s 73 of the Correctional Services Act, 1988¹⁷⁸, more particularly ss (6)(a) and (b) and ss (7)(c) thereof¹⁷⁹.

¹⁷² At 536f – g, para 47.

¹⁷³ Para 48.

¹⁷⁴ *Supra* (n 152).

¹⁷⁵ *Supra* (n 152, 153).

¹⁷⁶ See the considered and correct approach adopted by HJ Erasmus J in *S v Williams; S v Papier* 2006 (2) SACR 101 (C) 108c-d, para 50. See also Du Toit et al *op cit* 28-10U where the authors express the view that "... Pakane [*S v Pakane supra* (n 168)] is most certainly no authority for an approach that sentencing courts should as a matter of routine determine non-parole-periods as provided for by s 276B".

¹⁷⁷ Act 51 of 1977 as amended.

¹⁷⁸ Act 111 of 1988 as amended.

¹⁷⁹ These subsections read as follows:

As the Court correctly pointed in *S v Williams; S v Papier*¹⁸⁰ where a Court, as part of its sentence, wanted to make an order regarding a non-parole-period, it had to do so in terms of s 276B of the Criminal Procedure Act, 1977¹⁸¹ - which is the source of its power for such an order – and not in terms of s 73(7)(c) or 73(6)(a) of the Correctional Services Act, 1999¹⁸².

These latter provisions of the Correctional Services Act, 1998¹⁸³ merely provided for what had to happen where a Court had, or had not,

(6)(a) Subject to the provisions of paragraph (b), a prisoner serving a determinate sentence may not be placed on parole until such prisoner has served either the stipulated non-parole-period, or the rest of the sentence, but parole must be considered whenever a prisoner has served 25 years of a sentence or cumulative sentences.

(b) A person who has been sentenced to –

(i) periodical imprisonment, must be detained periodically in a prison as prescribed by regulation;

(ii) imprisonment for corrective training, may be detained in a prison for a period of two years and may not be placed on parole until he or she has served at least 12 months;

(iii) imprisonment for the prevention of crime, may be detained in a prison for a period of five years and may not be placed on parole until he or she has served at least two years and six months;

(iv) life imprisonment, may not be placed on parole until he or she has served at least 25 years of the sentence but a prisoner on reaching the age of 65 years may be placed on parole if he or she has served at least 15 years of such sentence;

(v) imprisonment contemplated in section 52(2) of the Criminal Law Amendment Act, 1997 (Act No 105 of 1997), may not be placed on parole unless he or she has served at least four fifths of the term of imprisonment imposed or 25 years, whichever is the shorter, but the court, when imposing imprisonment, may order that the prisoner be considered for placement on parole after he or she has served two thirds of such term."

“(7)(a) ...

(b) ...

(c) If a person has been sentenced to imprisonment for –

(i) a definite period under section 276(1)(b) of the Criminal Procedure Act;

(ii) imprisonment under section 276(1)(i) of the said Act;

(iii) a period not exceeding five years as an alternative to a fine,

the person shall serve at least a quarter of the effective sentences imposed or the non-parole-period, if any, whichever is the longer before being considered for placement under correctional supervision, unless the court has directed otherwise."

¹⁸⁰ *Supra* (n 156) paras 13 and 15.

¹⁸¹ Act 51 of 1977 as amended.

¹⁸² Act 111 of 1998 as amended.

¹⁸³ Act 111 of 1998 as amended.

prescribed a non-parole-period in terms of s 276B of the Criminal Procedure Act, 1977¹⁸⁴.

These provisions of s 276B of the Criminal Procedure Act, 1977 and s 73 of the Correctional Services Act, 1998 therefore complement each other.

2.4.2.2 Sections 286A and 286B of the Criminal Procedure Act 51 of 1977 as amended by Act 105 of 1977

The Legislature has also addressed this tension between the Judiciary and the Executive in respect of convicted persons who have been declared "dangerous criminals"¹⁸⁵ and those who have been sentenced to life imprisonment¹⁸⁶, which included the imposition of a discretionary life sentence and the obligatory life sentence in terms of s 51 of the Criminal Law Amendment Act¹⁸⁷. The Legislature has attempted to resolve this tension by providing that, in the case of a dangerous criminal who has been sentenced to an indefinite period of imprisonment, the court is authorised not only to impose a minimum term of imprisonment, but also to direct that after such a person has served that minimum period of imprisonment, that he/she be brought back to the court for the court to consider and decide whether to place such a prisoner under correctional

¹⁸⁴ Act 51 of 1977 as amended.

¹⁸⁵ See s 286A and s 286B of the Criminal Procedure Act 51 of 1977.

¹⁸⁶ In terms of both s 276(1)(b) read with s 283 of the Criminal Procedure Act 51 of 1977.

¹⁸⁷ 105 of 1997.

supervision or on day parole or parole, and for what period¹⁸⁸. In this instance, the administrative and executive organs of the state, namely the Correctional Services and Parole Board (CSPB) duly assisted by the Case Management Committee (CMC), has an advisory function only in the sense that it could make recommendations to the court in respect of the granting of placement under correctional supervision or parole or day parole¹⁸⁹.

Similarly, in the case of a prisoner serving a sentence of life imprisonment, it is the court which is authorised to consider and decide whether or not to grant day parole or parole in respect of such a prisoner, and the conditions attached to such day parole or parole¹⁹⁰. The CSPB in this instance also fulfils merely an advisory function by making recommendations to the court on the granting of parole or day parole and appropriate conditions of community corrections¹⁹¹. The existence and recognition of this tension has also led one commentator to advocate a cautious approach by those who are authorised to consider early release, which observation, although made in the context of the 1959 Correctional Services Act, is equally applicable and valid in the context of the applicable provisions of the 1998 Correctional Services Act. He remarked as follows:

¹⁸⁸ See s 286B of the Criminal Procedure Act 51 of 1977, read with s 75(1)(b) of the Correctional Services Act 111 of 1998.

¹⁸⁹ See s 75(1)(b) of the Correctional Services Act 111 of 1998.

¹⁹⁰ Section 75 of the Correctional Services Act 111 of 1998.

¹⁹¹ See s 75(1)(c) of the Correctional Services Act 111 of 1998.

"The legal rules relating to early release are part of the external aspects of prison law, for they affect the terms of imprisonment actually served by the prisoner rather than the conditions of detention. One may therefore expect that when early release is being considered, careful attention will be paid to principles of legality as developed in the law of criminal procedure and administrative law. One may also expect that those who consider early release will be conscious of the distinction between sentencing law and prison law. It follows that in order not to undermine the authority of the sentencing courts, routine interventions in the terms of imprisonment to be served should be limited and subject to predetermined maximums"¹⁹².

It is in this context that the powers and functions of those executive and administrative functionaries and organs of state in the consideration and execution of early release must be approached, analysed and understood.

2.5 Conclusion

The 1998 Correctional Services Act makes provision for various mechanisms of early release of prisoners, before the expiry of their actual term of imprisonment and imposed by the sentencing court.¹⁹³ Parole is one of these early release mechanisms created and provided for by the 1998 Correctional Services Act¹⁹⁴.

¹⁹² See Van Zyl Smit *op cit* (n 26) 348

¹⁹³ See the provisions referred to in notes 33 – 44 above.

¹⁹⁴ Act 111 of 1998 as amended.

Although there are certain similarities between parole and these other forms of early release mechanisms, parole differs from those mechanisms in material respects.

The early release of prisoners on parole, and the subsequent creation and imposition of non-parole periods, demonstrates a tension within the judicial and the executive relationship. That tension is resolved, in South Africa, on the basis that courts acknowledge and accept that its function as a sentencing court is statutorily determined, that it is bound to that sentencing jurisdiction and that, as a sentencing court, its function is to impose the maximum sentence and that it should not as a general rule prescribe to the executive branch of government as to how, and for how long, convicted persons must be detained after having served the statutorily determined minimum period or the non-parole period of imprisonment¹⁹⁵. The courts should exercise the discretion and power granted to it by the Legislature in the form of ss 276B, 286A and 286B of the Criminal Procedure Act, 1977¹⁹⁶, cautiously, only when expressly authorised thereto by, and within the strict parameters of, the empowering legislation and only in exceptional circumstances¹⁹⁷.

¹⁹⁵ *S v Mhlakaza and another* 1997 (1) SACR 515 (SCA) 520h-j; *S v Botha* 2006 (2) SACR 110 (SCA) paras 25 – 26.

¹⁹⁶ Act 51 of 1977 as amended.

¹⁹⁷ *S v Williams*; *S v Papier* 2006 (2) SACR 101 (C) para 15. See also Du Toit *et al op cit* (n 148). As to what would constitute “exceptional circumstances” and how the South African courts approach it, albeit predominantly in the context of bail, see generally Du Toit *et al op cit* (n 148) Service 39, 2008 9-45 *et seq* and the cases referred to therein, *inter alia* *S v Dlamini*; *S v Dladla & Others*; *S v Joubert*; *S v Schietekat* 1999 (2) SACR 51 (CC) paras 75 – 77; *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA); *S v Viljoen* 2002 (2) SACR 550 (SCA); *S v Bruinjies* 2003 (2) SACR 575 (SCA); *S v Scott-Crossley* 2007 (2) SACR 470 (SCA); *S v C* 1998 (2) SACR 721 (C) 724b-g; *S v Mohamed* 1999 (2) SACR 507 (C) 515c-d.

The executive on the other hand ought to, and should, exercise its power with due regard to its constitutional obligations, including acknowledging and adhering to the principle of legality, and in such a way that it does not undermine the authority of the sentencing courts.¹⁹⁸

¹⁹⁸ Van Zyl Smit *South African Prison Law and Practice* (1992) 348. See also *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2002 (2) SA 674 (CC).

CHAPTER 3

THE PRACTICE OF PAROLE IN SOUTH AFRICA

3.1 Introduction

This chapter focuses specifically on the practice of parole in South Africa, how it has evolved and changed over the years and the role of the various participants in the parole process, namely the prisoner, correctional officials, the Case Management Committee (CMC), the Correctional Supervision and Parole Board (CSPB), the Correctional Supervision and Parole Review Board (CSPRB) and the Court. It further explores the criteria and factors that played, and continue to play, a role in determining whether or not a prisoner is eligible to be released on parole. This is done by a comparative analysis of the practice of parole under the now repealed 1959 Correctional Services Act¹, the repealed 1997 Parole and Correctional Supervision Matters Amendment Act², and the current 1998 Correctional Services Act³.

¹ The Correctional Services Act 8 of 1959.

² Act 87 of 1997.

³ The Correctional Services Act 111 of 1998.

3.2 Historical context of parole in South Africa

In 1980, the release system reflected in Chapter VI of the Prisons Act 8 of 1959 was created and introduced by the Prisons Amendment Act 1980⁴. Prison boards were replaced with release boards⁵. Institutional committees were created to assist with, and facilitate, the assessment of prisoners and to make recommendations to the release boards (previously the prison boards) regarding their eligibility to be released on probation or parole⁶. The powers of the Commissioner were increased to release prisoners on parole or probation and to grant special remission in special deserving cases to certain prisoners at his own discretion⁷. A Release Advisory Board was created (in addition to release boards) to advise the Minister on matters of policy, the possible release on parole or probation of prisoners sentenced to life imprisonment and any other matter on which the Minister needed advice⁸.

The most significant development in penal policy and practice which characterised this period was the creation of the release advisory board which tempered, for the first time in the penal history of South Africa, the

⁴ Prisons Amendment Act 22 of 1980.

⁵ By s 6 of Amendment Act 22 of 1980.

⁶ Section 2 of Act 22 of 1980.

⁷ Subsections 1–10 of Act 22 of 1980.

⁸ Section 61A of the Prisons Act 8 of 1959 as amended by s 8 of Act 22 of 1980. This section was substituted by s 16 of Act 122 of 1991 and repealed by s 21 of Act 68 of 1993.

otherwise unfettered discretionary powers of the Minister – to release a prisoner on parole or probation or not⁹.

The above release system in terms of Chapter VI of the Prisons Act of 1959 was totally overhauled in the early 1990s¹⁰. Correctional supervision as a non-custodial form of punishment was introduced¹¹. The Commissioner was also now empowered to release certain prisoners from imprisonment under correctional supervision in certain prescribed circumstances¹².

Moreover, the name of the Act was changed from the Prison Act of 1959 to the Correctional Services Act¹³.

The terminology was changed, which was reflected by the deletion of certain definitions and the insertion of new terms and definitions¹⁴. The practice¹⁵ of giving almost all prisoners one third remission of sentence and the blanket release on parole of prisoners after having served only two thirds of their sentences was stopped. The 'new' 1959 Correctional

⁹ Section 8 of the Prisons Amendment Act 22 of 1980 which inserted s 61A of the Prisons Act 8 of 1959.

¹⁰ Correctional Services Supervision Matters Amendment Act 122 of 1991 and Correctional Services Amendment Act 68 of 1993. Van Zyl Smit 'Prisoners' Rights' (1994) 5 *South African Human Rights Yearbook* 279.

¹¹ Section 276(1)(h) and s 276(1)(i) read with s 276A3 of the Criminal Procedure Act 51 of 1977 as amended by Act 122 of 1991. Van Zyl Smit *op cit* (n 10).

¹² See n 11 above.

¹³ Section 33 of Prisons Amendment Act 122 of 1991.

¹⁴ Section 1 of Act 8 of 1959 as amended by s 1 of Act 122 of 1991 and s 1 of Act 68 of 1993.

¹⁵ Van Zyl Smit *op cit* (n 10) 279.

Services Act in its amended form then provided in express terms that all prisoners would be considered for parole after having served half of their sentences¹⁶.

One of the significant features of the 1993 Amendment Act was the introduction of the credit system¹⁷.

It may not have been the intended objective of the credit system, but it created an administrative nightmare for the Department of Correctional Services ('the DCS')¹⁸. It also subverted the express intention behind s 65 of the 1959 Correctional Services Act to have prisoners considered for parole only after having served half their sentences. It did that by providing that prisoners could earn credits dependent on their overall conduct and performance in prison, which would be converted into days. Although the DCS was at pains to emphasise in their Manual and various policy documents that these credits could not be used as of right by prisoners to be released earlier, before expiry of their prison terms, these same policies and the 1959 Correctional Services Act, as amended by Act 68 of 1993, made provision for a prisoner's date for consideration to be

¹⁶ Section 65 of the 1959 Act, as amended by Act 68 of 1993.

¹⁷ Section 1 read with s 22A of the 1959 Act, as amended by Act 68 of 1993.

¹⁸ This is borne out by the many policy directives regarding credits, its application and the manner in which it must be awarded, that were issued over the years by the Office of the National Commissioner of Correctional Services. The writer was also frequently engaged in litigation in the High Court of South Africa, regarding these policy directives and credits, and is therefore aware that there was no uniformity in South African prisons, until now, regarding the interpretation of these policy directives and the application of the Credit System. See also Van Zyl Smit *op cit* (n 10, n 15).

released on parole, to be brought forward by the number of credits earned¹⁹. A prisoner could henceforth earn a maximum of credits equal to one third of his or her sentence, hence the reference to the one third rule²⁰. In effect, this resulted in many prisoners being eligible to be considered for parole after having served only one third of their sentence (it being half of their sentence after deducting the one third gained as credits!)²¹. The planners and drafters of the new release system in terms of the amending legislation had clearly failed if their objective was the

¹⁹ The Department of Correctional Service's Manual is described and referred to by them as their Correctional Service Order and then followed by the applicable part, eg B (in Afrikaans, Diens Order B) and divided in different chapters, designed in Roman figures, each chapter dealing with and explaining a different aspect of prison administration and regulation. The chapter dealing with parole is Chapter VI, described and referenced as CSOB VI, and the specific policy dealing with credits is described as Service Order 2, hence the full abbreviated reference for the specific chapter in the Manual dealing with parole (Ch VI), and then specifically with the awarding and calculation of credits (Service Order 2) would be CSOB VI(2) read with CSOB VI (1A)(23 and 24) – the latter policies dealt with the 'Determination of Realistic Parole Date'. The date of consideration for parole with a determinate sentence is said as follows:

VI(1A)(24)(a) The date of consideration (half of sentence minus credits)
(i) All prisoners with determinate sentences must be considered for parole after serving ½ of their sentences minus credits. The emphasis is on consider and a prisoner is not automatically placed out after completion of ½ of his sentence....

See also CSOB VI(2)(a)(v) – where it is emphasised that the allocated credits cannot shorten the imposed sentence; and (vi) wherein it is explicitly cautioned that credits cannot be claimed as of right. However, a prisoner's right to lay a complaint or to make representations against a decision of the institutional committee was acknowledged.

See also Policy Document dated 30/09/1993, ref: 1/8/B: 'Insake Beleidsaanpassing: Verbod op Parolering ten opsigte van Sekere Misdade' (prohibition against paroling in respect of certain offences); Policy document dated 23 April 1998, ref: 1/8/B: Division Placements and Representations: 'Penalisation Factors: Applicable on Parole Boards and Delegated Officials' by Venter, Commissioner: Correctional Services, Director Offender Policy; Policy Document dated 14 November 1998: Ref 1/8/B: Division Placements: 'Re: Penalising for escape from legal detention when possible placing on parole is considered by the Parole Board by Korabie for Commissioner: Correctional Services: CDC Functional Services; and Policy Document dated 7 November 2002: Ref 1/8/B: Prison Services: Consideration for Conversion of Imprisonment into Correctional Supervision in terms of s 276A(3) s 287(4)(b) of the Criminal Procedure Act, 1977 and CSA VI (1A)(5)(a) (cc) / SA VI (1)(iv) (CC).

See also http://intranet.dcs.gov.za/prison_services/placementnew.htm: 'The New Placement Policy: Department of Correctional Services' (accessed on 27 September 2004).

²⁰ CSOB *op cit* (n 19) VI (1A)(24)(a). Section 1 read with s 22A and s 65 of the 1959 Correctional Services Act. See also Van Zyl Smit *op cit* (n 10, n 15).

²¹ CSOB *op cit* (n 19) VI (2) read with CSOB VI (1A) 23-24 (n 19). See also s 1 read with s 22A read with s 65 of the 1959 Act as amended by Act 68 of 1993.

removal of the one third rule. The introduction of the credit system had effectively retained the one third rule²².

The effect of these policy directives issued by the Commissioner meant that certain prisoners who had committed certain defined serious offences would be penalised more, resulting in fewer credits²³. As a result, such a prisoner might forfeit the opportunity of having his/her consideration date for parole being brought forward²⁴. As could be expected, the credit system was the subject of not only open revolt by prisoners, which led to a Commission of Enquiry lead by Mr Justice Kriegler²⁵, it was also the subject of many legal challenges²⁶.

Another feature of the new release system²⁷ was the fact that despite the introduction of parole boards (in contradistinction to release boards)²⁸, the discretionary power to decide whether or not to release a prisoner on

²² Van Zyl Smit *op cit* (n 10) 279. See in particular CSOB VI (1A)(23)(d) where it is explicitly stated: 'Note: Irrespective of credits allocated, no prisoner's period of consideration will be less than one third (1/3) of their total detention periods. (Determinate sentences only).'

²³ See the Policy Directives dated 23 November 1994, ref 1/8/B and 23 April 1998, ref 1/8/B *op cit* (n 19).

²⁴ See the *Winckler* case (n 26) and *Mohamed* case (n 26), for an assessment of the latter two policy documents, one of 1994 and another of 1998 – which is not the subject of analysis here. See also the policy documents referred to in n 19 above.

²⁵ Van Zyl Smit *op cit* (n 10, n 15) referring to the prison uprisings and the findings of the Kriegler Commission.

²⁶ *Winckler v Minister of Correctional Services & Others* 2001 (2) SA 747 (C); *Combrinck & Another v Minister of Correctional Services & Another* 2001 (3) SA 338; *Mohamed v Minister of Correctional Services & Others* 2003 (1) SA 169 (C) and *Nortje & Andere v Minister van Korrektiewe Dienste & Andere* 2001 (3) SA 422 (A) at 480, all of which dealt with the policy directives issued by the Commissioner in 1994 and 1998 (referred to in n 23 above) and which prescribed certain penalisation factors for certain offences which invariably impacted negatively on the number of credits a prisoner could earn.

²⁷ Under Act 68 of 1993.

²⁸ Section 1 of the 1959 Correctional Services Act as amended by Act 68 of 1993.

parole still vested with the Commissioner of Correctional Services. The parole boards merely had an advisory function²⁹.

It was these aspects that the later Correctional Services Amendment Act 87 of 1997 (the 1997 Amendment Act) sought to address by *inter alia* deleting the definition of credits and repealing the entire credit system. It also sought to increase the power of parole boards in the decision-making process relating to the earlier release of prisoners on parole³⁰.

The substance of the 1997 Amendment Act was, however, re-enacted in the 1998 Correctional Services Act³¹. When comparing the provisions of the 1997 Amendment Act and the new 1998 Correctional Services Act, there are indeed vast similarities.

However, the release system as reflected in Chapter VI of the 1998 Correctional Services Act, including the composition of the structures and decision-making bodies within that system, as well as the procedures contained in the current 1998 Correctional Services Act were radically different from that contained in the release system in Chapter VI of the

²⁹ Section 1, s. 5C, s 63 and s 65 of the 1959 Correctional Services Act as amended by Act 68 of 1993.

³⁰ Section 1 read with ss 4, 7, 8, 9 and 11 of Act 87 of 1997. This 1997 Amendment Act was never implemented until 30 July 2004, when by Proclamation R. 38 of *Government Gazette* No 26626 of 30 July 2004, this whole Act, except ss 20–23, was repealed. The dates of commencement of those ss 20–23 was set as 1 October 2004, which coincided with the commencement of the remainder of the provisions of the current Correctional Services Act 111 of 1998.

³¹ Van Zyl Smit *op cit* (n 10, n 15).

1959 Correctional Services Act. A system collectively referred to as community corrections has been introduced by the current 1998 Correctional Services Act, and parole has been redefined to mean '... a form of community corrections under which a prisoner may be released ...'³².

The basic ingredients or essential elements of parole reflected in Crofton's 'Intermediate System' consisting of (i) conditional release of a prisoner into the community, (ii) under supervision, (iii) with community involvement to effect social integration, and (iv) revocation of parole for breach of the conditions of parole³³ had been incorporated into the South African penal system and inform the vision and philosophy of the Department of Correctional Services (DCS) regarding parole in South Africa³⁴. The Cabinet of the Republic of South Africa has approved the Department of Correctional Services' White Paper on Corrections in South Africa³⁵. The DCS describes its parole policy, which it says is sometimes erroneously referred to as 'a release policy', as: (i) directing the release of an incarcerated offender; (ii) under community correctional supervision; (iii) subject to, and on the basis of, an undertaking by the parolee that he/she will not abscond and will comply with the conditions, including

³² Section 1 of the Correctional Services Act 111 of 1998.

³³ Carney *op cit* (chapter 1, n 11); Abadinsky *op cit* (chapter 1, n 10); Gottfredson and Gottfredson *op cit* (chapter 1, n 19).

³⁴ See the White Paper on Corrections in South Africa, Department of Correctional Services, February 2005; pp 7, 88, para 5.5, also referred to in chapter 1, n 22.

³⁵ This White Paper has been described by the then Commissioner of Correctional Services, L Mtshali, as 'the principal strategic document aimed at directing the management and service provision of the department over the next twenty years and beyond.' The White Paper *op cit* (n 34) 9.

continued participation in correctional and developmental programmes as imposed by the Correctional Supervision and Parole Board; and (iv) which gives effect to the principle of social reintegration of the offender as part of the purpose of the correctional system³⁶.

3.3 Parole in terms of the Correctional Services Act 8 of 1959 ("the 1959 Correctional Services Act")

In order to fully appreciate the changes and development of legislation dealing with parole, full reference will have to be made to the relevant provisions of the 1959 Correctional Services Act that applied until 1 October 2004 when Chapters VI and VII of the 1998 Correctional Services Act commenced, and including the relevant policies and guidelines which will remain applicable to prisoners sentenced to imprisonment before that date.³⁷

Section 22A of the 1959 Correctional Service Act³⁸, makes provision for the allocation of credits to a deserving prisoner. These credits may not exceed, but can amount to, a total number of credits equal to half of the period of that prisoner's term of imprisonment. It is awarded at intervals of not more than 6 (six) months by the relevant Institutional

³⁶ White Paper on Corrections in South Africa, Department of Correctional Services, February 2005 para 5.5, pp 9–10.

³⁷ In terms of Proclamation R. 38, 2004 in *Government Gazette* No 26626, Vol 469 dated 30 July 2004. See also s 136 of the Correctional Services Act 111 of 1998.

³⁸ Which was inserted by s 9 of the Correctional Services Amendment Act 68 of 1993.

Committee³⁹. These credits '... may be taken into account in determining the date on which a parole board may consider the placement of such a prisoner on parole'⁴⁰.

Section 62 of the 1959 Correctional Services Act dealt with the powers, functions and duties of institutional committees. The institutional committee assessed each prisoner and then decided on the number of credits if any, to be awarded to a prisoner. This committee also did the actual allocation of the credits awarded. This assessment, decision and allocation had to be done at least once every six months⁴¹. The institutional committee also made recommendations to the Commissioner of Correctional Services or his appointed and authorised delegated official, regarding any complaint the prisoner might have had but which fell outside its (institutional committee's) jurisdiction⁴².

Section 62(3) furthermore conferred on the prisoner a procedural right to 'appeal' to the Commissioner against the decision of, or recommendations by, the institutional committee. To enable him to exercise this right, the prisoner had to be informed by the institutional

³⁹ In terms of s 62 of the Correctional Services Act 8 of 1959.

⁴⁰ Section 22A(2) of the Correctional Services Act 8 of 1959. The definition of credits in terms of s 1, as well as the whole of s 22A of the Correctional Services Act 8 of 1959 (ie the so-called credit system) had been repealed *in toto* by the Parole and Correctional Supervision Amendment Act 87 of 1997, but this Act had never been promulgated and put into effect. No reference to any form of credit system is made in the new Correctional Services Act 111 of 1998, except in s 136 thereof, the transitional provision. Until 1 October 2004 the credit system therefore had neither been repealed nor abolished in terms of any existing and/or promulgated legislation.

⁴¹ See s 62(1) of the Correctional Services Act 8 of 1959.

⁴² See s 62(2) of the Correctional Services Act 8 of 1959.

committee of the decision and/or recommendation and the reasons for it. The Commissioner, after having obtained and considered the verbal or written remarks of the prisoner and institutional committee, could ratify, amend, declare it (the decision) null and void and/or replace that decision with his own, provided that such decision could not adversely affect the prisoner⁴³. No remedy was prescribed or existed (in terms of the 1959 Correctional Services Act) for the prisoner who disagreed with the decision of the Commissioner, where the Commissioner had indeed ratified (not amended or replaced) the decision of the institutional committee, which decision was the subject of the appeal, despite the fact that such ratification might indeed affect the prisoner adversely.

Section 63 dealt with the powers, functions and duties of Parole Boards. Section 63(1)(a) required a Parole Board to give a special report as required either by the Minister or the Commissioner of Correctional Services having regard to the nature of the offence and any remarks made by the Court in question at the time of the imposition of sentence. Its report is further required, in terms of s 63(1)(a), to have regard to the conduct, adaptation, training, aptitude, industry and physical and mental state of a prisoner and the possibility of his/her relapse into crime. Section 63(1)(b)(ii) required a Parole Board to make recommendations to the Commissioner regarding whether a prisoner should be placed on parole in terms of s 65 of the 1959 Correctional Services Act.

⁴³ Section 62(3) of the Correctional Services Act 8 of 1959.

In terms of s 63 the Parole Board had to make recommendations to the Commissioner or the Minister, as the case may be, with regard to (a) the placement of a person under correctional supervision who had been sentenced to imprisonment in terms of s 276(1)(i) and/or s 287(4)(a) of the Criminal Procedure Act⁴⁴, or whose sentence had been converted to correctional supervision in terms of s 276A(e)(ii) or 287(4)(b) of the Criminal Procedure Act⁴⁵ as amended; and (b) the placement of such prisoner on parole or day parole, and in the event of release of the prisoner on parole being recommended, the period thereof, the supervision thereof and the conditions of such placement.

The Parole Board was also required, in terms of s 286B of the Criminal Procedure Act, 1977⁴⁶ to submit a report to the Court in respect of a person who had been declared a dangerous person by the Court and who had been sentenced to an indefinite period of imprisonment, on a date specified by the Court. In terms of s 268B of the Criminal Procedure Act, 1977⁴⁷, it is the Court (and not the Commissioner of Correctional Services) who decided on the date that such a dangerous criminal might be considered for release on parole, and, if so, the conditions for release of such a prisoner on parole, or his/her further imprisonment.

⁴⁴ Act 51 of 1977 as amended.

⁴⁵ Act 51 of 1977 as amended.

⁴⁶ Act 51 of 1977 as amended.

⁴⁷ Act 51 of 1977.

Section 65 dealt with the release of prisoners and placement of prisoners on parole, and since 1993, also dealt with special remission of sentence of a prisoner and special measures for the reduction of the prison population.⁴⁸

The Commissioner was therefore vested with the discretionary power to release a prisoner (other than a dangerous criminal) on parole.⁴⁹ Section 65(2) provided that a prisoner may, after a report submitted by the Parole Board in terms of s 63 had been studied, be placed on parole before the expiration of his term of imprisonment. Before the Commissioner exercised his discretion whether or not to place a prisoner on parole, he/she was required to consider the relevant report from the Parole Board submitted in terms of s 63⁵⁰. It is accordingly clear from a reading of the relevant provisions of the 1959 Correctional Services Act that a necessary pre-condition to the Commissioner or his duly delegated official exercising his/her discretion whether or not to place a prisoner on parole, was that the relevant report from the Parole Board be considered. The Parole Board itself therefore played a limited yet important and necessary role in the decision whether or not a prisoner was to be placed on parole. It must be clear that in terms of the provisions of the 1959 Correctional Services Act the Parole Board itself had no 'discretion' as to

⁴⁸ See s 65 as amended by s 21 of the Correctional Services Amendment Act 68 of 1993.

⁴⁹ See s 65(2) read with s 63(1) of the Correctional Services Act 8 of 1959.

⁵⁰ See s 65(8) of the Correctional Services Act 8 of 1959 which provided for this in clear terms.

whether or not a prisoner is to be released on parole. It was therefore possible that a Parole Board may not recommend that a prisoner be released on parole but that the Commissioner nevertheless decides, after having considered the Parole Board's report, to place a prisoner on parole as from a date determined by him in accordance with s 65(8) of the 1959 Correctional Services Act or vice versa⁵¹. The Parole Board could not give legal or statutory effect to its recommendation. The 1959 Correctional Services Act simply did not make provision for this.

The Commissioner, in contrast to the Parole Board, however, had a discretion whether or not to release a prisoner on parole, after considering a report from a Parole Board submitted in terms of s 63, acting in terms of s 65(8) of the 1959 Correctional Services Act. In *Goldberg & Others v Minister of Prisons & Others*⁵², the Appellate Division (as the Supreme Court of Appeal was then known) stated that the Act and the Regulations⁵³ provided for a wide range of powers to be exercised by the Commissioner and members of the prison service in connection with the administration of prisons. Virtually every power involved the exercise of some greater or lesser measure of discretion. 'In some instances a great latitude of choice is left to the person charged with the duty of exercising a particular

⁵¹ Although this did not happen often, there is at least one reported incident where the Parole Board recommended parole but the Commissioner refused to follow this recommendation, in *Winckler & Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C).

⁵² 1979(1) SA 14 (A) at 31 H.

⁵³ This refers to the Correctional Services Act 8 of 1959 and the Regulations promulgated thereunder.

discretionary power; he may virtually have complete freedom in the exercise of his discretion as to whether, when and in what manner he will act.⁵⁴ The Court (in the **Goldberg** matter) commented that the Commissioner acts in a purely administrative capacity, and the only statutory limitation on his power is that a determination made by him shall not be inconsistent with the provisions of the Act, the Regulations or any order of the Court⁵⁵ :

"If therefore, the Commissioner on considerations of expediency and policy, determines the manner in which prisoners, or any category or one of them, is to be employed, trained or treated, a court of law is not, in my opinion, empowered to enter upon a review of his conduct, provided that it is not inconsistent with the provisions of the Act, the Regulations or any order of a court."

In his dissenting judgment, Corbett J.A. (as he was then, since retired as Chief Justice of the Supreme Court of Appeal of South Africa) commented as follows⁵⁶:

"An exercise of a discretion is assailable in a court of law where it is shown that the party in whom it is vested acted mala fide or from ulterior motive or failed to apply his mind in the matter.... In this context "ulterior motive" does not necessarily connote a sinister motivation: it can relate simply to the case where for instance, a person or body vested by statute with the discretionary power use it for a purpose not expressly or impliedly authorised by the statutory enactment."

The Commissioner was also vested with the discretionary power to cancel or amend any condition of parole or add new conditions at any time, but subject to the parolee being given notice by the Commissioner of his

⁵⁴ At 34A.

⁵⁵ At 34A.

⁵⁶ At 48D.

general intention and being afforded an opportunity to be heard in respect of the proposed action of the Commissioner. No further remedy, in this context, was afforded the parolee except insofar as the Commissioner had to give reasons to the affected prisoner for his action.⁵⁷ Where a parolee's parole conditions had been amended by the Commissioner and such parolee did not accept any of the amended conditions, his parole would be cancelled, a warrant for his arrest would be issued and he had to serve the remainder of his prison term⁵⁸. The Commissioner retained that discretionary power, to, once again and at a later stage, place such a prisoner on parole, but, again, only if he accepted the amended conditions.⁵⁹

The failure by the parolee to observe a condition of his/her parole could lead to a withdrawal (partial or complete) of such a parolee's parole by the Commissioner, but only if the Commissioner was satisfied that the prisoner has indeed failed to observe a condition of parole⁶⁰. The procedure envisaged was that a warrant for the arrest of the prisoner would be issued by the Commissioner, which could be executed by any peace officer (police, correctional official etc.) whereupon the prisoner could be provisionally detained in prison, until the Commissioner had

⁵⁷ Section 65(3)(b)(i) and (ii) of the Correctional Services Act 8 of 1959.

⁵⁸ Section 65 3(b)(iii) of the Correctional Services Act 8 of 1959.

⁵⁹ See s 65(3)(b)(ii) of the Correctional Services Act 8 of 1959. See also in this context *Roman v Williams N.O.* 1997 (9) BCLR 1267 (C) at 1278 F-I per Van Deventer J, also reported as *Roman v Williams N.O.* 1998 (1) SA 270 (C).

⁶⁰ See s 65(3)(c) and (d) of the Correctional Services Act 8 of 1959.

heard the prisoner and had had sufficient opportunity to hear other evidence in this regard⁶¹. This had to be done within 72 hours of such detention⁶². The power to make a decision regarding a breach or otherwise of a condition of parole by a parolee and his/her withdrawal of parole vested solely with the Commissioner⁶³.

The general rule of practice applicable at the time was contained in subsection 4 of s 65 of the 1959 Correctional Service Act. It provided that a prisoner, including a person sentenced to imprisonment for correctional training or for the prevention of crime had to be considered for placement on parole when she/he had served half of his/her term of imprisonment. Although this provision was phrased in the negative form, in practice, it meant that, if a prisoner had complied with the requirements for placement on parole at half of his/her term of imprisonment, he/she would invariably be placed on parole. For all categories of sentenced prisoners, except those sentenced to life imprisonment, the Commissioner was vested with the discretion whether or not to place such a prisoner on parole, after consideration of a report by the Parole Board⁶⁴.

Since 1993⁶⁵, in the case of prisoners sentenced to life imprisonment, the Parole Board was required to submit a prognosis report to the Minister

⁶¹ See s 65(3)(c) of the Correctional Services Act 8 of 1959.

⁶² Section 65(3)(c) of the Correctional Services Act 8 of 1959.

⁶³ Section 65(3) of the Correctional Services Act 8 of 1959.

⁶⁴ Section 65(4), 65(7), 65(8) and 65(9) of the Correctional Services Act 8 of 1959.

⁶⁵ In terms of the Correctional Services Amendment Act 68 of 1993.

who was requested to refer the matter to the National Advisory Council. This latter Council had to, after consideration, advise the Minister regarding the possible placement on parole of such a prisoner. The Minister could then order the placement of such a prisoner on parole, subject to any condition which he/she might determine, and from a date determined by him. Such parole and the conditions imposed, were operative and applicable until the parolee's (prisoner's) death.⁶⁶

The date on which consideration could be given to whether a prisoner may be placed on parole (which in practice was usually half the prison term) might be brought forward by the number of credits earned by the prisoner⁶⁷. This provision was envisaged as an incentive to seemingly encourage good discipline and order amongst prisoners and to enhance, in the process, good prison administration. In doing so, the prisoners might earn "credits" which could bring forward their assessment date for parole⁶⁸. In this sense, and depending on a positive prognosis and recommendation, these credits could result in the early release of these prisoners⁶⁹. This resulted in a practice that developed that a prisoner would normally be released on parole after having served one third of his

⁶⁶ Section 65(5), (6) and (7) of the Correctional Services Act 8 of 1959. This latter provision was introduced/enacted by s 21 of the Correctional Services Amendment Act 68 of 1993.

⁶⁷ See s 65(4) of the Correctional Services Act 8 of 1959.

⁶⁸ See CSOB VI (2)(a)(i)–(iv) *op cit* (n 19). See also an unpublished booklet compiled at the time by Bosman *Chapter VI (Placement / Release), Parole Board* (1999).

⁶⁹ See s 65(4) of the Correctional Services Act 8 of 1959. See also CSOB VI(2)(a)(i)–(iv). See also Van Zyl Smit *South African Prison Law and Practice* (1992).

or her sentence (the so-called 'one third rule').⁷⁰ It is this provision which has prompted many a prisoner to assert that he/she had earned 'enough credits' (amounting to more than half of his/her term of imprisonment) to be released on parole. This is also the provision which has not only caused the Department of Correctional Services innumerable problems but has also been in many instances, the subject of litigation by the prisoner against the Department of Correctional Services. This litigation was often premised on the argument, incorrectly, that the number of credits earned by the prisoner would entitle such a prisoner to be released on parole earlier, on a date roughly calculated to be the date of his actual expiry of his prison term minus the total number of credits earned by such a prisoner.⁷¹

3.4. The assessment of the prisoner for parole under the 1959 Correctional Services Act

⁷⁰ Van Zyl Smit *South African Prison Law and Practice* (1992) 362 where the author states: 'The general rule is that prisoners may be released on parole after they have served one third of their sentence.' See also CSOB VI(2)(i)(iii)(bb), and CSOB IV(2)(ii)(iv)(aa).

⁷¹ See CSOB VI(2)(a)(v) *op cit* (n 19–22, n 68) which clearly states that credits do not shorten the prison sentence imposed by the Court. See also the Cape Provincial Division of the High Court unreported cases of *Johan Carl Van Der Merwe v Minister of Correctional Services and two others* Cape High Court Case Number 5040/1999 (a matter which was set down for urgent hearing on 10 June 1999, but which has subsequently been postponed *sine die*); *Jackson Mbulane v Minister of Correctional Services and Others*, Cape High Court Case number 8262/1999 wherein Hlophe DJP (as he then was) dismissed Mr Mbulane's application to be released on parole before the expiry of his prison term. See also *Winckler & Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C). See also the cases of *Sidney Hewu, Hilbrow Yeki and Baba Siquesa (applicants) v Minister of Correctional Services and two others*, Cape High Court case nos 4863/2002 and 4871/2002. On 16 September 2002 and before Griesel J, these matters were postponed *sine die* to enable applicants to amend and/or supplement their defective papers. Both these applications have subsequently been dismissed by Meer J as being without any factual and/or legal foundation to sustain a case for earlier release from prison, ie before the expiration of their actual terms of imprisonment.

3.4.1 General

Two crucial aspects need to be emphasised in the context of the assessment of a prisoner for parole in terms of the 1959 Correctional Services Act. The first aspect is the assessment date for placement of the prisoner on parole by the Parole Board, and the accompanying impact of the amount of credits earned by the prisoner as awarded by the institutional committee. The second aspect is the actual assessment procedure itself as prescribed in the manual for the Department of Correctional Services ('the CSOB')⁷² and the policy directives and guidelines issued by the Commissioner.

In practice a sentenced prisoner first appeared before the institutional committee, after having served three months of his prison term (if his sentence was more than six months but less than two years). Where his sentence was two years or longer, it would be at intervals which do not exceed six months⁷³.

Based on this interview session with the prisoner the institutional committee had then allocated or awarded an amount of credits to the

⁷² See CSOB IV(1) and (2) *op cit* (n 19, n 68).

⁷³ CSOB VI (2)(b)(i)–(iii) *op cit* (n 19, n 68).

prisoner, following the criteria laid down in the law⁷⁴ and set out in more detail in the CSOB⁷⁵. Where a prisoner disagrees and/or is aggrieved with the amount of credits awarded to him/her by the institutional committee, he/she can lay a complaint to that effect by noting it and registering it in the complaints register. The Head of the Prison must then obtain the complete response of the chairperson of the institutional committee. Thereafter and after having evaluated and assessed the information at his disposal, the Head of the Prison then makes a decision in accordance with the provisions of s 62(3) of the 1959 Correctional Services Act.⁷⁶ The prisoner must acknowledge in writing that the decision had been communicated to him/her by the institutional committee.

Based on the number of credits awarded to the prisoner, he/she is then allocated an assessment date by the institutional committee, which information is recorded and filed in the prisoner's file⁷⁷.

The prisoner then physically appears before the Parole Board on the assessment date⁷⁸. The Parole Board then has to decide whether the prisoner is a suitable candidate for placement on parole, based on the information contained in the prisoner's file, and taking into consideration the representations, if any, by or on behalf of the prisoner, and the

⁷⁴ See ss 22A and 65 read with s 1 of the Correctional Services Act 8 of 1959.

⁷⁵ See n 19–22, n 68.

⁷⁶ See CSOB VI(2)(e)(iv)–(iv) *op cit* (n 68).

⁷⁷ In accordance with CSOB VI(1)(c)(iv)(aa) *op cit* (n 19–22, n 68).

⁷⁸ *Ibid.*

relevant and applicable legal principles and the guidelines set out in the CSOB⁷⁹. This is usually done in the form of a hearing or interview, on scheduled dates where the prisoner, with⁸⁰ or without her/his legal representative, appears before the panel of the Parole Board⁸¹. Legal representation for prisoners has only been available since the enactment of the 1993 Constitution⁸². In 2004 certain parole boards would still not allow prisoners to be legally represented at or during parole hearings⁸³. The prisoner is then given an opportunity of addressing the panel and/or to hand in any documents/statements containing positive information about himself and/or motivations (from his family, previous employers, religious counsellors) which could assist him in being considered favourably by the Parole Board for placement on parole. Thereafter, the Parole Board adjourns to consider all the relevant information including the report and recommendations of the institutional committee. After

⁷⁹ *Ibid.*

⁸⁰ If such a prisoner could afford a legal representative.

⁸¹ See generally, CSOB VI(1)(c) and (d) *op cit* (n 19–22, n 65 and n 77).

⁸² In accordance with s 25(1)(c) of the Constitution Act 200 of 1993. The author has learnt that the Minister has recently issued a new directive to all Correctional Supervision and Parole Boards in terms whereof no legal representation at parole board hearings is allowed. The legal services department of the DCS was reluctant to give the author a copy of this directive. This policy, if challenged, is bound to be set aside by the court on the basis that it violates a prisoner's or any person's right to legal representation guaranteed in s 35(2)(a) and (b) of the Constitution Act 108 of 1996.

⁸³ In Malmesbury Prison, for example, no legal representation was allowed at such hearings until the commencement of Chapters IV, VI and VII of the Correctional Services Act 111 of 1998 on 1 October 2004. The author learnt this during a consultation session in a pending matter at the time, involving the Department of Correctional Services, wherein he acted as counsel for the Minister of Correctional Services during 2004. The position presently is that no legal representation is allowed at parole board hearings in terms of the aforesaid policy directive issued by the Minister. The author has also been advised thus by the current Chairperson of the Malmesbury CSPB in and around 20 November 2008, after the author has submitted a written application for legal representation on behalf of a prisoner, L Kinnear, in the latter's application to be released on parole, dated 24 November 2008 and submitted to the Malmesbury CSPB on 25 November 2008.

having considered all the relevant information concerning the prisoner, the Parole Board makes a recommendation based on the facts at its disposal, contained in a report, to the delegated official (ie the person authorised by the Commissioner) or the Commissioner, whether or not the prisoner should be placed on parole⁸⁴. A copy of this report with the recommendation, which cannot be amended without the intervention of the full Parole Board⁸⁵ must, on request, be made available to the prisoner. The delegated official or the Commissioner, then, after consideration of the report containing the recommendation, and any other relevant information at his/her disposal, makes the decision whether or not to release the prisoner on parole and, if so, on which date and under which conditions. Appropriate conditions are also contained in the report and recommendations of the Parole Board.⁸⁶ The only recourse which an aggrieved prisoner has against this process is either to make representations to the delegated official and/or the Commissioner⁸⁷. In practice it seldom happened that the delegated official or the Commissioner interfered or deviated from the recommendation by the Parole Board⁸⁸. One internal protective mechanism, for such a prisoner however, is the requirement by the Commissioner or the delegated official that the Parole Board must furnish reasons to him/her in a case where the

⁸⁴ CSOB VI(1)(c)(i) and CSOB VI(1)(q) *op cit* (n 19–22, n 65).

⁸⁵ CSOB VI(1)(c)(8) *op cit* (n 19–22, n 65).

⁸⁶ The author was furnished with this information during consultation sessions with authorised officials of the Department of Correctional Services in the course of preparing for litigation instituted by prisoners against the Minister/Commissioner of Correctional Services.

⁸⁷ See s 62(3) of the Correctional Services Act 8 of 1959.

⁸⁸ See also the discussion above with reference to n 51.

Board had recommended that a prisoner must not be placed on parole after having served the usual half of his/her sentence or must be placed on parole on a later date than at half the sentence.⁸⁹

This does not mean that the delegated official or the Commissioner may not deviate from the Parole Board's recommendation in any particular instance. It remains the Commissioner who ultimately retains the discretionary power whether or not, in his sole discretion, to release a prisoner on parole. In practice it has indeed happened that the Commissioner (or his delegated official) has refused to accept the recommendation of a particular Parole Board, to place certain prisoners on parole⁹⁰.

3.4.2 The assessment date

In evaluating and examining the 'assessment date' for possible placement on the parole of a prisoner, a distinction must also be drawn between :

⁸⁹ CSOB VI(1)(n)(i)(bb)(i), VI(1)(n)(cc)(i) read with VI(2)(a)(ii) *op cit* (n 19–22, n 65). This is in accordance with the prisoner's procedural right to "appeal" to the Commissioner against a negative recommendation by the Institutional Committee or the Parole Board in terms of s 62(3) of the Correctional Service Act 8 of 1959.

⁹⁰ For example, in *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C) the prisoners (Applicants) were three white, well-known, wealthy and well-educated accountants who had all been sentenced in the Cape High Court, after a protracted investigation and a trial, to long terms of imprisonment. After having considered the information placed before them concerning these three prisoners, the Parole Board recommended parole in respect of all three of them. The delegated official, after careful consideration of these recommendations and all relevant information concerning the offence committed by the Applicants and the sentences imposed, decided not to follow the Parole Board's recommendation to place these three applicants on parole at that particular time. When the Commissioner deviated from the Parole Board's recommendations, and refused to place them on parole, they approached the Cape High Court, on an urgent basis to review and set aside this decision by the Commissioner, on various grounds. Their application was subsequently dismissed with costs. See also the discussion above with reference to n 51.

- (a) the pre-1994 period which would be the era under the 'old release policy' prior to the introduction of the credit system by the Correctional Services Amendment Act⁹¹;
- (b) the post-1993 period, which would be the period after the introduction of the credit system by virtue of s 22A of the 1959 Correctional Services Act⁹², which was then referred to as 'the new release policy'⁹³, until 30 September 2004;
- (c) the period under the new and current legislation of 1998⁹⁴, which would be from 1 October 2004.

Under the 'old release policy' (pre-1994 period), as a general rule, prisoners were considered for placement on parole after expiry of half of their term of imprisonment⁹⁵. Although it did not mean that at such date a prisoner had to be released on parole automatically, it often happened

⁹¹ Act 68 of 1993.

⁹² Act 8 of 1959. Section 22A was introduced by s 21 of the Correctional Services Amendment Act 68 of 1993.

⁹³ See Policy Directive dated 30 September 1993, ref 1/8/B (signed HJ Brayn). See also Policy Directive dated 23 November 1994, ref 1/8/B and 23 April 1998, ref 1/8/B, which was also referred to and formed part of the records, in *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C), *Combrinck v Minister of Correctional Services* 2001 (3) SA 338 (D) (see n 23–24 above).

⁹⁴ The relevant provisions under the Correctional Services Act 111 of 1998, Chapters IV, VI and VII had been put into operation as from 1 October 2004. See also Policy Directive Reference 1/9/B dated 18 August 2004 issued by the Department of Correctional Services. The award of credits is dealt with and explained generally in CSOB VI(2).

⁹⁵ Which was also required by law – see s 65 of the Correctional Services Act 8 of 1959, before its amendment.

where a prisoner has applied to be released and placed on parole, that such application was generally granted. This was obviously in the discretion of the Commissioner or his/her delegated official and subject to the prisoners complying with the relevant and necessary requirements for placement on parole. Where such release was not recommended by the Parole Board, the Board had to give reasons for its decision to the delegated official or the Commissioner.⁹⁶

After the introduction of s 22A of the 1959 Correctional Services Act which introduced the credit system in late 1993 and which was implemented in 1994,⁹⁷ the allocation of credits to a prisoner by the institutional committee of a prison had the practical effect of bringing forward the assessment date.⁹⁸ Thus a prisoner who, for example, was sentenced to six years imprisonment would usually have been assessed after having served half of his sentence (i.e. three years into his sentence). If such a prisoner had been awarded sufficient credits, his or her assessment for parole eligibility could then take place before the expiry of three years, since the number of credits earned had to be subtracted from the three (3) years, which would then be the prisoner's earlier assessment date which in practice could, and often does, result in

⁹⁶See CSOB V1(2)(a)(ii). See also n 85 above.

⁹⁷See s 22A read with s 1 and s 65 of the Correctional Services Act 8 of 1959. See also CSOB VI (2); Policy directives dated 30 September 1993 and 23 November 1994 (n 89); Policy Directive dated 23 April 1998 (n 19). See also White Paper on Corrections in South Africa. February 2005, Department of Correctional Services p 47 para 2.6.3 *et seq.*

⁹⁸See CSOB VI (2) *op cit* (n 19). See also s 1 of the Correctional Services Act 8 of 1959, where 'credits' is defined as '... the days and months contemplated in s 22A(2).'

such a prisoner becoming eligible for parole before having served half of his/her sentence⁹⁹. The philosophy behind the credit system was clearly based on a rehabilitative ideal, serving as an incentive for the prisoner to work towards his earlier release from prison, albeit under certain and specified conditions of placement on parole.¹⁰⁰

The backlash of this system in South Africa which the drafters clearly had not foreseen or were not mindful of at the time, was the strong community reaction against early release of prisoners, in the context of a perceived increasing criminality, especially in relation to increased violent, sexual and aggressive crimes in South Africa in general. This necessitated closer scrutiny and consideration of the parole policy by the Department of Correctional Services and attempts to implement it on a more or less uniform basis throughout the country.¹⁰¹

The effect was, firstly, that the department then devised a formula or new policy in terms whereof the interests and safety of the community was

⁹⁹ See CSOB VI (2) *op cit* (n 19); Policy directives dated 23 November 1994 and 23 April 1998 *op cit* (n 19, 89).

¹⁰⁰ See CSOB VI (2) *op cit* (n 19). This philosophical approach was of course not exclusive to South Africa. It was also part of the correctional process in prisons in India and England and underpinned the rationale of awarding good time credits in the American penal system. This is demonstrated by the cases, *inter alia*, referred to in Chapter 1 (n 2–8) and in Chapter 5: Parole: Is it a Right or Privilege? See also Moses 'Parole: Is it a Right or Privilege?' (2003) 19 *SAJHR* 263–277. See, generally, Hudson *Penal Policy and Social Justice* (1993) 43, 143, 164–165; Gottfriedson and Gottfriedson 'Decision Making in Criminal Justice: Towards the Rational Exercise of Discretion' (1988) 3 *Law, Society and Policy* 2nd Ed 229–232; Abadinsky *Probation and Parole: Theory and Practice* (1977) 1–25, 158–161, 168–171.

¹⁰¹ See Directives from Head Office of the Department of Correctional Services in Pretoria dated 4 February 1997 and 17 May 1997 *op cit* (n 124). The latter document noted *inter alia* the continuous public outcry regarding sexual assaults on women.

emphasised as '... the first priority in this process'.¹⁰² Accordingly, prisoners who had been convicted of committing serious offences and sentenced to imprisonment would only be seriously considered for placement on parole after expiry of at least $\frac{3}{4}$ of his/her sentence. It did not mean that such a prisoner was not assessed and considered for parole at earlier intervals, and in accordance with the allocated credits, but his/her effective release and placement on parole could only take place after having served at least $\frac{3}{4}$ of his/her sentence.¹⁰³

Secondly, and as could be expected in the circumstances, the Legislature intervened by enacting the Parole and Correctional Supervision Amendment Act, 1997¹⁰⁴ which sought to repeal s 1 of the 1959 Correctional Services Act, which referred to credits, and s 22A of the said Act, which entitled a prisoner to earn credits. This 1997 Amendment Act sought to abolish¹⁰⁵, with immediate effect, the credit system

¹⁰² Policy Directive dated 4 February 1997 *op cit* (n 124).

¹⁰³ See Directive dated 23 November 1994, and Directive dated 23 April 1998 *op cit* (n 23, 89). The wording of the relevant policy directives was unfortunately very confusing in that it created the impression that prisoners would be considered for parole only after having served at least $\frac{3}{4}$ or $\frac{4}{5}$ of their sentences, whichever the case may be. That could certainly not have been the intention of the drafters. Such a literal interpretation would mean that the Department was acting in breach of the law (s 65 of the Correctional Services Act 8 of 1959) which stipulated that such consideration ought to be done after prisoners have served half of their sentences. This formed the subject matter of at least four urgent applications in the Cape High Court (referred to in n 71 above) brought by prisoners against the Minister/Commissioner (Provincial Commissioner) of Correctional Services for making this 'new' policy applicable to them; See n 26 above and the cases referred to therein. See also n 50 and 68 above.

¹⁰⁴ Parole and Correctional Supervision Amendment Act 87 of 1997 – referred to hereinafter as the 1997 Amendment Act. See also n 40 above.

¹⁰⁵ See the headnote to the 1997 Amendment Act and s 24 thereof, which is an important provision, and s 1 to and including s 22 thereof, which introduced for the first time in the history of penal legislation in South Africa, direct judicial control over the release or non-release of sentenced prisoners on parole. It sought to amend the Criminal Procedure Act 51 of 1977, by inserting s 276B which makes provision for 'Fixing of a non-parole period'. See also s 276B(1)(a)

applicable to sentenced prisoners.

3.4.3 The assessment of prisoners and the assessment criteria for parole eligibility

One of the most striking aspects of this system is the fact that s 22A of the 1959 Correctional Services Act set out in clear terms the **requirements** to be met by the prisoner for every credit, the **intervals** at which the **assessments** had to be done and the **factors** to be taken into account by the Institutional Committee in awarding the credits. This was positive from a prisoners' rights point of view (for its legal certainty which is in accordance with the principle of legality). In addition to these guidelines, a body of rules had been developed by the Department of Correctional Services which were reflected in Chapter VI of the Correctional Service Orders¹⁰⁶ using the relevant provisions of the Act as a basis for setting out, in written form, the various factors and criteria for assessment of a prisoner. The institutional committees and the Parole Boards of the respective prisons were guided by these guidelines and rules¹⁰⁷.

It appears that the objectives of the credit system were twofold¹⁰⁸:

Firstly, to influence a prisoner's conduct and adaptability in the prison

of the Criminal Procedure Act 51 of 1977 as amended by the 1997 Amendment Act.

¹⁰⁶ CSOB VI(1) and (2) *op cit* (n 19).

¹⁰⁷ *Ibid.* See also Van Zyl Smit *op cit* (n 15).

¹⁰⁸ CSOB VI(2) *op cit* (n 19).

system positively and to promote such conduct; and, secondly, to serve as an incentive to the prisoner to participate actively in a multi-disciplinary programme and to display initiative, especially in the context of performing labour related matters.

It was also stipulated in the CSOB¹⁰⁹ that credits could not be demanded as of right by prisoners. Credits also did not have the effect of shortening a prisoner's actual prison sentence imposed by the Court, but they did have the effect of enabling a prisoner to be considered for parole at an earlier date than his normal assessment date without the credits¹¹⁰. As a consequence it could lead to the prisoner being recommended for parole at an earlier assessment date by the Institutional Committee, to the Parole Board. The Parole Board would invariably follow the recommendations of the Institutional Committee. In those instances where it did not accept such recommendation, it would be obliged to furnish reasons to the delegated official, or the Commissioner, for not recommending placement on parole at such earlier assessment date of the prisoner.¹¹¹ It was also emphasised that the allocated credits were not the only criterion for considering the placement of a prisoner on parole, but had to be considered by the Parole Board in conjunction with factors such as a prisoner's general prognosis, available support systems in the community and other relevant factors which might play a role in the Parole

¹⁰⁹ CSOB VI(1)(h), read with CSOB VI(1)(n)(i)(bb)(v); VI(1)(n)(cc)(i) and VI(2)(a)(ii) *op cit* (n 19).

¹¹⁰ CSOB VI(2)(a)(v) *op cit* (n 19).

¹¹¹ CSOB VI(1A) 15 para d (at 35) *op cit* (n 19). See also n 19–22, 68 above.

Board making a certain recommendation to the delegated official, or the Commissioner¹¹². The delegated official or the Commissioner, after further consideration of these recommendations by the Parole Board, made the actual decision whether to place a prisoner on parole or not.¹¹³

For purposes of allocating credits and the determination of an assessment date¹¹⁴, the following period of imprisonment was given to the following sentences : in the case of habitual criminals : 10 years and six months; in the case of life sentences : 20 years, whereafter such a prisoner could be considered for placement on parole. In the case of habitual criminals, the prisoner could only be considered for placement on parole after having served a period of seven years of imprisonment notwithstanding the number of credits earned by such a prisoner. A person sentenced to corrective training would be considered for parole at half of his/her sentence served minus the amount of credits earned, which would be a period of four years minus credits and in the case of a person sentenced for prevention of crime, at eight years minus credits.

Certain maximum penalisation periods had been determined for different kinds of disciplinary transgressions and/or criminal offences committed by

¹¹² CSOB VI(1A) 15 para d (at 35), CSOB VI(2)(a)(v) *op cit* (n 19).

¹¹³ Section 65 read with s 63 of the Correctional Services Act 8 of 1959.

¹¹⁴ CSOB VI(1A)15 para d (at 35) read with CSOB VI(2)(a)(v) *op cit* (n 19). Whereas these periods were prescribed and regulated by policy as explained in the CSOB under the Correctional Services Act 8 of 1959, it is presently determined by statute in terms of s 73 of the Correctional Services Act 111 of 1998.

prisoners while in prison, as well as for negative factors relating to the offence and the prisoner¹¹⁵. These penalisation periods would then be, depending on the assessment by the relevant institutional committee, added to the date that the prisoner might become eligible for placement on parole. In practice, this may result in the date upon which a prisoner might become eligible for parole being extended by the period equal to the penalisation period¹¹⁶.

So, for example, it had been determined that the penalisation factor for multiple offences having been committed by the prisoner would be one month, and if they were multiple offences of a similar kind, the penalisation factor would automatically be two months¹¹⁷. For a previous conviction, it would be one month¹¹⁸, but for an aggressive/sexual previous offence it would automatically be two months. Depending on the frequency of the commission of the offences, the prisoner could be penalised by as much as six months if the offences were committed in a period of less than two years of each other¹¹⁹. However, no penalisation would occur if the period between the first offence committed and the second offence committed exceeded ten years¹²⁰. Non-observation of the conditions of a suspended sentence would have a penalisation period of three months per

¹¹⁵ CSOB VI (1A)(23)(e)-(h); (1A)(29) *op cit* (n 19). See also Policy Directive dated 23/04/98 ref 1/8/B and its Annexure A, 1–7 (referred to in n 23 above).

¹¹⁶ *Ibid.*

¹¹⁷ CSOB VI (1A)(25)(c)(i) *op cit* (n 19) 58. Policy Directive dated 23/04/98 *op cit* (n 19) 1–7.

¹¹⁸ CSOB VI (1A)(25)(a)(1) and (c)(vi) *op cit* (n 19) 58, 59. Policy Directive dated 23/04/98 *op cit* (n 19) 1–7.

¹¹⁹ CSOB VI (1A)(25)-(29) *op cit* (n 19) 55–61. Policy Directive dated 23/04/98 *op cit* (n 19) 1–7.

¹²⁰ CSOB VI (1A)(25)(a)(i) and (25)(c)(vi) *op cit* (n 19) 56, 59.

suspended sentence up to a maximum of one year¹²¹. For non-observance or breach of a parole or correctional supervision condition, a six month penalisation period per breach would apply, up to a maximum of two years¹²². The latter is subject to the proviso that the Commissioner can withdraw the prisoner's placement on parole and order such prisoner's further detention for the duration of the unexpired term of his or her imprisonment¹²³.

A prisoner who had been sentenced to imprisonment for aggressive criminal offences committed whilst in prison or outside and for sexual offences, would not be placed on parole until after having served at least $\frac{3}{4}$ of their prison sentences¹²⁴ (the so-called $\frac{3}{4}$ rule). The $\frac{3}{4}$ rule was, since its actual implementation by the Department of Correctional Services, the subject of litigation against the Department on the basis, *inter alia*, that it represented a "new policy" by the Department ostensibly introduced in 1998, in direct contrast with the credit system of 1993, which was unfair and *ultra vires* the powers of the Commissioner, as well as

¹²¹ CSOB VI (1A)(25)(c)(vii) *op cit* (n 19). Policy Directive dated 23/04/98 *op cit* (n 19) 1–7.

¹²² CSOB VI (1A)(25)(c)(iv) *op cit* (n 19). Policy Directive dated 23/04/98 *op cit* (n 19) 1–7.

¹²³ See s 65(3)(d) of the Correctional Services Act 8 of 1959, read with CSOB VI (1A)(23)(h) and (25)(c)(iv) *op cit* (n 19) 52, 58. Policy Directive dated 23/04/98 *op cit* (n 23) 1–2 (factors 5 and 6).

¹²⁴ See also Policy Directives:

1. Ref 1/8/1 dated 4/02/1997 – Re : The Implementation of the Placement Policy : Serious Offences.
2. Ref 1/8/8 dated 17/05/1997 – Re George Community : Western Cape : Women Against Rape etc.
3. Ref 1/8/8 dated 24/2/1998 – Re Applications of the Placement Policy: Aggressive/Sexual Offences.
4. Ref 1/8/8 dated 23/4/1998 – Penalisation Factors : Applicable on Parole Boards and Delegated Officials

unconstitutional¹²⁵. It was unsuccessfully challenged furthermore on the basis that this new policy seriously prejudiced prisoners sentenced before April 1998, when this new policy (the ¾ rule) seemed to have been implemented, in that it was being implemented retrospectively. As such, it was unconstitutional and therefore unenforceable, and it infringed the prisoner's right to legitimate expectations for being considered and placed on parole after having served half of his/her sentence.

The Commissioner's counter-submissions to these arguments were that this reasoning was flawed in material respects, namely:

- (a) The so-called ¾ rule did not mean that the Institutional Committee and the Parole Boards would only start to assess such a prisoner after having served already ¾ of his/her sentence. The assessment process is a continual process which happens over predetermined intervals in respect of prisoners. The consideration of prisoners for parole occurred once they had served half of their prison sentence, as required by law. This consideration date could in fact be brought forward by the number of credits earned by the prisoner. It was not permissible to postpone such consideration until after half of a

¹²⁵See the unreported cases of: *Johan Carl Van Der Merwe v Minister of Correctional Services and 2 others*, Cape High Court Case No. 5040/99 (n 71) and *Jackson Mbulane v Minister of Correctional Services and Others*, Cape High Court No.8262/99. See also *Winckler & Others v Minister of Correctional Services & Others*, (n 26, 51, 90) *supra*; *Combrinck & Others v Minister of Correctional Services*, 2001 (3) SA 747 (C); *Mohammed v Minister of Correctional Services & Others*, 2003 (6) SA 169 (SE).

prisoner's prison term. A prisoner could, however, be placed on parole only after having served eg $\frac{3}{4}$ of his/her sentence.

- (b) The so-called $\frac{3}{4}$ rule did not represent a new policy, since it was already applicable and generally followed by Parole Boards in and around 1994. The policy directive dated 23 November 1994¹²⁶ expressly made provision for certain categories of prisoners who could not be placed on parole after having served at least $\frac{3}{4}$ of their sentences of imprisonment.
- (c) As such, no legitimate expectations could be harboured by any such prisoner, to be released on parole, after having served half of his / her sentence.
- (d) No prisoner had a clear right to be released from prison prior to the expiry of his/her prison term.

The objective of these penalisation periods in the case of these offenders, was that they would have to serve the minimum sentence period (non-parole period) of $\frac{3}{4}$ or $\frac{2}{3}$ of the sentence specified by the court. Only after the expiration of this minimum period, if favourably considered (depending on the positive factors as were reflected in the number of credits earned) could they become eligible for placement on

¹²⁶ Ref 1/8/B – referred to in n 23 and 93 above.

parole¹²⁷. If such prisoners complied with the applicable criteria laid down by the Commissioner of Correctional Services and accepted the conditions of parole, they could be placed on parole¹²⁸. That did not mean that such persons must not have been assessed, considered and evaluated for their suitability for placement on parole and general progress whilst in prison before they have served $\frac{2}{3}$ or $\frac{3}{4}$ of their sentences, as the case may be.¹²⁹ The wording of many of the directives dealing with assessment and penalisation factors was, and remains ambiguous, in that the impression could be created, albeit erroneously, that a prisoner falling in the $\frac{3}{4}$ and/or $\frac{2}{3}$ penalisation period(s) cannot or could not have been, assessed for credits and/or considered for parole by the Institutional Committee or the Parole Board respectively, prior to them having served at least $\frac{2}{3}$ or $\frac{3}{4}$ of their sentences, as the case may be.¹³⁰

Any aggrieved prisoner could only make representations to either the

¹²⁷ CSOB VI (1A) *op cit* (n 19) 23–29.

¹²⁸ See CSOB VI(1c) I; CSOB VI (1A) *op cit* (n 19) 14–20 read with s 63(b)(ii) of the Correctional Services Act 8 of 1959, in particular subparagraph (10) which required the prisoner to accept the imposed conditions of correctional service / parole by way of a 'sworn statement'.

¹²⁹ See Policy Directive : Ref 1/8/1 dated 17 May 1997 *op cit* (n 124), para 2.1, where it is stated : 'To exclude a prisoner from the "consideration process" of parole as defined in s 65 of the Correctional Services Act, 1959, may be regarded as unconstitutional and contradictory to a person's human rights. Emphasis is therefore placed on consideration for, not "automatic release" on parole' (emphasis is in the original). See also Directive dated 9 October 2000, reference 1/8/B from the Placements Division of the Department of Correctional Services, to all Provincial Commissioners, re-emphasising directive 1/8/B dated 23 April 1998. See also s 65 of Correctional Services Act 8 of 1959.

¹³⁰ See in general CSOB VI (1A) *op cit* (n 19, 115–117); see also Policy Directive Manual dated 23 April 1998, reference 1/8/B from the Directorate : Offender Policy, by Venter FJ *op cit* (n 23), also referred to in and used as the basis of the applications of *Jackson Mbulane v Minister of Correctional Services & Others supra* (n 71) and *Johan Carl van der Merwe v Minister of Correctional Services and Two Others* (n 71). See also *Winckler & Others v Minister of Correctional Services & Others supra* (n 26, 51, 71); *Combrinck & Others v Minister of Correctional Services & Others supra* (n 26); *Mohamed v Minister of Correctional Services & Others supra* (n 26).

delegated official or the Commissioner, against a recommendation or assessment of the Institutional Committee or recommendation of the Parole Board.¹³¹

The procedure of assessment and recommendation and the eventual decision by the Commissioner as to whether or not to place a prisoner on parole, was in the circumstances particularly cumbersome. These difficulties were exacerbated by the absence of a national and uniform procedure, since each prison's Institutional Committee and/or Parole Board would follow its own procedures and interpretations of the Act and Regulations. Hence the need for the numerous policy directives to be issued to the various prisons in the respective provinces throughout South Africa, by the Commissioner of Correctional Services.

Despite these criticisms which can justly be levelled at the process, it nevertheless represented a valiant attempt, to stipulate in written form, and as clearly as possible in the circumstances, the criteria that would be taken into account in the eventual assessment of a prisoner and determination for his/her eligibility and suitability for placement on parole or not. The prisoner was therefore, in theory at least¹³² fully informed as to what to expect, how to behave and/or not to behave, the credit or penalty factor associated with each action and could, on this basis,

¹³¹ The rights and/or remedies of a prisoner are more fully discussed in Chapter 4, *infra*.

¹³² Based on the availability of the aforementioned criteria and guidelines at his/her particular prison.

prepare his/her submissions to an Institutional Committee or Parole Board or the delegated official or the Commissioner, as the case may be.

The Parole Boards were required, as a matter of policy and without the affected prisoner having requested reasons and/or having objected to the specific recommendation in the circumstances, to give reasons to the delegated official or the Commissioner, in the event of it not recommending placement on parole at expiry of half of the prisoner's sentence¹³³. This requirement reflects, at the very least, an awareness on the part of the relevant officials of the Department of Correctional Services, of a prisoner's procedural rights and the importance of his/her release from prison, albeit subject to parole conditions. It also reflects an awareness of the importance of a prisoner's freedom and his/her reintegration into society and the community. It also constitutes an acknowledgement, in concrete form, of the efforts and work performed by the prisoner to attain and/or achieve the goal of freedom, albeit conditionally in the form of placement on parole. The emphasis and objective of the criteria seemed to be that a prisoner's efforts whilst in prison, towards rehabilitation and resocialisation be duly acknowledged and encouraged, and rewarded in the form of a real possibility of early release on parole subject to certain conditions. The decision to release on

¹³³ See CSOB VI(1)(h) read with CSOB VI(1)(n)(i)(bb)(i), VI(1)(n)(cc)(i) and VI(2)(a)(ii) *op cit* (n 19, n 68).

parole vested in the discretion of the Commissioner.¹³⁴

3.5 Comparing the provisions of the Correctional Supervision and Parole Amendment Act, 87 of 1997, dealing with the assessment of prisoners for parole with the provisions of the 1959 Correctional Services Act

The amending provisions of the Correctional Supervision and Parole Amendment Act 87 of 1997 envisaged that it was still the duty of the Institutional Committee to assess a prisoner, in exactly the same manner as under the 1959 Correctional Services Act except for allocating any credits to him/her.¹³⁵

The powers of the Institutional Committee were also extended in terms of the amended s 62 by :

- (a) enabling it to form sub-committee(s) within and under its jurisdiction;¹³⁶ and

¹³⁴ In terms of s 65 of the Correctional Services Act 8 of 1959.

¹³⁵ See s 62 of the Correctional Services Act 8 of 1959, s 4 and s 6 of the Correctional Supervision and Parole Amendment Act 87 of 1997. Section 4 of Act 87 of 1997 sought to abolish the credit system.

¹³⁶ See s 5A of the Correctional Services Act 8 of 1959 as amended by s 2, s 4 and s 6 of the Correctional Supervision and Parole Amendment Act 87 of 1997.

- (b) authorising it to prepare and submit a report to the Commissioner in respect of any prisoner sentenced to 12 months or less, and to the Parole Board in respect of any prisoner sentenced in excess of 12 months, regarding the nature of the offence committed by the prisoner and any remarks made by the Court, the conduct, adaptation, training, attitude, industry and physical and mental state of such prisoner; the possibility of his/her relapse into crime, the possible placement of such a prisoner under correctional supervision or his/her conversion of the sentence of imprisonment to correctional supervision; the possible placement of such a prisoner on parole or day parole, and the period therefor and conditions applicable, and such other matter as the Commissioner/Parole Board may request¹³⁷.

The 1997 Amendment Act did not specify how this assessment and decision should be made, and what criteria should be used by the Institutional Committee in determining, for example, whether the specific prisoner's conduct was good or bad, whether his/her adaptation was good or bad, and on what basis such assessment ought to be done. The same applied in relation to assessing the training, attitude and aptitude, industry and physical and mental state of the prisoner. No criteria had been listed for determining and making a decision and recommendation regarding the

¹³⁷ See s 6 of the Correctional Supervision and Parole Amendment Act 87 of 1997.

prognosis of 'the possibility of the prisoner's (sic) relapse into crime'¹³⁸.

The criteria and guidelines as developed under the 1959 Correctional Services Act (before the amendment, and in terms of the Correctional Supervision and Parole Amendment Act, 1997) according to which those decisions should be made, would still be applicable by virtue of the provisions of s 62(1)(a) of the 1959 Correctional Services Act, as long as it was not inconsistent with or in violation of the provisions of the 1959 Correctional Services Act and the Constitution of the Republic of South Africa Act, 1996 regarding any rights of a person, including a prisoner¹³⁹.

Although the 'credit system' was sought to be abolished by virtue of the Correctional Supervision and Parole Amendment Act 1997, sentenced prisoners at that time, up to and including the commencement date of these provisions, could be not prejudiced by such an abolition. Instead, the tasks of the Department and/or Institutional Committee were made less complicated by the provision in s 24 of the Correctional Supervision and Parole Amendment Act 1997¹⁴⁰. These credits, which in practice

¹³⁸ See s 62(1)(bA) of the Correctional Services Act 8 of 1959, which had been inserted by s 6 of the Amendment Act 87 of 1997.

¹³⁹ The Correctional Supervision and Parole Amendment Act 87 of 1997 has never been put into operation (see n 30). The criteria and guidelines developed under and in terms of the 1959 Correctional Services Act are still applicable by virtue of the provisions of s 136 of the Correctional Services Act 111 of 1998.

¹⁴⁰ Section 24 of Act 87 of 1997 provides that every prisoner who was sentenced before the commencement thereof, would receive the maximum number of credits, and, furthermore, will be evaluated by the Commissioner and/or Minister for possible placement on parole as soon as possible after the commencement of this Act, and the Minister of Commissioner is implored, in obligatory terms, '... to consider the placement on parole of every such person in terms of the

could amount to a period equal to half of a prisoner's term of imprisonment, had to be taken into consideration in (a) determining the date on which such a prisoner must be assessed, which date, according to the formula under the credit system under the 1959 Correctional Services Act, could now be brought forward by the number of credits earned; and (b) deciding whether to release such a prisoner on parole; and (c) deciding when he/she could be so released on parole.

In doing so, the Commissioner and/or the Minister or the duly authorised tribunal or official would have to apply their minds in the manner prescribed by law¹⁴¹ and in accordance with the applicable provisions in the Constitution and the Promotion of Administrative Justice Act 3 of 2000. In this context and with application of the norm applicable in terms of the 1959 Correctional Services Act¹⁴², namely that a prisoner would normally be released after having served one third of his/her prison sentence (the one third rule), it is submitted that a prisoner sentenced in terms of the 1959 Correctional Services Act would not and could not be prejudiced by the abolition of the credit system.

principal Act as it was in force immediately before the commencement of this Act' (my emphasis). This Act was, however, never put into operation. See n 30 above.

¹⁴¹Including the common law position as set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 AD at 152. See also s 24 of the Supreme Court Act 59 of 1959. See also s 24 of the Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution Act). See also s 33 of the Constitution Act 108 of 1996 read with Schedule 6 Transitional Arrangements, Item 23(2) thereof; s 1 read with s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). See, generally, Hoexter *Administrative Law in South Africa* (2007) 28 *et seq.*

¹⁴²Section 65 of the Correctional Services Act 8 of 1959. See also CSOB VI(1) and (2) *op cit* (n 19–22).

The primary aim of the Correctional Supervision and Parole Amendment Act 87 of 1997 was clearly to abolish the credit system as it existed at the time. The credit system would remain in force however, in respect of the prisoners sentenced before the commencement of the amending legislation¹⁴³, to the extent that such prisoners ought to be given the maximum number of credits. These credits had to be taken into account by the institutional committee in favour of the prisoner, in its assessment of him/her and its recommendation to either the Commissioner or Parole Board for possible placement on parole. This 1997 Amendment Act¹⁴⁴, therefore introduced a dual system of assessment of prisoners namely a system of assessment of prisoners sentenced prior to its commencement, and one for prisoners sentenced after its commencement.

Despite the administrative problems the Correctional Supervision and Parole Amendment Act, 1997 would have created¹⁴⁵, it represented a

¹⁴³ By virtue of s 24 of Act 87 of 1997.

¹⁴⁴ *Ibid.*

¹⁴⁵ Because the practical effect thereof will be that the prisoner falling under the old system will benefit, since they are entitled, as of right, to receive the maximum number of credits which will, in turn, enhance his/her date of assessment for parole. This, in turn, could result in his/her earlier release on parole. Thus, if prisoner A was sentenced a day before prisoner B, before the 1997 Amendment Act commenced, prisoner A's assessment date would therefore be brought forward with the number of credits allocated to him/her in terms of this Act, whereas this would not happen in respect of prisoner B, inasmuch as the latter was not entitled to any credits, as the credit system has been abolished by the Amendment Act 87 of 1997. This dual system would have operated therefore unfairly against the latter category of prisoners. Even if it is argued that there is no guarantee that such a prisoner will be released on early parole, or that such recommendation need not be made by the institutional committee, the latter will have to apply its mind in a judicial manner, which would require taking into account the relevant legislation, the

definitive break with the past, a marked progression in the acknowledgement of a prisoner's procedural and administrative rights, in general, and such a prisoner's rights in respect of Parole Board hearings, its recommendations and the decisions of the Commissioner, in particular¹⁴⁶.

As can be seen from the relevant provisions of the 1997 Amendment Act, the legislature did not introduce a 'new' or alternative method of assessment of prisoners for placement on parole. In fact, what it sought to do was to replace or transform the decision-making authority regarding placement on parole, introducing for the first time, by legislation,

rules of natural justice and the notion of fairness. In this regard it must be able to withstand the test of 'illegality', 'irrationality' and 'procedural impropriety' – per Lord Diplock in *Council of Civil Service Union & Others v Minister of Civil Service* HL 1984 (3) All ER 934, 949-951. With regard to the notion of fairness, see the case of *Doozy v Secretary of State for the Home Department* 1993 (3) All ER 92 at 106-109. See also the instructive case in the European Court of Justice, which decided that under Article 6 of the European Convention, the test for administrative fairness/justice as set out by Lord Diplock in the *Civil Service Union* case, *supra*, is still limited – and even went beyond that boundary, in *Campbell & Fell v United Kingdom* 1984 Series A, Vol 7, EHRRP 165. See s 33 of the Constitution Act 108 of 1996. See also ss 1, 3, 6 and 8 of PAJA 3 of 2000.

¹⁴⁶ Section 6 of Act 87 of 1997, which amended s 62 of the 1959 Correctional Services Act, improved the procedural and administrative rights for prisoners. In terms of the amended s 62(2) of the 1959 Correctional Services Act (as amended by s 6 of Act 87 of 1997) the prisoner, who is dissatisfied with the decision of the institutional committee, had the right to lay a complaint or to request reasons from the institutional committee for their recommendations. Prisoners are, furthermore, entitled to be informed of the contents of their reports submitted to the Commissioner or the Parole Boards, and are allowed to make written representations to such Commissioner or Parole Boards. In terms of the amended s 63 of the 1959 Correctional Services Act, as amended by ss 6 and 7 of the Correctional Supervision and Parole Amendment Act 87 of 1997, a prisoner must be afforded the right to know the contents of a report prepared and submitted by the Parole Board, to the Court, in any given situation, and be given an opportunity to submit written representations to such Court in response thereto, or to appear in person before such Court. Furthermore, prisoners had been afforded the right to be represented at Parole Board hearings by any person authorised by the Parole Board. Although the right to legal representation is guaranteed to the prisoner, under this Correctional Services Amendment Act 87 of 1997, the right to legal representation at the State's expense (legal aid) is not guaranteed. A further procedural safeguard for a prisoner whose application for placement on parole has failed is the fact that the Parole Board must reconsider the prisoner's case within two years, in terms of s 63(9) of the Correctional Services Act 8 of 1959.

community involvement in prison administration. It also introduced direct judicial supervision in regulating specifically the release and placement of prisoners under correctional supervision, parole and/or day parole. The clear objective of the legislature with these provisions was to transfer (or attempting to transfer) the decision making authority regarding the placement of prisoners under correctional supervision or on parole, from the traditional prison administration, to an independent body, consisting of appointed and responsible members of the community, and other State Departments and to effect greeter participation of the judiciary, as part of the Parole Board end/or National Advisory Council.¹⁴⁷ This drastic, yet creative intervention by the legislature, sought to give effect to the community's perceived fears and legitimate demands that prisoners should not be released too early on parole and must remain in prison for the duration of the full term of imprisonment. It furthermore attempted to give effect to the 'rights/plight' of the victims of crime¹⁴⁸.

The provisions of the Correctional Services Amendment Act 1997 were, however, never put into operation although it was assented to by Parliament on 26 November 1997. Its provisions, however, remain extremely relevant and important to determine the nature and extent of the

¹⁴⁷ See s 3 of Act 87 of 1997

¹⁴⁸ As identified in the policy directives issued by the Department of Correctional Services, referred to in n 97, 124 above. See also South African Law Commission report on 'A New Sentencing Framework' Project 82 (November 2000) Introduction para 1, pp 3–5 (paras 1.8 and 1.9); Department of Correctional Services (RSA): White Paper on Corrections in South Africa (February 2005), 49, paras 2.7.3 and 2.7.4.

changes in prison administration in South Africa, and the role it has played in shaping the present day parole and parole regime, particularly if regard is had to the transitional provision in s 136 of the 1998 Correctional Services Act¹⁴⁹ (before its amendment to its present form).

3.6 **Parole in terms of the Correctional Services Act, 111 of 1998 after 1 October 2004**¹⁵⁰ (*"the 1998 Correctional Services Act"*)

3.6.1 **Introduction**

A pertinent starting point would be s 136 of the 1998 Correctional Services Act. It is a transitional provision and deals with assessment and consideration of prisoners for possible placement on parole. This section reads as follows:¹⁵¹

136 Transitional Provision

- (1) Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act.

¹⁴⁹ The Correctional Services Act 111 of 1998.

¹⁵⁰ In terms of GG 26626 dated 30 July 2004 (Procl R 38 dated 30/07/04), the remainder of the 1998 Correctional Services Act, including Chapters V, VI and VII thereof, will commence as from 1 October 2004. See also n 30 above.

¹⁵¹ Before its amendment, s 136 of the Correctional Services Act 111 of 1998 read as follows:

- (1) Any person serving a sentence of imprisonment immediately before the commencement of this Act will be subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections, but the Minister may make such regulations as are necessary to achieve a uniform policy framework to deal with prisoners who were sentenced immediately before the commencement of this Act, and no prisoner may be prejudiced by such regulations.
- (2) For the purposes of considering the placement of such person under community corrections, the relevant authority provided for in this Act will have the power to consider such a placement.

1959 (Act No. 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those chapters.

- (2) When considering the release and placement of a prisoner who is serving a determinate sentence of imprisonment as contemplated in subsection (1), such prisoner must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act 8 of 1959).

In terms of this provision, the assessment and consideration of prisoners for parole, sentenced before 1 October 2004 (this being the commencement of the relevant provisions of the 1998 Correctional Services Act) will be done in accordance with the provisions of the 1959 Correctional Services Act. The relevant policies, guidelines and criteria relating to the assessment, consideration of and placement of prisoners on parole, as developed under the 1959 Correctional Services Act, have now been elevated to having legal force and effect. These aspects of the 1959 Act remain applicable and still form the basis of assessments and consideration of prisoners for possible placement on parole, but only in respect of those prisoners sentenced before 1 October 2004. These policies and guidelines will endure in new legislative form, until each prisoner sentenced before 1 October 2004 has served his/her sentence. This may potentially be indefinitely (for those prisoners sentenced to life imprisonment before 11 October 2004) or for the next 25 years (in the case of those prisoners declared dangerous prisoners, just before the

commencement of the relevant parts of the 1998 Correctional Services Act on 1 October 2004). The most important directive in this process, put in peremptory terms, is that prisoners sentenced before the commencement of this Act, must receive the maximum credits in terms of s 22A of the 1959 Correctional Services Act.¹⁵² The decision as to whether a prisoner will be placed on parole, will henceforth be taken by the authority prescribed in the 1998 Correctional Services Act. The appropriate authority, in all those cases where a person has been sentenced to a term of imprisonment for 12 months or less, is the Commissioner.¹⁵³ The Correctional Supervision and Parole Board is the appropriate authority in all those cases where a person has been sentenced to a determinate sentence of imprisonment of more than twelve (12) months and to indeterminate sentences excluding life imprisonment¹⁵⁴.

Where a person had been sentenced to life imprisonment, and/or to an indeterminate sentence and had been declared by the Court to be a dangerous criminal, that Court will be the prescribed authority, after a report containing an assessment and evaluation of the prisoner concerned, as well as recommendations, by the Correctional Supervision and Parole Board had been submitted to the Court on a date determined

¹⁵²Section 136(2) of the Correctional Services Act 111 of 1998, read with s 35(3)(n) of the Constitution Act 108 of 1996.

¹⁵³See s 75(7) of the Correctional Services Act 111 of 1998.

¹⁵⁴See s 75(1) of the Correctional Services Act 111 of 1998.

by such Court.¹⁵⁵

This transitional provision read with the relevant provisions of the 1959 Correctional Services Act¹⁵⁶ creates a dual system of assessment, consideration and placement on parole of sentenced prisoners. The practical effect of this dual system is:

- (a) Those category of prisoners sentenced and imprisoned under the 1959 Correctional Services Act up to 30 September 2004 must be assessed and considered for parole by taking into consideration the fact that the credit system applied to them, and furthermore by taking into consideration the maximum number of credits allocated to them in accordance with s 136 of the 1998 Correctional Services Act; and
- (b) The category of prisoners that have been sentenced and imprisoned under the provisions of the 1998 Correctional Services Act, from the date of its commencement on 1 October 2004, will be assessed and considered for parole without regard to the credit system or any credits, since no such system is created in terms of the 1998 Correctional Services Act.

¹⁵⁵ See s 75(1)(b) and (c) of the Correctional Services Act 111 of 1998, read with s 2(c) and 3 and further read with s 78 of the Correctional Services Act 111 of 1998.

¹⁵⁶ Section 1 read with s 22A and s 65 of the Correctional Services Act 8 of 1959 as amended.

The clear intention of the drafters of s 136 of the 1998 Correctional Services Act seems to be that prisoners under the 'old system' (ie sentenced before 1 October 2004) should not be prejudiced by the provisions of the subsequent 'new' legislation being applied retrospectively.¹⁵⁷

The practical implication of this transitional provision is that all prisoners who have been sentenced prior to 1 October 2004 must now be considered for possible release on parole or probation once they have reached their minimum detention date, which in practice would be after having served one third of his/her prison sentence¹⁵⁸. The maximum credits which these prisoners are entitled to in terms of these provisions are equal to half of the period which he/she has already served.¹⁵⁹

A prisoner must usually be considered for placement on parole after having served half of his/her sentence. By virtue of this provision, that consideration date is now being advanced by the maximum number of credits. A prisoner sentenced to 18 months imprisonment prior to 1

¹⁵⁷ The applicable provision s 136 of the Correctional Services Act 111 of 1998. This is in accordance with the general rule against retroactive/retrospective application of the law, and which now is a constitutionally guaranteed right in terms of s 35(3)(l) and (n) of the Constitution, Act 108 of 1996. These latter two provisions were grouped as one provision under the Interim Constitution Act, Act 200 of 1993, in s 25(3)(f) thereof.

¹⁵⁸ This is confirmed by Department of Correctional Services (DCS) policy directive, reference 1/9/B dated 18/08/2004 issued by the Directorate: Pre-Release Resettlement, which was issued to 'All Regional Commissioners' with the heading 'Dealing with Sentenced Offenders and Profile Reports (G326 Form) prior to inception of the New Correctional Supervision and Parole Boards on 1 October 2004'.

¹⁵⁹ Section 22A(1)(a) of the Correctional Services Act 8 of 1959.

October 2004 is entitled to be considered for placement on parole after nine months¹⁶⁰. Such a prisoner must be assessed for the allocation of credits after having served six months¹⁶¹. At such assessment, he/she is now entitled, in terms of the provisions of s 136(2) of the new Correctional Services Act 1998, to three months credits, being the maximum amount of credits which he/she could earn. His/her consideration date for placement on parole, which would normally have been after having served nine (9) months, would now be advanced by this three (3) months earned as credits. He/she will therefore be entitled to be considered for parole after having served only six (6) months of his 18 months imprisonment, ie at one third of his/her sentence.¹⁶²

3.6.2 The Correctional Supervision and Parole Board (CSPB) and the Correctional Supervision and Parole Review Board under the 1998 Correctional Services Act

A practical starting point in determining a prisoner's rights and remedies in relation to the Correctional Supervision and Parole Board (CSPB) would be the case management committee (CMC)¹⁶³. The duty of the CMC is to assess each prisoner under its jurisdiction and to compile a report, the contents of which must be made known to the relevant prisoner. If the

¹⁶⁰ Section 65(6) of the Correctional Services Act 8 of 1959.

¹⁶¹ ie At intervals of six months in terms of s 62(1) of the Correctional Services Act 8 of 1959.

¹⁶² See also the references in 19, 20–22 above. See also DCS Policy Directive dated 18/08/2004, Ref 1/9/B referred to in n 158 above.

¹⁶³ Established in terms of s 42 of the Correctional Services Act 111 of 1998.

prisoner disagrees with the contents of the report in respect of his/her assessment by and/or the recommendation of the case management committee, he/she can make written representations in that regard to the Area Manager or Correctional Supervision and Parole Board.¹⁶⁴ In compiling this report the CMC therefore is subject to the guidelines provided for in the Order to ensure uniformity in applying departmental policy.¹⁶⁵

The report of the case management committee and its recommendations are forwarded to the Area Manager, at the latter's request (in the case of a person sentenced to 12 months imprisonment or less) and to the CSPB in the case of persons sentenced to imprisonment for periods exceeding 12 months.¹⁶⁶

After having received and considered the report from the Case Management Committee on any prisoner serving a prison sentence exceeding twelve months, the Correctional Supervision and Parole Board may (a) place such a prisoner (except a prisoner having been declared a dangerous criminal or sentenced to life imprisonment) on day parole, under correctional supervision or grant parole and set the conditions of

¹⁶⁴Section 42(3) and 75(3) of the Correctional Services Act 111 of 1998.

¹⁶⁵In terms of Regulation 24(6) Government Notice No R914 30 July 2004, which commenced on 31 July 2004. The order referred to in this Regulation is the CSOB referred to in n 19 above.

¹⁶⁶Section 42 read with s 75(1) of Correctional Services Act 111 of 1998.

community corrections to be imposed on the prisoner;¹⁶⁷ and (b) in respect of a prisoner having been declared a dangerous criminal in terms of s 286 of the Criminal Procedure Act 51 of 1977, and a prisoner sentenced to life imprisonment, make recommendations to the Court, on the granting of day parole or parole and/or the placement under correctional supervision (only in respect of dangerous criminals) and on the conditions of community corrections to be imposed on the prisoner.¹⁶⁸

3.6.3 Cancellation of parole, day parole or correctional supervision

The Commissioner of Correctional Services may request the CSPB on the advice of the Supervision Committee, to cancel parole, day parole or correctional supervision, or to amend the conditions of community corrections imposed on a person (prisoner). This procedure would not apply in respect of a dangerous criminal and a life-sentenced prisoner. In such cases the CSPB makes recommendations to the Court. The Board must consider the matter within 14 days, but the recommendations of the Board, may be implemented provisionally prior to the decision of the CSPB.¹⁶⁹

The procedure whereby the Commissioner approaches the CSPB to

¹⁶⁷Section 75(1)(a) of the Correctional Services Act 111 of 1998.

¹⁶⁸Section 75(1)(b) and (c) read with s 52 of the Correctional Services Act 111 of 1998, emphasis added.

¹⁶⁹Section 75(2)(a) of the Correctional Services Act 111 of 1998.

cancel parole, day parole or correctional supervision as set out in s 75(2)(a) of the 1998 Correctional Services Act, envisages a two-staged enquiry by the CSPB, namely a consideration stage and a decision stage. The consideration stage must take place within 14 days of the Commissioner's request contemplated in s 75(2)(a) of the 1998 Correctional Services act. Since a prisoner is entitled to make representations, to be present and to be legally represented at the hearing by the CSPB¹⁷⁰, the decision stage is seemingly envisaged to take longer. It seems that the intention of the drafters of the legislation is that in these circumstances where a prisoner is dissatisfied with either the advice of the Supervision Committee¹⁷¹ and/or the recommendation by the CSPB¹⁷² and wishes to submit representations to the CSPB or the CSPB - Review Board, while awaiting the decision of the CSPB, its recommendations which by its very nature must be provisional, can be implemented provisionally.¹⁷³

The CSPB may, after having considered the matter, decide to cancel parole, day parole or correctional supervision, or to amend the conditions of community corrections, but if the affected prisoner does not accept the amended conditions, the day parole, parole or correctional supervision

¹⁷⁰ In terms of s 75(3) of the Correctional Services Act 111 of 1998.

¹⁷¹ Contemplated in s 75(2)(a) of the Correctional Services Act 111 of 1998.

¹⁷² As contemplated in s 75(2)(a) of the Correctional Services Act 111 of 1998.

¹⁷³ See s 75(2)(a) of the Correctional Services Act 111 of 1998.

must be cancelled.¹⁷⁴ Before the CSPB acts, it must, however, inform the prisoner who is subject to the community corrections, to submit written representations or to appear before it in person and/or to be legally represented¹⁷⁵. Such a prisoner must also be informed by the CSPB of its recommendations and must confirm, in writing, that such notice had in fact been given.¹⁷⁶

The CSPB may also make recommendations to the Court, in respect of prisoners sentenced to life imprisonment or dangerous criminals and at the request of the Commissioner (who requested the CSPB's recommendation on the advice/recommendation of the supervision committee¹⁷⁷) regarding possible cancellation of parole or day parole or amendment of the conditions of community corrections. This matter must also be considered by the CSPB within 14 days, whereafter the CSPB, having considered the matter, must provide the court with its recommendations on the cancellation of parole or day parole or the amendment or not of the community corrections of the prisoner.¹⁷⁸ As in the case of non-life sentenced prisoners and non-dangerous criminals, the recommendations of the CSPB may also be provisionally implemented prior to the decision of the Court.¹⁷⁹ The prisoner is likewise entitled to be

¹⁷⁴ See s 75(2)(b) of the Correctional Services Act 111 of 1998.

¹⁷⁵ Section 75(3)(a) of the Correctional Services Act 111 of 1998.

¹⁷⁶ See s 75(3)(b) of the Correctional Services Act 111 of 1998.

¹⁷⁷ Section 75(2)(c) of the Correctional Services Act 111 of 1998.

¹⁷⁸ See s 75(2)(c) of the Correctional Services Act 111 of 1998.

¹⁷⁹ See s 75(2)(c) of the Correctional Services Act 111 of 1998.

informed of his/her right to make written representations or to appear or be legally represented before the CSPB.¹⁸⁰ This prisoner must also be informed by the CSPB of its recommendations to the court, and the prisoner must confirm that the recommendations have been conveyed to him/her.¹⁸¹ In these cases where a person had been sentenced to life or declared a dangerous criminal, the prisoner has the right to submit written representations with regard to the recommendation of the CSPB, to the Court, and the CSPB must allow the prisoner to exercise that right.¹⁸²

The only remedy which this category of prisoners has, if their parole, day parole or community corrections is cancelled and they are placed in custody, is that the CSPB must review the position within a time stipulated/decided upon by it (the CSPB), but such review must be done within two years.¹⁸³ Apart from this, in the event of the conditions of community corrections being amended by the CSPB (at the request of the Commissioner and recommendation by the Supervision Committee) the prisoner concerned must either accept such amended conditions or remain in custody.¹⁸⁴

The decision of the CSPB is final. Thereafter, only the Commissioner or Minister of Correctional Services, may within their sole discretion, refer

¹⁸⁰ See s 75(3)(a) of the Correctional Services Act 111 of 1998.

¹⁸¹ See s 73(3)(b) of the Correctional Services Act 111 of 1998.

¹⁸² See s 75(3)(c) of the Correctional Services Act 111 of 1998.

¹⁸³ See s 75(6) of the Correctional Services Act 111 of 1998.

¹⁸⁴ See generally s 75(2)(b) of the Correctional Services Act 111 of 1998.

such decision of the CSPB for reconsideration to the Correctional Supervision and Parole Review Board (CSPRB).¹⁸⁵

The CSPRB can, by simple majority, either confirm or set aside the decision of the CSPB and, in either event, give reasons for its decision which are to be made available to the Minister, the Commissioner, the prisoner concerned, the CSPB concerned and to all other CSPBs for their information and guidance.¹⁸⁶

The CSPRB, as a review tribunal, is obliged to consider the record containing the evidence which it received from the CSPB, as well as '... any submission, which the Minister, Commissioner or person concerned may wish to place before....' it '... as well as such other evidence or argument as is allowed' by the review tribunal¹⁸⁷. After the CSPRB has done that, it is further obligated to make a decision either confirming the decision of the CSPB or substituting it with its own decision and make any order the CSPB ought to have made.¹⁸⁸

Although it is not clearly specified in these provisions¹⁸⁹, the prisoner and the Commissioner have the right to appear in person and/or to be

¹⁸⁵ See s 75(8) of the Correctional Services Act 111 of 1998.

¹⁸⁶ Section 75(8) read with s 76(4) and read with s 77 of the Correctional Services Act 111 of 1998.

¹⁸⁷ Section 77(1) of the Correctional Services Act 111 of 1998, emphasis added.

¹⁸⁸ Section 77(1) of the Correctional Services Act 111 of 1998.

¹⁸⁹ Sections 75-77 of the Correctional Services Act 111 of 1998.

legally represented in the CSPRB. This follows necessarily from the fact that this forum may indeed receive submissions, hear evidence and/or argument¹⁹⁰. The prisoner's right to be afforded legal representation at the State's expense if substantial injustice would otherwise result, is clearly intended by the legislature, regard being had to the prisoner's right to make and present submissions and legal argument.¹⁹¹

Given the nature and power of the CSPRB,¹⁹² which is similar to that of a high court of law dealing with review applications brought by prisoners, it would amount to an act in breach of a prisoner's fundamental rights as guaranteed in the Constitution, should such a prisoner be denied the right to adduce and challenge evidence, the right to access to legal representation and/or the right to appear in person or be legally represented in this forum.¹⁹³

A natural consequence of the right to adduce and challenge evidence, which is also a constitutional imperative, is to allow cross-examination of such oral evidence and/or to allow such other evidence to be controverted by the other party, who may be affected thereby, and thereafter hear argument on the evidence.¹⁹⁴

¹⁹⁰ Section 77(1) of the Correctional Services Act 111 of 1998, emphasis added.

¹⁹¹ See s 6(3) read with s 17 read further with s 75(3)(a) and 77 of the Correctional Services Act 111 of 1998. See also s 35 of the Constitution Act 108 of 1996.

¹⁹² Section 76 and 77 of the Correctional Services Act 111 of 1998.

¹⁹³ See s 2 read with s 34, 35(2), 35(3) and 38 of the Constitution Act 108 of 1996.

¹⁹⁴ Section 35(3)(i) of the Constitution Act 108 of 1996, read with ss 35(2) and 34 thereof, further read with s 77(1) of the Correctional Services Act 111 of 1998.

3.6.4 The Court's role in terms of the 1998 Correctional Services Act¹⁹⁵

The last tier within the 1998 Correctional Services Act of legal rights and remedies afforded to prisoners affected by administrative decisions during the term of their imprisonment, is the Court and its powers, as provided for in s 78 of the 1998 Correctional Services Act¹⁹⁶.

The Court referred to in s 78 is the High Court which imposed the original sentence (or such other Court as lawfully constituted in terms of s 276A of the Criminal Procedure Act 1977).¹⁹⁷ This Court deals with the rights of prisoners who have been convicted and sentenced to life imprisonment or to an indeterminate period of imprisonment or a person

¹⁹⁵ The "court" is not defined in the Correctional Services Act 111 of 1998, but it is clear that it can only be a court of law with sentencing jurisdiction to impose a life sentence and/or declare a criminal to be a dangerous person in terms of the provisions of the Criminal Procedure Act 51 of 1977, ss 286, 286A, 286B, read with s 1 thereof, further read with the provisions of ss 166 to 173 and s 34 of the Constitution Act 108 of 1996. See also s 19 of the Supreme Court Act 59 of 1959.

¹⁹⁶ Section 78 of the 1998 Correctional Services Act reads as follows :

Powers of court in respect of prisoners serving life sentences

- 78(1) Having considered the record of proceedings of the Correctional Supervision and Parole Board and its recommendations in the case of a prisoner sentenced to life imprisonment, the court may, subject to the provisions of section 73(6)(b)(iv), grant parole or day parole or prescribe the conditions of community corrections in terms of section 52.
- (2) If the court refuses to grant parole or day parole in terms of subsection (1), it may make recommendations in respect of treatment, development and support of the prisoner which may contribute to improving the likelihood of future placement on parole or day parole.
- (3) Where a Correctional Supervision and Parole Board acting in terms of section 73 recommends, in the case of a person sentenced to life imprisonment, that parole or day parole be withdrawn or that the conditions of community corrections imposed on such a person be amended, the court must consider and make a decision upon the recommendation.
- (4) Where the court refuses or withdraws parole or day parole the matter must be reconsidered by the court within two years.

¹⁹⁷ Section 276A of the Criminal Procedure Act 51 of 1977, specifically s 276A(4)(a).

having been declared by the Court to be a dangerous criminal.¹⁹⁸ It is also the Court which had, at the date of imposing the original sentence, set the date of the consideration for parole of such a prisoner.¹⁹⁹

The Court must give consideration to the question of possible release of the prisoner on parole, day parole, community corrections and the conditions thereof, based on the relevant reports and recommendations by the CSPB²⁰⁰. It must then decide whether or not parole, day parole or community corrections must be granted, with or without conditions, as well as what would constitute appropriate conditions.²⁰¹

The Court retains its jurisdiction over the prisoner/parolee/probationer, even where the Court has ordered his/her release on parole, day parole or community corrections. This is so because the same Court must also consider the reports and recommendations by the CSPB as advised by the case management committee and/or the Commissioner. The Commissioner is advised by the Supervision Committee and determines whether or not a parolee or probationer has acted in breach of his/her conditions and whether or not parole must be revoked or whether or not the conditions must be amended. The same Court must then make a

¹⁹⁸Section 75(1)(b-c) of the Correctional Services Act 111 of 1998 read with s 286A and 286B of the Criminal Procedure Act 51 of 1977.

¹⁹⁹Section 276(A)(4) as amended by s 21 of the Correctional Services Amendment Act 87 of 1997.

²⁰⁰Section 75(1) read with s 78(1) of the Correctional Services Act 111 of 1998.

²⁰¹Section 78 of the Correctional Services Act 111 of 1998.

decision based upon those reports and recommendations²⁰².

The built in remedy for the prisoner or parolee concerned in this section²⁰³, is that the Court, where it has refused or revoked parole, is obliged to revisit its own decision and reconsider it within a period of two years.

There are two scenarios pursuant to the provisions of s 78 of the 1998 Correctional Services Act. The first scenario is where the prisoner, after, for example, 25 years, must be considered by the Court for parole, day parole or community corrections for the first time²⁰⁴. In such a case the CSPB, after receiving the report from the case management committee dealing with the specific prisoner, must prepare a report with recommendations as to whether or not parole should be granted. This report, with recommendations, is then submitted to the Court²⁰⁵. In these instances where the CSPB has recommended parole, day parole or community corrections and, subject to the provisions of s 75(1)(b) and (c) of the 1998 Correctional Services Act,²⁰⁶ the Court, having considered and accepted these reports and recommendations, may on the basis of these reports, order the prisoner's placement on parole, day parole or

²⁰² Section 75 and 78(1) of the Correctional Services Act 111 of 1998.

²⁰³ Section 78(4) of the Correctional Services Act 111 of 1998.

²⁰⁴ Contemplated in s 78(1) of the Correctional Services Act 111 of 1998.

²⁰⁵ The prisoner's remedies within this scenario are set out in s 75(3) of the Correctional Services Act 111 of 1998 as described above.

²⁰⁶ For prisoners sentenced to life imprisonment the CSPB cannot recommend placement under correctional supervision.

community corrections, as the case may be.

The second scenario is where the Court must consider whether a prisoner's parole, day parole or correctional supervision and/or conditions relating thereto, must either be withdrawn/cancelled or amended. Such a parolee or probationer is subject to a supervision committee²⁰⁷, which prepares and submits its recommendations regarding such parolee or probationer to the CSPB²⁰⁸. In this case the CSPB must also prepare a report with recommendations²⁰⁹, which it must submit to the Court. However, before it submits the report to the Court, the prisoner/parolee has the right to be informed about this, to make written submissions and/or to appear in person before the CSPB and/or to be legally represented before such Board and/or to present evidence and/or submissions, which evidence and submissions must then accompany the report and recommendations of the CSPB to the Court²¹⁰.

The Court must consider the report and recommendations and must make a decision, but is not obliged to accept the recommendations of the CSPB²¹¹. The Court thus retains the discretion to accept or reject the recommendations by the CSPB²¹².

²⁰⁷ Established in terms of s 58 read with s 57 of the Correctional Services Act 111 of 1998.

²⁰⁸ Section 57 read with ss 58 and 78 of the Correctional Services Act 111 of 1998.

²⁰⁹ In terms of s 78(3) of the Correctional Services Act 111 of 1998.

²¹⁰ In terms of s 75(3) of the Correctional Services Act 111 of 1998, as submitted above.

²¹¹ Section 75(1) read with s 78 of the Correctional Services Act 111 of 1998.

²¹² Section 75(1) read with s 78 of the Correctional Services Act 111 of 1998.

In both the first and second scenarios the Court automatically serves as a court of review for the decision and recommendation by the CSPB. It can also serve as a review court for a decision by the Correctional Supervision and Parole Review Board, in cases where the latter was required to review a report and recommendation of the CSPB and made a decision, not favourable to the prisoner or parolee. It is this decision which is then taken on review by the prisoner, to the Court. The High Court, therefore, serves as the last tier of remedies afforded to prisoners who wish to challenge certain decisions within the framework of the 1998 Correctional Services Act.

In the first scenario referred to above, where the Court has refused to grant parole, day parole or correctional supervision (the prisoner therefore remains in custody) no further remedy exists or is afforded to the prisoner within the parameters of the 1998 Correctional Services Act, except that the Court may give directions as to '... treatment, development and support of the prisoner which may contribute to improving the likelihood of future placement on parole or day parole'²¹³.

In the second scenario, where the report and recommendation by the

²¹³Section 78(2) of the Correctional Services Act 111 of 1998. See also the discussion of further remedies, including parole *infra*, with reference to ss 2 read with s 34, 34(2), 35(3) and 38 of the Constitution Act 108 of 1996, further read with ss 6(3), 17, 75(3)(a) and 77 of the Correctional Services Act 111 of 1998.

CSPB, which recommends cancellation of parole, day parole or correctional supervision, are accepted by the Court, and the Court likewise endorses that recommendations, the affected parolee's or probationer's position, within the framework of the 1998 Correctional Services Act, is worse.

In terms of s 75 where such a cancellation or amendment of parole, day parole or correctional supervision is envisaged, and in fact recommended by the CSPB pursuant to a request by the Commissioner (as advised by the supervision committee), such parole, day parole or correctional supervision may be suspended provisionally and the Commissioner can issue a warrant for the immediate detention of such a person, before the decision is taken by the CSPB or the Court.²¹⁴ Pending the decision of the CSPB or the Court, the parolee or probationer will remain in custody. The negative impact of such provisional incarceration, is mitigated to a certain extent by the requirement that the Board must in either case consider the matter within 14 days and take a decision and/or make recommendations to the Court, where applicable.²¹⁵

No other legal remedy apart from the above exists within the provisions of the 1998 Correctional Services Act for the prisoner against the decision of the Court which has acted in terms of s 78 of the 1998

²¹⁴Section 75(2) of the Correctional Services Act 111 of 1998.

²¹⁵Section 75(a) and (c) of the Correctional Services Act 111 of 1998.

Correctional Services Act, except that that Court must reconsider the matter (withdrawal of parole, day parole or correctional supervision) within two years.²¹⁶

In both scenarios the wording of the provisions of s 78 of the 1998 Correctional Services Act, suggests that a decision may be taken by the Court, on consideration of '... the record of the proceedings of Correctional Supervision and Parole Board and its recommendations in the case of a prisoner sentenced to life imprisonment...' only.²¹⁷ There is no reference to the fact that any affected person and/or body, including the prisoner or parolee or the probationer concerned, may be present and/or may be legally represented and/or may adduce evidence and/or make submissions, in, at, and to, that Court. This is in stark contrast with the relevant provisions dealing with the proceedings by the Correctional Supervision and Parole Review Board in terms of s 77(1) of the 1998 Correctional Services Act.

It would also be fair, equitable and just, and in accordance with the constitutionally guaranteed rights of a person, including a prisoner²¹⁸, that the affected prisoner or parolee or probationer be given the opportunity to appear in person and/or be legally represented before the relevant Court, to make submissions and/or to argue the merits of its case, if necessary.

²¹⁶ Section 78(4) of the Correctional Services Act 111 of 1998.

²¹⁷ Section 78(1) of the Correctional Services Act 111 of 1998.

²¹⁸ See s 34 read with ss 35, 172 and 173 of the Constitution Act 108 of 1996.

and/or to adduce evidence, if it is considered necessary, and granted by the Court²¹⁹.

Such a prisoner against whom the Court has acted in terms of s 78²²⁰, must also be afforded the right to legal representation, since the nature of the enquiry itself (i.e. whether or not to deprive the parolee of his or her freedom) is of sufficient gravity to justify legal representation and/or an order that it must be provided at the State's expense²²¹.

The nature of the proceedings in this Court largely resembles that of a review court²²². Consequently, the prisoner should be afforded the right to apply to Court to present further, relevant evidence and, should the application be granted, to present such evidence. Such prisoner should also be afforded the right to challenge evidence and recommendations, present arguments and make submissions to the Court²²³.

The decision by the Court, referred to in s 78 of the 1998 Correctional Services Act, is subject to review in terms of the common law and constitution of South Africa and as amplified in the relevant provisions of

²¹⁹ In terms of ss 34, 35, 172 and 173 of the Constitution Act 108 of 1996, further read with s 17 and s 6(3) of the Correctional Services Act 111 of 1998.

²²⁰ Section 78(1) of the Correctional Services Act 111 of 1998.

²²¹ *Ibid.*

²²² See s 19 read with s 24 of the Supreme Court Act 59 of 1959. See also the discussion of this section in Erasmus *Superior Court Practice* Service 21 (2004), A1-20-38; A1-68-88.

²²³ Section 19 read with s 24 of the Supreme Court Act 59 of 1959, read with ss 34, 35, 172 and 173 of the Constitution Act 108 of 1996, further read with s 17 and s 6(3) of the Correctional Services Act 111 of 1998.

the Promotion of Administrative Justice Act 3 of 2000.²²⁴

Where the Court, acting in terms of s 78 of the 1998 Correctional Services Act takes a decision or acts in such a way that would be tantamount to a breach or denial of the prisoner's common law rights and/or constitutionally guaranteed rights, such a prisoner will have the necessary *locus standi* to approach the High Court for the necessary relief, including review of the decision²²⁵. This will represent the penultimate tier of remedies afforded the prisoner who is aggrieved with the decision of the Court, acting in terms of s 78 of the 1998 Correctional Services Act.

In practice, such relief would be sought by an affected prisoner by

²²⁴ See the cases referred to in Chapter 4. See s 1, 3, 6 and 8 of PAJA 3 of 2000. See also the Constitution Act 108 of 1996, specifically s 7, 8, 9, 10 and 12 (Rights in the Bill of Rights), s 33 (Just Administrative Action), s 34 (Access to Courts), s 35(2) (challenging the lawfulness of his/her detention or further detention 'in person before a court') and s 35(3)(a) (the right of an accused person to appeal or review, by a higher court, in the sense that a person who appeared before the Court in terms of s 78 of the 1998 Correctional Services Act (111 of 1998) is in fact an accused person who had been found guilty and sentenced, originally by this Court, and was appearing again before the relevant Court, as an accused person. As such he/she is entitled to the protection, it is submitted, afforded by s 35(3) of the Constitution. See also ss 172 and 173 of the Constitution Act 108 of 1996. See also s 19 read with s 24 of the Supreme Court Act 59 of 1959. See *Pharmaceutical Manufacturers Association of South Africa & Another; In Re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 24 (CC) paras 45–49. See generally Mubangizi, *Constitutional Rights for Prisoners in South Africa: A Critical Review*, De Jure (2002) 42–64; Mubangizi, *The Constitutional Rights of Prisoners in South Africa: The Law versus The Practice* SACJ 14 (2001) 310–326 at 310–312; Mubangizi *International Human Rights Protection for Prisoners: Which Way South Africa?* SAYIL (26) 2001, 87–113 at 87–88; 110–113. Bukurura, *Emerging Trends in the Protection of Prisoners Rights in Southern Africa*, African Human Rights Journal (2002) 2, 92–109 at 101–104; De Vos, *Prisoner's Rights Litigation in South Africa Since 1994: A Critical Evolution*, Law, Democracy and Development, Vol 9, Issue 1 (2005) 89–112 at 92–94, 97, footnotes 34–36.

²²⁵ See the discussion with reference to n 224 above.

application on notice, as prescribed in the Rules of Court.²²⁶ If a prisoner approaches a High Court in terms of the prescribed procedure, which must be done on notice to the other party and supported by an affidavit, it would mean that such a Court, as a Court of Review will in any event have to deal with evidence (as contained in the affidavit(s) of the applicant and the opposing affidavits, if any). It may furthermore have to deal with additional evidence, if such an application was made to the Court and granted²²⁷. Such a Court of Review will also have to deal with the applicant (prisoner or parolee or probationer) either in person or his/her legal representative, and will have to afford the parties the opportunity to present argument and make submissions to the Court before it gives its judgment on the application²²⁸.

The last tier of remedies afforded an aggrieved prisoner/parolee, would be to apply for leave to appeal to the Supreme Court of Appeal or to the Constitutional Court against an order of the Court *a quo* (of first instance)²²⁹. In such cases, the Applicant bears the onus of making out a case for him/her to be heard by the highest courts of the land²³⁰. The

²²⁶ See Rule 6 read with Rule 53 of the Uniform Rules of Court, made in terms of the Supreme Court Act 59 of 1959. See the discussion of those Rules by Erasmus, Farlam, Fichardt, Van Loggerenberg, *Superior Court Practice* (1994) B1-32 to 58; B1-380 to 386.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ Sections 19, 20 read with ss 21, 22 and 24 of the Supreme Court Act 59 of 1959. See the discussion of these sections by Erasmus *et al op cit* (n 226) A1-38B to A1-75.

²³⁰ See *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531 C; Erasmus *et al op cit* (n 226) A1-49 and the cases referred to therein. See also *MaccSand CC v Macassar Land Claims Committee and Others* SCA case no: 594/2003, judgment delivered 30 November 2004. See also s 35(3)(c) of the Constitution Act 108 of 1996. See also *S v Rens* 1996 (1) SACR 105 (CC);

Applicant will have to apply to the Court *a quo* for leave to appeal against its order or judgment²³¹. When such leave is granted, the merits of the appeal will be heard by and argued before the Supreme Court of Appeal or the Constitutional Court, as the case may be²³². Should leave to appeal to the Supreme Court of Appeal or Constitutional Court be refused by the Court of first instance, the prisoner/parolee's last resort would be to petition or apply to the Supreme Court of Appeal or the Constitutional Court directly for leave to appeal against the judgment or order of the Court *a quo*. In both instances, the applications must comply with the formal requirements for applications for leave to appeal.²³³

1996 (2) BCLR 155 CC. See also *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 501 CC; *S v Bhulwana*; *S v Gwodiso* 1995 (12) BCLR 1579 CC; 1996 (1) SA 338 (CC) (onus on accused to disprove something). *Standard Bank of SA Ltd v Harris and another NNO (JA du Toit Inc Intervening)* 2003 (2) SA 23 (SCA); *Minister of Environmental Affairs & Tourism v George and Others* 2007 (3) SA 62 (SCA).

²³¹ See n 229 above.

²³² See n 229 above.

²³³ See generally s 318 of the Criminal Procedure Act 51 of 1977, read with s 20, 21 22 and 24 of the Supreme Court Act 59 of 1959 and further read with Rules 49, 52 and 53 of the Rules of Court. See also Erasmus *et al op cit* (n 226) B1-351, B1-386 and the author's discussion of the applicable rules with reference to the relevant case law.

3.7 **Conclusion**

The practice of parole has changed dramatically over the last decades since its introduction in 1911²³⁴. The introduction of the 1998 Correctional Services Act, which was preceded by the 1997 Parole and Correctional Supervision Act²³⁵ (which was never put into operation) has effected a fundamental change in the practice of parole as it was under the 1959 Correctional Services Act. Whereas in form the legal position of a prisoner has been improved under the 1998 Correctional Services Act, as opposed to the 1959 Correctional Services Act, in substance that may not necessarily be the case.

In this regard, reference was made to the fact that no specific guidelines exist in the 1998 Correctional Services Act in terms of which prisoners can work and strive to attain a positive assessment and recommendation which may result in a favourable decision by the CSPB or the Commissioner of the Court, i.e. to release him or her on parole. In contrast, clear guidelines in this respect existed under the 1959 Correctional Services Act, which would still be applicable in terms of Section 136 of the 1998 Act (the transitional provision) to those prisoners who have been sentenced before the 1998 Act came into operation on 1 October 2004. In practice, therefore, these guidelines will still be applicable for a long time to come until those prisoners sentenced before 1 October 2004 have finished their terms of imprisonment. The effect hereof is that these prisoners would be entitled to be allocated the maximum number of credits allowable under the 1959 Correctional Services act, as opposed to those prisoners sentenced after 1 October 2004, who would not be entitled to any credits. The 1998 Correctional Services Act, which is applicable to this category of prisoners, simply does

²³⁴ As discussed in Chapter 1.

²³⁵ No 87 of 1997.

not make provision for any credits, or the allocation of any credits to this category of prisoners. The further effect hereof is a differentiation between those prisoners sentenced before 1 October 2004 and those sentenced thereafter. The differentiation creates a tension between the rights of these two categories of prisoners. This tension is reflected in the fact that those prisoners sentenced before 1 October 2004, and who are entitled to receive the maximum number of credits, will become eligible for parole much earlier after having served only one third of their sentences, and could thus be released on parole much earlier, whereas no such right and expectation exists for those prisoners sentenced after 1 October 2004. The effect of this differentiation created by the Legislature is that those prisoners sentenced after 1 October 2004 are discriminated against, which could potentially be unfair and in violation of their constitutional right to equality.²³⁶

It was also demonstrated that, whereas the Parole Board only had an advisory function under the 1959 Correctional Services Act, it now has an independent status, theoretically at least, and can take decisions regarding the placement of prisoners on parole and/or make recommendations in respect of those prisoners sentenced to life imprisonment or having been declared dangerous criminals, to the Court

²³⁶ See s 12 of the Constitution Act 108 of 1996, which guarantees everyone's right to equality and prohibits unfair discrimination, read with s 35 of the Constitution. This is one of the most contentious issues following the promulgation of the 1998 Correctional Services Act generally and s 136 (the transitional provision) in particular, which ash the potential to create a lot of litigation at the instance of prisoners sentenced after its introduction. This study does not purport to resolve the tension, nor to have this tension as its primary focus. The Constitutional Court may well, in the not too distant future, be required to address and resolve this tension. In this regard, the common law maxims *contemporanea ex posito* and *subsequito observatio* could well find application and could be involved. The Appellate Division of the South African Supreme Court (at the time, now the Supreme Court of Appeal) formulated the application of these common law maxims in *Transnet v Ngcezula* 1995 (3) SA 538 (A) 549, as follows: 'If substantive rights and obligations are not affected and can still be enforced by the new procedure, the new procedure will be held to apply. The opposite will be the case if substantive rights and obligations are affected by the new procedure'. See also De Ville *Constitutional and Statutory Interpretation* (2000) 236.

and/or the Minister of Correctional Services and/or the Commissioner of Correctional Services, as the case may be. It is that process and the rights and obligations of prisoners in that process, and which have a material impact on the ultimate decision as to whether or not to release the prisoner on parole – that forms the subject matter of the next chapter.

CHAPTER 4
THE PAROLE PROCESS AND THE RIGHTS, REMEDIES AND OBLIGATIONS
OF PRISONERS IN THAT PROCESS

4.1 Introduction

This chapter examines the nature of the parole process, the various stages which inform and form part of that process which it identifies as the assessment of a prisoner and the recommendation regarding the eligibility for parole of such a prisoner, the consideration of such a prisoner and the eventual decision whether or not to release such a prisoner on parole. The process may also involve the determination of whether or not a parolee's parole should be cancelled, in those cases where there is an alleged breach of parole conditions¹. These stages are identified as inter-related and inter-dependant on each other, forming part of a multi-staged decision-making process of parole. This chapter also describes the procedures of each of these stages and the rights and obligations of the prisoners and the correctional officials during those stages.

Prisoners acquire and have rights and obligations throughout this process vis-à-vis the state, as represented by the Department of Correctional Services, its various organs and officials, including the Case Management Committee (CMC), the Correctional Supervision and Parole

¹ This aspect has already been discussed in Chapter 3 under the heading: Cancellation of Parole, Day Parole or Correctional Supervision.

Board (CSPB), the Correctional Supervision and Parole Review Board (CSPRB) and the court acting in terms of the applicable provisions of the 1998 Correctional Services Act². These organs of state also have rights and obligations vis-à-vis the prisoner in this parole process and they are particularly obliged to act strictly within the parameters allowed by the 1998 Correctional Services Act³, the Constitution⁴ and the Promotion of Administrative Justice Act, 2000⁵.

Within the context of parole, the **assessment** of prisoners and their **consideration** for parole eligibility are two distinctly different, yet inter-related stages of the parole process performed by different institutions within the Department of Correctional Services. The assessment is done by the Case Management Committee (CMC) and starts from the reception of the prisoner at a prison until a recommendation is eventually made by the CMC concerning the particular prisoner to the Area Manager (in the case of those prisoners sentenced to less than 12 months imprisonment), as the delegated official of the Commissioner of Correctional Services, or the Correctional Supervision and Parole Board (CSPB)⁶ (for those prisoners sentenced to more than 12 months imprisonment). The assessment focuses on the general conduct and adaptation of the prisoner whilst in prison, which will be noted and recorded in reports concerning that prisoner by the CMC and which will eventually inform the

² See s 78 of the Correctional Services Act 111 of 1998.

³ Act 111 of 1998.

⁴ The Constitution Act 108 of 1996.

⁵ Act 3 of 2000, hereinafter PAJA, 2000.

⁶ See s 38, read with s 42 and s 45 of the Correctional Services Act, 111 of 1998.

recommendation made by it to the Area Manager or to the CSPB concerning that prisoner's suitability for parole⁷. The consideration of the prisoner to determine whether or not he or she is eligible to be released on parole, is done by the Area Manager (as the delegated official of the Commissioner)⁸ or the CSPB⁹. It involves considering these reports and recommendations submitted by the CMC as well as representations by or on behalf of the prisoner and any other relevant information placed at the disposal of the Area Commissioner or the CSPB.¹⁰

4.2 The principle of parole in South Africa

The predominant feature of the 1959 Correctional Services Act, viz-a-viz prisoners, is its emphasis on the **release** of such prisoner.¹¹

The premise of the 1998 Correctional Services Act, in contrast to the 1959 Correctional Services Act, is clearly that of **incarceration** of sentenced prisoners : 'a sentenced prisoner remains in prison for the full period of sentence...' and the '... prisoner sentenced to life imprisonment remains in prison for the rest of his or her life'.¹²

⁷ Section 38 read with s 42 and s 45 of the Correctional Services Act, 111 of 1998.

⁸ In those instances where the prisoner has been sentenced to less than 12 months imprisonment, in terms of s 73(1) read with s 75(7) and s 42(2)(d) of the Correctional Services Act, 111 of 1998.

⁹ Sections 45, 73 and 75 of the Correctional Services Act, 111 of 1998.

¹⁰ Sections 45, 73 and 75 of the Correctional Services Act, 111 of 1998.

¹¹ Section 65(1) of the 1959 Correctional Services Act, provides as follows (emphasis added): '1) A prisoner shall be released upon the expiration of the term of imprisonment imposed upon him.'

¹² Section 73(1) of the Correctional Services Act, 111 of 1998 (emphasis added).

This indicates a paradigm shift in penal policy, by the legislature, from an emphasis on rehabilitation of prisoners, to deterrence which is indicative of a punitive approach¹³. This shift was as a result of the perceived identifiable shortcomings of the penal system in South Africa. Specific criticisms that were levelled in this regard include the lack of consistency in sentences (like cases are not treated like) as a result of perceived unfair discrimination against certain offenders on the grounds of race and social status. Judges and magistrates were also criticised, in many instances, when imposing punishment, for under-emphasising the seriousness of the offence which led them to impose disproportionately light sentences in such cases. Criminals who had been convicted of serious offences and sentenced to long terms of imprisonment were very often released prematurely by the Department of Correctional Services, which not only undermined the original sentence imposed by a court of law, but brought the whole criminal justice system into serious disrepute.¹⁴

To ameliorate this punitive approach, the focus now seems to be on rehabilitation of offenders.¹⁵ The current white paper on correctional

¹³ See *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 522 I–J where the following observation was made by the Supreme Court of Appeal: 'We are, for instance, aware that there is a bill (referring to the Correctional Services Act, 111 of 1998 which had been introduced as from 1 October 2004) that will, if enacted, once again change the parole and release regime – now to introduce stricter requirements. The palpable object of the bill is to cater for present political and public opinion. It illustrates the point that if a court attunes a sentence with regard to its understanding of contemporary prison laws or practice, it may result in an unintended injustice to the convicted person' per Harms JA.

¹⁴ See generally: 'Report on A New Sentencing Framework' 2000 *South African Law Commission Project 82* in particular paras 1.8 and 1.9 *et seq.*

¹⁵ See generally: 'Report on A New Sentencing Framework' 2000 *South African Law Commission Project 82* in particular paras 1.8 and 1.9 *et seq.* See also White Paper on Corrections in South Africa, Department of Correctional Services (February 2005); Introduction, 71–73.

services seeks to address that paradigm shift in penal policy by re-emphasising the importance and need for rehabilitative mechanisms and treatment of prisoners in South African prisons¹⁶. According to this new approach, the emphasis is on the 'corrective training' of the prisoner, hence the terms **correctional** official, **correctional** facilities or **correctional** centre instead of prisons, and **correctional** services instead of prison services¹⁷. In achieving this objective, the Department of Correctional Services advocates a more co-operative and integrated approach towards correctional services in general and the rehabilitation of prisoners in particular¹⁸.

Despite this paradigm shift in penal policy, the principle of release on parole has now been firmly established by the highest courts in South Africa as part of the constitutional jurisprudence of South Africa¹⁹. Parole has indeed been elevated to a constitutional prerogative without which the sentence of life imprisonment in South Africa (and in Namibia) would

¹⁶ See White Paper, Department of Correctional Services: 'Correcting Offending Behaviour, Overcrowding and Corrections as a Societal Responsibility: Build a Caring Correctional System that Truly Belongs to All' by Department of Correctional Services, Republic of South Africa (February 2005) Chapter 4 (71 *et seq*).

¹⁷ See White Paper, Department of Correctional Services: 'Correcting Offending Behaviour, Overcrowding and Corrections as a Societal Responsibility: Build a Caring Correctional System that Truly Belongs to All' by Department of Correctional Services, Republic of South Africa (2005) Ch 4.

¹⁸ See White Paper, Department of Correctional Services: 'Correcting Offending Behaviour, Overcrowding and Corrections as a Societal Responsibility: Build a Caring Correctional System that Truly Belongs to All' by Department of Correctional Services, Republic of South Africa (2005) (Ch 4).

¹⁹ See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *S v Mhlakaza and Another* (n 10); *Minister of Correctional Services v Kwakwa and Another*, 2002 (4) SA 445 (SCA); *S v Bull and Another*; *S v Chavulla and Others* 2002 (1) SA 535 (SCA).

otherwise have been unconstitutional²⁰.

The Legislature in South Africa has also acknowledged the principle of parole in that the prisoner can be released earlier than the date on which his or her prison sentence in fact expires, subject to certain parole or correctional supervision conditions²¹. That principle finds expression in the provisions of s 73 of the 1998 Correctional Services Act. Section 73(5) clearly provides that a prisoner can be released on parole before expiry of the actual term of imprisonment once he or she complies with certain eligibility requirements and has accepted the conditions of his or her release on parole. These conditions are determined and set by the Correctional Supervision and Parole Board (CSPB). Prisoners who have been sentenced to life imprisonment and/or declared dangerous criminals are dealt with by the court, which decides whether to place such a prisoner under correctional supervision or on parole, on the recommendations of the CSPB.²²

It is now a well established principle that parole is a necessary and legitimate part of the administration of justice generally and of penal

²⁰ See *S v Mhlakaza and Another* (n 10); *S v Bull & Another*, *S v Chavulla & Another* 2002 (1) SA 535 (SCA) at 552, para 23, read with paras 11 to 14 and 25. See also *S v Niemand* 2002 (1) SA 21 (CC) paras 21–26; *State v Tcoeib* 1996 (1) SACR 390 (NmS) 398–399, particularly 399, paras A to C.

²¹ See generally Chapter VII of the Correctional Services Act, 111 of 1998.

²² See s 78 of the Correctional Services Act, 111 of 1998.

practice in particular in South Africa.²³ As such, it would be irregular and unlawful for any court, when imposing a sentence, to try to prevent a prisoner from being released on parole, by factoring that into his or her sentence in order to thwart the objectives of parole²⁴.

It is also acknowledged that the present parole and release regime under the 1998 Correctional Services Act is more stringent than the previous regime, as it introduces stricter requirements with the clear objective to cater for the present political and public opinion regarding criminality and violence²⁵.

Section 73 of the 1998 Correctional Services Act now prescribes in peremptory terms that a prisoner '... must be placed under correctional supervision, or on day parole or on parole ...' on a date determined by the Correctional Supervision and Parole Board or, in the case of a prisoner sentenced to life imprisonment or those who have been declared dangerous criminals, by the court²⁶. Where the CSPB has made a determination that a prisoner is eligible to be released subject to correctional supervision or on parole, such a prisoner acquires a right to

²³ See report on a New Sentencing Framework *op cit* (n 12) paras 1.8, 1.9 *et seq.* See also *S v Mhlakaza and Another* (n 13); *S v Bull*; *S v Chavulla & Others* (n 19); *S v Niemand* (n 20); *S v Tcoeib* (n 20); *S v Makwanyane* (n 19).

²⁴ See *S v Khumalo and others* 1983 (2) SA 540 (N) at 542 A; *S v S* 1987 (2) SA 307 (AD) at 313 H; *S v Smith* 1996 (1) SACR 250 (E) 254-259; *S v Mhlakaza and another* 1997 (1) SACR 515 (SCA) 521-523; *S v Chavulla and Others*; *S v Bull* (n 19).

²⁵ See *S v Mhlakaza and Another* (n 13, 19).

²⁶ See s 73(5) of the Correctional Services Act, 111 of 1998.

be released on parole.²⁷ This right, however, is subject to such a prisoner accepting the stipulated conditions imposed upon or him or her by the CSPB.²⁸ This obligation on the CSPB or the court will only arise, and then the resultant right of such a prisoner to be placed under correctional supervision, or on parole or day parole, will only be triggered, once:

- (a) The prisoner has been **assessed** by the case management committee (CMC) of the prison concerned, pursuant where to a report is compiled, containing *inter alia* a plan for the reintegration and rehabilitation of the specific prisoner into the community and a recommendation, which must then be submitted to the Correctional Supervision and Parole Board, or the area manager²⁹;
- (b) The prisoner has been **considered** by the Commissioner or the area manager as the delegated official of the Commissioner³⁰, or the CSPB (for all those prisoners serving a definite sentence of imprisonment for a period longer than 12 months) or by the court (in respect of all those prisoners who have been sentenced to life imprisonment or have been declared dangerous criminals³¹; and

²⁷ See s 73(5) of the Correctional Services Act, 111 of 1998.

²⁸ See s 73(5) of the Correctional Services Act, 111 of 1998.

²⁹ See s 38 read with s 42, s 42(2)(a) and (d) and s 45 of the Correctional Services Act, 111 of 1998.

³⁰ Only in those instances where prisoners have been sentenced to less than twelve months' imprisonment. See s 73(1) read with s 42(2)(d) and s 75(7) of the Correctional Services Act, 111 of 1998.

³¹ See s 73 of the Correctional Services Act, 111 of 1998.

- (c) A **decision** has been taken by the Commissioner (or area manager) or the CSPB or the court, as the case may be, pursuant to the abovestated assessment and consideration, to release such a prisoner on parole, day parole or under correctional supervision³².

If, after such assessment and consideration, it is decided to release the prisoner under correctional supervision or on parole or day parole, the decision will not be capable of being implemented until the prisoner has agreed in writing to the parole or correctional supervision conditions, has indicated that he/she understood them and that he/she will co-operate with the prison authorities to implement them³³.

4.3. The legal nature of the parole process

The process of parole is typically a multi-staged decision-making one³⁴, involving as it does the assessment and consideration³⁵ of the prisoner, recommendations³⁶ concerning such a prisoner by the CMC and/or CSPB, regarding his/her eligibility for placement on parole (or subject to correctional supervision) and a decision³⁷ by the relevant public official or

³² That decision can only be taken by the commissioner or area manager, as delegated official of the Commissioner, in respect of those prisoners sentenced to less than twelve months (in terms of s 75(7) read with s 73 of the Correctional Services Act, 111 of 1998), by the CSPB in respect of all those prisoners sentenced to imprisonment for twelve months or more, excluding those sentenced to life imprisonment or declared dangerous criminals (in terms of s 73(1) read with s 73(6)(b)(iv) and (v) of the Correctional Services Act, 111 of 1998).

³³ See s 73(5)(b), s 45 and s 55(3) of the Correctional Services Act, 111 of 1998.

³⁴ See, generally, Hoexter *Administrative Law in South Africa* (2007) 392–397.

³⁵ See para 4.2(a) above as well as paras 4.3.1 and 4.3.2 below.

³⁶ See para 4.2(b) above as well as paras 4.3.1 and 4.3.2 below.

³⁷ See para 4.2(c) above as well as para 4.3.3 below.

authority whether or not to release such a prisoner on parole.

The highest courts in South Africa differ on the question whether preliminary conduct and/or decisions, such as recommendations and/or investigations, constitute administrative action and would therefore be subject to administrative review in terms of the common law, the Constitution³⁸, or the Promotion of Administrative Justice Act³⁹.

As Hoexter⁴⁰ points out, the approach under the common law before 1994 was generally that, as no 'rights' were affected in the preliminary stages by investigations or advisory action, the aggrieved party was generally not entitled to natural justice. This attitude, she points out⁴¹, continued even after the introduction of our constitutional dispensation in 1994 until it was unanimously rejected by the Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*⁴², described by Hoexter as a 'bold step'⁴³. In this case, the Supreme Court of Appeal rejected the arguments that:

³⁸ South African Constitution Act 108 of 1996.

³⁹ Promotion of Administrative Justice Act 3 of 2000. See: *Chairman, Board of Tariffs & Trade v Blanko Inc* 2001 (4) SA 571 (SCA), paras 13, 14; *Buffalo City Municipality v Gauss* 2005 (4) SA 498 (SCA) at paras 10–15; *New Clicks SA (Pty) Ltd v Tshabalana-Msimang NO* 2005 (2) SA 520 (C) paras 40–41; cf *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 707 (SCA) paras 17–20; *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs & Tourism* 2005 (3) SA 156 (C) paras 56 *et seq*, and *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 150, 484 and 672. See, generally, Hoexter *Administrative Law in South Africa* (2007) 392–397.

⁴⁰ See Hoexter *op cit* (n 34) 393.

⁴¹ See Hoexter *op cit* (n 34) 393.

⁴² 1999 (2) SA 707 (SCA) (para 17–20).

⁴³ Hoexter *op cit* (n 34) 393.

- (a) No 'rights' were violated at the first stage; and
- (b) Since the *audi alteram partem* rule will be applied at the second stage, it need not be applied at the first stage.

The court's reasoning was that the preliminary step, which was the granting of a license in terms of s 9 of the Minerals Act 50 of 1991, which would then be followed by the approval of an environmental management programme in terms of s 39 of that Act opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia where it lays ... 'the necessary foundation for a possible decision ...' which may have grave results. In such a case, the audi rule applies to the considerations of the preliminary decision ...⁴⁴

This case was followed by *Earthlife Africa Cape Town v Director General, Department of Environmental Affairs & Tourism*⁴⁵, a case concerning the construction of a pebble bed nuclear reactor. Here the full bench of the Cape Provincial Division pointed out that the initial step, which was the granting of authorisation by the Director General, was not

⁴⁴ *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (n 39) para 17.

⁴⁵ *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 2005 (3) SA 156 (C) (n 39) para 17.

only a necessary prerequisite to further steps in the process, but also a final step as far as the Environmental Conservation Act 73 of 1989 was concerned⁴⁶.

The later Supreme Court of Appeal case of *Buffalo City Municipality v Gauss*⁴⁷ held that the initial steps were considered to be part of a bigger process which ultimately caters for the right of the aggrieved party to be heard. In such cases, a subsequent hearing would suffice '... provided of course that it does not cause prejudice and that the hearing is itself a fair one'⁴⁸.

This case is also regarded by Hoexter as 'a retreat from the spirit of the "Save the Vaal" case, noting that it had not been referred to by the Supreme Court of Appeal in the Buffalo case'⁴⁹.

However, within the purview of PAJA, the ingredients of the Act's definition of administrative action suggests that preliminary conduct (such as in *Chairman, Board on Tariffs & Trade v Blanco Inc*⁵⁰), including recommendations of an administrator and/or body fall outside the purview of PAJA⁵¹. This stems from the requirement of a 'direct' legal effect, which seems to translate into a requirement of finality. This was also how the

⁴⁶ See also Hoexter *op cit* (n 34) 396–397.

⁴⁷ 2005 (4) SA 498 (SCA).

⁴⁸ See Hoexter *op cit* (n 34) 346 and 394–395.

⁴⁹ Hoexter *op cit* (n 34) 394.

⁵⁰ 2001 (4) SA 571 (SCA).

⁵¹ See s 1 of the Promotion of Administrative Justice Act 3 of 2000. See, generally, Hoexter *op cit* (n34) 396.

majority of the court in the Cape Provincial Division case interpreted the term when it found in *New Clicks South Africa (Pty) Ltd v Tshabalala Msimang NO*⁵² that recommendations of a pricing committee did not constitute administrative action⁵³.

This effect of the PAJA, ie which again invites the courts to return to pre-democratic reasoning has been described as a great pity⁵⁴. However, as Hoexter⁵⁵ points out, the Constitutional Court, in a final appeal in the *New Clicks* case⁵⁶ declined to treat the two stages of the process – recommendations from the pricing committee and the subsequent regulations made by the Minister – as separate and independent decisions. To treat them thus, said Chaskalson CJ would be to put form above substance⁵⁷. According to Ngcobo J, the enabling legislation contemplates a single process, consisting of several stages⁵⁸. According to Moseneke J, it is one continuous process involving the committee and the Minister at different times⁵⁹.

⁵² 2005 (2) SA 520 (C) paras 40–41 (n 35).

⁵³ *New Clicks SA (Pty) Ltd v Tshabalala Msimang NO* (n 53) para 40–41; Hoexter *op cit* (n 34) 396.

⁵⁴ Hoexter *op cit* (n 34) 396–397. The term “pre-democratic” refers to the reasoning of the courts before the introduction of the Interim Constitutions of the Republic of South Africa Act, 200 of 1993, which was later replaced by the current Constitution of the Republic of South Africa Act 108 of 1996.

⁵⁵ Hoexter *op cit* (n 34) 397.

⁵⁶ *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC).

⁵⁷ *New Clicks case supra* (n 56) para 137.

⁵⁸ *New Clicks case supra* (n 56) para 441.

⁵⁹ *New Clicks case supra* (n 56) para 672.

The PAJA could, so it is argued⁶⁰, conceivably be interpreted so as to avoid this effect, which would be by viewing multistage processes more holistically.

But even if these preliminary stages are interpreted to fall outside the purview of the PAJA, and accordingly do not qualify as administrative action (it not being final), this does not mean that it could not be tested on the other common law and/or constitutional review grounds such as it not being in accordance with the constitutional principle of legality and/or reasonableness and/or being unfair in the circumstances⁶¹.

Within the context of parole, the assessment of a prisoner and a recommendation by the case Management Committee (CMC)⁶² or the consideration of a prisoner and a recommendation by the Correctional Supervision and Parole Board (CSPB)⁶³ would be the equivalent of such a preliminary step. Such an assessment, consideration and recommendation, however, will invariably inform and form part of the eventual decision whether or not to release a prisoner on parole of, and by, the relevant authority, be it the Commissioner, the CSPB or the court⁶⁴. As such, it will be evaluated and scrutinised as being an integral part of the parole process and the final decision of the applicable public

⁶⁰ Hoexter *op cit* (n 34) 397.

⁶¹ Hoexter *op cit* (n 34) 397.

⁶² Section 38 read with s 42 and s 45 of the Correctional Services Act, 111 of 1998.

⁶³ Section 73(1) read with s 75(7) and s 42(2) of the Correctional Services Act, 111 of 1998.

⁶⁴ See para 4.2(c) (c) above.

official or tribunal and will therefore be subject to review either in terms of the common law, the constitution and/or the PAJA⁶⁵.

4.3.1 Assessment

Prisoners sentenced under the 1959 Correctional Services Act had, and continue to have, the advantage of the credit system, despite legislative efforts to abolish it⁶⁶. In terms of this system, prisoners would be assessed by the then existing institutional committee of a particular prison according to stipulated criteria⁶⁷. If a prisoner was positively assessed, he or she would be rewarded with a certain number of credits.

In the event of a positive assessment by the institutional committee, such a prisoner could be awarded with a number of credits which, if converted into days and/or months and/or years, could be equal to the maximum of half his term of imprisonment which he/she has **already served**.⁶⁸ Such a prisoner's date for **consideration** for placement on parole may be brought forward by the number of credits he or she has earned, and after the conversion thereof into days or months or years⁶⁹.

⁶⁵ Hoexter *op cit* (n 34) 397.

⁶⁶ Section 65 read with s 22A of the Correctional Services Act 8 of 1959, further read with s 136 of the Correctional Services Act 111 of 1998. See also the Correctional Services Amendment Act 87 of 1977, which sought to abolish the credit system, but was never put into operation. See generally the discussion of assessment in Chapter 3, para 1.2 19–49 *infra*.

⁶⁷ These criteria are listed in the Manual for Correctional Officials: CSOB, Chapter VI para (1A) 19 37–50, hereinafter referred to as 'CSOB VI', followed by the appropriate paragraph(s).

⁶⁸ Section 22A read with s 65 of the 1959 Correctional Services act. CSOB VI *op cit* (1A)(23) and (24), 51–55.

⁶⁹ *Ibid*. The aspects of assessment and awarding credits are fully discussed in Chapter 3 *infra*.

Should he/she be negatively assessed – which could be as a result of the nature of the offence committed, his/her previous convictions, or one or other disciplinary transgression – he or she would not receive any credits⁷⁰. Moreover, such a prisoner could also be penalised in accordance with certain stipulated penalisation periods determined by the Department of Correctional Services⁷¹.

The only remedies afforded to a prisoner who was dissatisfied with an assessment, or the recommendation of an institutional committee, were:

- (a) The right to be informed as to what was contained in the report affecting him/her; and
- (b) The right to make oral or written representations to the delegated official and/or the Commissioner of Correctional Services⁷²

Should a prisoner be dissatisfied with his or her assessment and/or recommendation by either the institutional committee or the parole board,

⁷⁰ CSOB VI *op cit* (n 67) (1A)(23)(c) 51. (See also Chapter 3, n 19)

⁷¹ CSOB VI *op cit* (1A)(23)(e)-(h); (1A)(29), 51-61. See also Policy Directive dated 23/04/98 ref 1/8/B and its Annexure A, 1-7. See generally in Chapter 3 under the heading 'Assessment of Prisoners and Assessment Criteria under the 1959 Correctional Services Act.

⁷² See s 62 read with s 65 of the 1959 Correctional Services Act. See CSOB VI(1A)(2)(i)-(iii) – where the procedure during Parole Board hearings was described as confidential, non-formal, and it is stipulated that Parole Boards were not obliged to furnish reasons for their decisions. An aggrieved prisoner could, if he or she had the means, challenge such a recommendation by a Parole Board (and by implication, the Institutional Committee) in a Court of law, by taking it on review to a High Court. As such they (Parole Board) can be forced to give reasons for their recommendations. They were in any case required to furnish reasons to the Commissioner or the delegated official should they not recommend parole for any prisoner.

and have lodged such a complaint in the form of an oral or written representation to the Commissioner, the latter (or his delegated official) could do either:

- (a) Ratify such an assessment or recommendation; or
- (b) Amend it; or
- (c) Declare it null and void; or
- (d) Substitute that assessment or recommendation or decision with his/her own.⁷³

In the event that the Commissioner amends or substitutes the decision of the institutional committee or the parole board, it may not be done to the prejudice of the prisoner⁷⁴. Should the Commissioner ratify the assessment, recommendation or decision which is being challenged by the prisoner, no further remedy within the parameters of the 1959 Correctional Services Act would be available to such a prisoner, except to approach the High Court for review⁷⁵.

⁷³ See s 62 read with s 65(3) of the 1959 Correctional Services Act.

⁷⁴ Section 62(3) of the 1959 Correctional Services Act.

⁷⁵ Section 62(3) of the 1959 Correctional Services Act. Prior to the 1993 Constitution of the Republic of South Africa, No 200 of 1993 and Act 108 of 1996, the decisions of the Commissioner or his duly delegated officials could only have been taken on review to the High Court on the common law grounds of review as set out in *Johannesburg Stock Exchange v Witwatersrand Nigel (Pty) Ltd* 1988 (3) SA 132 (A) at 152. See also *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115; and *Hoexter op cit* (n 31) pp 13–14.

The remedy of judicial review was only available to those prisoners who could afford the services of a legal representative, who could assist him/her in instituting and launching such review proceedings in the High Court. No compulsory legal aid at state's expense was authorised or granted to prisoners sentenced under the 1959 Correctional Services Act⁷⁶.

The 1998 Correctional Services Act, in contrast to its predecessor, stipulates clearly the different aspects regarding a prisoner that must be assessed⁷⁷, and the body which must perform such an assessment, namely the case management committee ('CMC')⁷⁸. The CMC replaced the institutional committee, which performed this function under the 1959 Correctional Services Act⁷⁹. The 1998 Correctional Services Act also

⁷⁶ This is to be differentiated from the system of what is commonly referred to in the South African legal framework regarding prisoners as 'Prison Appeals'. These Prison Appeals were done by practising advocates and members of the constituent bars in South Africa, on an *amico curiae* basis. This would usually be after an aggrieved prisoner had laid a 'complaint' with the visiting or inspecting judge or by having written a letter to a judge or the Judge President of any particular division of the High Court of South Africa. A case file concerning such a prisoner would then be laid before a judge in chambers for his or her assessment. If such a judge was of the opinion that there might be merit in the complaint of the prisoner, ie on the question of the prisoner's guilt and/or sentence that was imposed upon him or her, the matter would then be referred to court for argument. The Registrar of the High Court would then liaise with the local advocates association (the Bar, as it is called in South Africa) who would then appoint counsel to argue the case on behalf of the prisoner as *amicus curiae*. No such remedy existed for sentenced prisoners whose complaint was directed at an assessment, recommendation and/or a decision by the institutional committee and/or the parole board of a particular prison and/or the Commissioner of Correctional Services. However, s 17 read with s 75(3) of the Correctional Services Act, 111 of 1998, further read with s 36(3) of the Constitution, Act 108 of 1996, now guarantees the right to legal representation in such cases, and even legal aid in deserving cases.

⁷⁷ See s 38 of the Correctional Services Act, 111 of 1998.

⁷⁸ See s 42 of the Correctional Services Act, 111 of 1998.

⁷⁹ Section 38(1) provides as follows:

38(1) As soon as possible after admission as a sentenced prisoner, such prisoner must be assessed to determine his or her – (a) security classification for purposes of safe custody; (b) health needs; (c) educational needs; (d) social and psychological needs; (e) religious needs;

provides, unlike its predecessor, that a plan for each prisoner serving 12 months or more must be prepared by the CMC and that regular interviews must take place with a prisoner⁸⁰.

However, no assessment criteria are stipulated or mentioned in the 1998 Correctional Services Act in terms whereof a prisoner's suitability for placement on parole is to be assessed and determined. This leaves such assessment and determination wide open and solely within the discretion of such a CMC and/or correctional supervision and parole board. Thus, if a prisoner has committed a disciplinary infringement, the 1998 Correctional Services Act is silent on what effect, if any, that will have on such a prisoner's assessment and consideration for purposes of placement on parole or release subject to correctional supervision. This is particularly pertinent in circumstances where a prisoner has already been punished by the appropriate disciplinary tribunal and nothing is stipulated to the effect that such a prisoner's eligibility for parole will be negatively affected. No specific guidelines exist in the 1998 Correctional Services Act for prisoners in terms of which they can work or strive towards, a positive assessment for parole by the appropriate CMC. A positive assessment may result in a positive recommendation by the CMC to the CSPB and/or the Commissioner for possible early release on parole or under correctional supervision ((both parole and correctional supervision

(f) specific development program needs; (g) work allocation; (h) allocation to a specific prison; and (i) needs regarding reintegration into the community.

⁸⁰ See ss 38(2), 41 and 42 of the Correctional Services Act, 111 of 1998.

are incorporated in the term community corrections)⁸¹.

The Legislature sought to address this *lacuna* in two ways. Firstly, it enacted s 136 of the 1998 Correctional Services Act⁸². This is a transitional provision which makes provision for the assessment and consideration of prisoners who had been sentenced to imprisonment before its commencement on 1 October 2004, to be done in accordance with the policy and guidelines that were applied by the parole board under the 1959 Correctional Services Act. The assessment criteria and guiding principles that have been developed out of these policies and guidelines will therefore apply to those prisoners sentenced before 1 October 2004⁸³. Secondly, it enacted s 134⁸⁴ of the 1998 Correctional Services Act in

⁸¹Section 36 of the Correctional Services Act, 111 of 1998 sets out the objective of the implementation of imprisonment; s 37 sets out the general principles to guide the Department in the implementation of that objective; s 38 deals with the assessment of prisoners, yet is silent on any criteria for correctional supervision and/or parole; s 42 sets out the powers of the CMC – although this section imposed a duty on the CMC to assess each prisoner, it does not set out or refer to any criteria for such an assessment other than those aspects of the prisoner listed in s 38 which must be determined through such an assessment: ss 73, 75, 76, 77 and 78 which deal with the power of the CSPB, the Correctional Supervision and Parole Review Board (CSPRB) and the courts, similarly contain no provision for any of these institutions to apply any specific set of criteria or guidelines for the assessment and consideration of prisoners for parole or correctional supervision. None of these institutions are also empowered to develop or set their own criteria and/or guidelines in that respect.

⁸² See chapter 3, para 3.1 *infra* for a more detailed discussion of, and reference to, s 136 of the Correctional Services Act 111 of 1998, at p 122 – 123. Section 136 reads as follows:

(1) Any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII is subject to the provisions of the Correctional Services Act, 1959 (Act No. 8 of 1959), relating to his or her placement under community corrections, and is to be considered for such release and placement by the Correctional Supervision and Parole Board in terms of the policy and guidelines applied by the former Parole Boards prior to the commencement of those chapters. (2) When considering the release and placement of a prisoner who is serving a determinate sentence of imprisonment as contemplated in subsection (1), such prisoner must be allocated the maximum number of credits in terms of section 22A of the Correctional Services Act, 1959 (Act 8 of 1959).

⁸³ The date of commencement of the Correctional Services Act, 111 of 1998.

⁸⁴ Section 134 reads as follows:

'134 The Minister may make regulations not inconsistent with this Act as to –

(a) ...

respect of those prisoners sentenced and imprisoned after the commencement of this Act⁸⁵. This section simply states that the Minister may make regulations⁸⁶ regarding, *inter alia*, the assessment of prisoners.

These regulations, however, also do not set out any criteria and/or guidelines for the assessment of prisoners for parole or correctional supervision. The only provision in these regulations that could have relevance in this respect is Regulation 24⁸⁷, which deals with the role of the CMC, which must compile a report in respect of each prisoner in accordance with approved "guidelines" and "departmental policy".

No definition of 'guidelines' and/or 'departmental policy' is provided in the Regulations, nor in the 1998 Correctional Services Act. It is unclear and doubtful whether the 'guidelines' and/or 'departmental policy' are the same as the 'policy and guidelines' referred to in s 136 of the 1998 Correctional Services Act. The policy and guidelines referred to s 136 of the 1998 Correctional Services Act are clearly applicable to prisoners sentenced and imprisoned before the date of its commencement on 1

(d) The assessment of a sentenced prisoner; ...'

⁸⁵ On 1 October 2004, in terms of *Government Gazette* No 26626, Vol 469 of 30 July 2004.

⁸⁶ These regulations were promulgated on the 30 July 2004 in terms of *Government Gazette* No 26626, Regulation Gazette No 8023, Vol 469 dated 30 July 2004 and commenced on the 31 July 2004 in terms of Government Notice No R914 of 30 July 2004.

⁸⁷ Regulation 24(8) simply states the following:

- (6) (a) In compiling the report contemplated in s 42(2)(d) of the Act the Committee is subject to the guidelines provided for in the order to ensure uniformity in applying departmental policy.
- (b) A summary of the reasons for a recommendation on a prisoner's conditional placement or release must be provided to the Courts, Correctional Supervision and Parole Board or the Area Manager who decides on the placement or release of a prisoner.

October 2004. It is not clear whether it was the intention that the policy and guidelines referred to in s 136 of the 1998 Correctional Services Act must include or be the same as the 'guidelines' and/or 'departmental policy', which is contained in Regulation 24(6) and that, by virtue of this regulation, the policy and guidelines can be applied to all prisoners, including those sentenced **after** the commencement of the Act on the 1 October 2004. If this was indeed the intention of the Legislature, one would have expected it to be clearly set out in this transitional provision. This is clearly not authorised by s 136 of the 1998 Correctional Services Act. There is no provision in the 1998 Correctional Services Act, apart from those provisions in s 134, which expressly authorises the Minister or the Commissioner to issue any order or policy guidelines in respect of the placement of prisoners on parole. No such authorisation is to be found in the Regulations, apart from the provisions of Regulation 24(6).

The effect of the transitional provision is the creation of a dual system, operating under the 1998 Correctional Services Act, for the purposes of assessment, consideration and placement on parole or release under correctional supervision. One system only applies to those category of prisoners sentenced and imprisoned under the 1959 Correctional Services Act, to whom the credit system still applies and who will receive the maximum number of credits which will result in their **consideration date** for parole (or correctional supervision) being brought forward. The practical result is that these prisoners would become eligible for parole or

correctional supervision after having served only one third of their respective sentences⁸⁸. The other system applies to those category of prisoners who have been sentenced and imprisoned under the provisions of the 1998 Correctional Services Act, from the date of the commencement, the 1 October 2004, and which makes no provision for any credit system or 'credits' to be afforded to any prisoner.⁸⁹

The right and remedy of a prisoner in relation to an assessment by the CMC are:

- (e) He or she is entitled, as an enforceable right, to be informed of the contents of the report compiled by the CMC concerning him/her and submitted by it to the Correctional Supervision and Parole Board or the area manager (where his or her sentence is 12 months or less)⁹⁰;
- (b) He or she **must** be afforded the opportunity to submit written representations to the CSPB or Commissioner (or area manager), as the case may be⁹¹.

⁸⁸ By virtue of the operation of s 22A(1)(a) of the 1959 Correctional Services Act read in conjunction with the transitional provision (s 136 of the Correctional Services Act, 111 of 1998) and the principle against retrospectivity embodied in s 35(3)(l) and (n) of the Constitution Act 108 of 1996.

⁸⁹ See also in this regard the Directive, with reference number 1/9/B and dated 18 August 2004 issued by the Department of Correctional Services, its Directorate: Pre-Release Resettlement, with the heading 'Dealing with Sentenced Offenders and Profile Reports (G326 Form) prior to inception of the new Correctional Supervision and Parole Boards on 1 October 2004'. (Also referred to in Ch 3, n 158)

⁹⁰ Section 38 read with s 41 and s 42 of the Correctional Services Act, 111 of 1998.

⁹¹ Section 42(3) read with s 75(1) of the Correctional Services Act, 111 of 1998.

4.3.2 Consideration

The assessment of prisoners is done by the CMC, which would then submit its recommendations based on this assessment regarding the particular prisoner to the CSPB. The latter's duty is to consider these recommendations by the CMC regarding each prisoner, any representations by or on behalf of the prisoner and/or any other relevant information placed at its disposal, and thereafter to decide whether or not such prisoner ought to be released on parole.⁹²

The Correctional Supervision and Parole Board is empowered to consider all prisoners sentenced to more than twelve months imprisonment for parole, including those prisoners who have been declared dangerous criminals, and those prisoners who have been sentenced to life imprisonment⁹³. The Commissioner (or his delegated official, the area manager) considers those prisoners sentenced to less than twelve months imprisonment for parole upon receipt of the report from the CMC⁹⁴.

As a general rule, those prisoners serving determinate sentences in prison must be considered for parole by the CSPB after having served the

⁹² Section 73 and 2 75 of the Correctional Services Act, 111 of 1998.

⁹³ Section 73 read with s 75(1) of the Correctional Services Act, 111 of 1998.

⁹⁴ Section 42(3) read with s 75(7) of the Correctional Services Act, 111 of 1998.

stipulated non-parole period imposed by a court, or whenever a prisoner has served 25 years of a sentence or cumulative sentences⁹⁵.

The duty to consider the undermentioned categories of prisoners for parole or community corrections, only arises when they become eligible therefor, which is:

- (a) In the case of those prisoners sentenced to corrective training which is for a period of two years, when such prisoner has served twelve months⁹⁶;
- (b) In respect of those prisoners sentenced to imprisonment for prevention of crime, which is for a period of five years, after three and a half years⁹⁷;
- (c) In respect of those sentenced to life imprisonment, when they have served 25 years or, in the case of those prisoners who are 65 years or older when they have been imprisoned for at least 15 years⁹⁸;
- (d) In respect of those prisoners who have been declared dangerous criminals in terms of s 51 or s 52 of the Criminal Law Amendment

⁹⁵Section 73(6)(a) of the Correctional Services Act, 111 of 1998.

⁹⁶Section 73(6)(b)(i) of the Correctional Services Act, 111 of 1998.

⁹⁷Section 73(6)(b)(ii) of the Correctional Services Act, 111 of 1998.

⁹⁸Section 73(6)(b)(iv) of the Correctional Services Act, 111 of 1998.

Act, 1997⁹⁹, when they have served four fifths of the sentences imposed or 25 years, whichever is the shorter. The court may order that such a prisoner can be considered for parole after having served two thirds of the sentence imposed¹⁰⁰;

- (e) In respect of those prisoners who have been declared habitual criminals, who may be detained for 15 years, after having spent at least 7 years in jail¹⁰¹;
- (f) In respect of those prisoners who have been sentenced to imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act¹⁰², of which the period of imprisonment may not exceed 5 years, after serving at least one sixth of such sentence, whereafter they can be considered for placement under correctional supervision¹⁰³.

A person who has been sentenced to imprisonment under s 276(1)(i) of the Criminal Procedure Act¹⁰⁴ and to imprisonment for a period of five years or less, must be considered for placement under correctional supervision after having served one sixth of such sentences, unless the

⁹⁹ 105 of 1997.

¹⁰⁰ Section 73(6)(b)(v) of the Correctional Services Act, 111 of 1998.

¹⁰¹ Section 73(6)(c) of the Correctional Services Act, 111 of 1998.

¹⁰² Act No 51 of 1977.

¹⁰³ Section 73(7)(a) of the Correctional Services Act, 111 of 1998.

¹⁰⁴ Act No 51 of 1977.

court has directed otherwise¹⁰⁵.

A person who has been sentenced to (a) a definite period under s 276(1)(b) of the Criminal Procedure Act, 1977¹⁰⁶; (b) imprisonment under s 276(1)(i) of the Criminal Procedure Act, 1977¹⁰⁷; or (c) a period not exceeding five years as an alternative to a fine, must be considered for placement under correctional supervision after having served one quarter of the effective sentence or after having served the non-parole period, whichever is the longer¹⁰⁸.

It is evident from the provisions of s 75(1) of the Correctional Services Act, 1998¹⁰⁹ that the CSPB is obliged, in this consideration process, to consider:

- (1) The report submitted to it by the CMC¹¹⁰;
- (2) The written representations which the affected prisoner is entitled to submit to the CSPB pursuant to the report by the CMC¹¹¹;
- (3) 'Any other information'¹¹²; or

¹⁰⁵ See s 73(7)(b) of the Correctional Services Act, 111 of 1998.

¹⁰⁶ Of Act 51 of 1977.

¹⁰⁷ Of Act 51 of 1977.

¹⁰⁸ Section 73(7)(c) of the Correctional Services Act, 111 of 1998; emphasis added.

¹⁰⁹ Of the Correctional Services Act, 111 of 1998.

¹¹⁰ In terms of s 42 of the Correctional Services Act, 111 of 1998.

¹¹¹ Section 42(3) of the Correctional Services Act, 111 of 1998.

¹¹² Section 75(1) of the Correctional Services Act, 111 of 1998.

- (4) 'Argument'¹¹³,

Section 75 clearly contemplates a hearing where the prisoner may appear before the CSPB, and be legally represented, and be allowed to present written and/or oral argument. This certainly also contemplates the situation during which 'any other information' may be put before or brought to the attention of, the CSPB which it, in its discretion, may take into consideration when they determine whether a prisoner is a suitable candidate to be placed on parole or under correctional supervision.

4.3.3 **Decision**

(a) **By the Correctional Supervision and Parole Board (CSPB)**

After having received and considered all information placed at its disposal in the manner described above, the CSPB:

- (1) **Decides** whether or not to place any prisoner serving a prison sentence exceeding 12 months, but excluding those having been declared dangerous criminals or sentenced to life imprisonment, on parole or on day parole or under correctional supervision;

¹¹³Section 75(1) of the Correctional Services Act, 111 of 1998.

- (2) **Decides and sets** the conditions of community corrections to be imposed on a prisoner to be released on parole, day parole or under correctional supervision¹¹⁴; and
- (3) **Makes recommendations** to the court, in respect of a prisoner having been declared a dangerous criminal in terms of s 286 of the Criminal Procedure Act, 1977¹¹⁵, and a prisoner sentenced to life imprisonment, on the granting of day parole or parole or the placement under correctional supervision (the latter only applies in respect of dangerous criminals) and make recommendations on the conditions of community corrections to be imposed on such a prisoner¹¹⁶.

The decision of the CSPB is **final**. Thereafter, only the Commissioner of Correctional Services or the Minister of Correctional Services may, within his/her sole discretion, refer such a decision for reconsideration to the Correctional Supervision and Parole Review Board (CSPRB)¹¹⁷.

¹¹⁴ Section 75(1)(a) of the Correctional Services Act, 111 of 1998 read with s 73(5)(a)(i) of the Correctional Services Act, 111 of 1998.

¹¹⁵ S1 of 1977.

¹¹⁶ Section 75(1)(b) and (c), read with s 73(5)(a)(ii), further read with s 52 of the Correctional Services Act, 111 of 1998.

¹¹⁷ Section 75(8) of the Correctional Services Act, 111 of 1998. It is submitted that the affected prisoner is also entitled to refer to, or approach, the CSPRB regarding such a decision of the CSPB, by virtue of s 35(3) of the Constitution of the Republic of South Africa, 108 of 1996.

(b) **By the Correctional Supervision and Parole Review Board (CSPRB)**

The CSPRB must, when a matter has been referred to it for reconsideration, consider:

- (1) The record of the CSPB¹¹⁸;
- (2) Any submission made by or on behalf of the Minister;
- (3) Any submission made by or on behalf of the Commissioner; and
- (4) Any submission made by the prisoner concerned or on his behalf;
and
- (5) Any other evidence or argument which it, in its discretion, may
allow¹¹⁹.

Thereafter the CSPRB can, by simple majority, either confirm or set aside the decision of the CSPB and substitute its own decision and make any order which the CSPB ought to have made¹²⁰. The CSPRB is further obliged to give reasons for its decisions, which must be made available to

¹¹⁸ Submitted to it in terms of s 75(8) of the Correctional Services Act.

¹¹⁹ Section 77(1) of the Correctional Services Act, 111 of 1998.

¹²⁰ Section 77(1)(a) and (b) of the Correctional Services Act, 111 of 1998.

the Minister, the Commissioner, the prisoner concerned, the CSPB concerned and to all other CSPBs for their information and guidance¹²¹.

(c) **By the court**

The court must decide whether those prisoners sentenced to life imprisonment, or having been declared dangerous criminals, are suitable to be released on parole or subject to community corrections¹²².

A prisoner has a right to be informed by the CSPB of its recommendations to the court, and he/she must confirm that these recommendations have been conveyed to him/her¹²³. A prisoner furthermore has the right to submit written representations with regard to these recommendations of the CSPB, to the court, and the CSPB is obliged to allow that prisoner to exercise that right¹²⁴. The CSPB is furthermore obliged to submit these representations of the prisoner, together with its report, to the court¹²⁵. The court is obliged to consider all the above information before making a decision in respect of prisoners sentenced to life imprisonment or declared dangerous criminals¹²⁶. This applies to life sentenced prisoners who have already served 25 years or,

¹²¹ Section 77(2) of the Correctional Services Act, 111 of 1998.

¹²² Section 78(1) read with s 75(1)(b) and (c), further read with s 75(5)(a)(ii).

¹²³ Section 75(3)(b) of the Correctional Services Act, 111 of 1998.

¹²⁴ Section 75(3)(c) of the Correctional Services Act, 111 of 1998.

¹²⁵ Section 75(3)(c) of the Correctional Services Act, 111 of 1998.

¹²⁶ Section 78(1) of the Correctional Services Act, 111 of 1998.

in the case of such a prisoner being 65 years or older, 15 years¹²⁷; and in the case of dangerous criminals, after having served four fifths of his or her term of imprisonment, or 25 years, whichever is the shorter¹²⁸. The court may decide to grant parole or day parole and it also decides on the conditions of community corrections to be imposed on a prisoner who has been granted parole or day parole, or has been released subject to community corrections¹²⁹. The court may also decide to refuse to release a prisoner subject to community corrections or to refuse to grant parole or day parole¹³⁰. In such a case, the prisoner has the right only to have his or her case reconsidered by the court within two years¹³¹.

4.3.4 Acceptance

A prisoner will not be released on parole or placed subject to correctional supervision, despite a decision to that effect by the Area Manager (as the Commissioner's delegated official), the CSPB or the court, as the case may be, **unless** he or she has accepted the conditions of parole or correctional supervision set and imposed upon him by the Commissioner or Area Manager¹³², the CSPB¹³³ or the court¹³⁴. The acceptance of these conditions by such a prisoner is therefore a *condictio sine qua non* for his

¹²⁷ Section 73(6)(b)(iv) of the Correctional Services Act, 111 of 1998.

¹²⁸ Section 73(6)(b)(v) of the Correctional Services Act, 111 of 1998.

¹²⁹ Section 78(1) read with s 52 of the Correctional Services Act, 111 of 1998.

¹³⁰ Section 78(2) of the Correctional Services Act, 111 of 1998.

¹³¹ Section 78(4) of the Correctional Services Act, 111 of 1998.

¹³² Section 75(7) of the Correctional Services Act, 111 of 1998.

¹³³ Section 75(1)(a) read with s 73(5)(a)(i) of the Correctional Services Act, 111 of 1998.

¹³⁴ Section 78(1) read with s 73(5)(a)(ii), further read with s 75(1)(b) and (c) of the Correctional Services Act, 111 of 1998.

or her release on parole or subject to correctional supervision¹³⁵.

These conditions must be clearly stipulated, must be competent and authorised by statute, it must be in writing and the prisoner must be informed about those conditions in writing in a form and language which will enable the prisoner to understand¹³⁶. Such prisoner must also indicate his or her understanding either orally or in writing by attesting his signature to the written conditions¹³⁷.

If the prisoner is illiterate, this written information, which will include the conditions which will be imposed upon him or her, and the channels of communication for complaints and requests must be explained to him/her by a correctional official in a form and language that he/she understands, and through an interpreter, when necessary¹³⁸.

A prisoner must not only confirm that he has clearly understood this information as well as the importance of the conditions, but he must also **agree** to those conditions and he must furthermore **undertake** 'to co-operate in meeting them'¹³⁹. This constitutes the terms of the written agreement between the prisoner to be released on parole, or subject to

¹³⁵Section 73(5)(b) of the Correctional Services Act, 111 of 1998 simply provides: '(b) Such placement is subject to the prisoner accepting the conditions for placement.' See also s 51(2) of the Correctional Services Act, 111 of 1998.

¹³⁶Section 55(3)(a) and (c) read with s 52 and s 51(2) of the Correctional Services Act, 111 of 1998.

¹³⁷Section 55(3)(a) and (c) read with s 52 and s 51(2) of the Correctional Services Act, 111 of 1998.

¹³⁸See s 55(3)(b) of the Correctional Services Act, 111 of 1998.

¹³⁹Section 51(2) read with s 55(3)(c) of the Correctional Services Act, 111 of 1998.

correctional supervision on the one hand, and the Department of Correctional Services on the other hand, who is ultimately responsible for the administration of the prisons, including parole and correctional supervision, which form part of community corrections¹⁴⁰.

Despite the fact that a decision may have been made by the relevant authority (the Commissioner, the CSPB or the court, as the case may be) to release a prisoner on parole or subject to correctional supervision, no such order can be made, and hence that decision cannot be implemented, unless this written agreement has been concluded between the prisoner concerned and the relevant section within the Department of Correctional Services, which would usually be the Supervision Committee attached to a particular community corrections office¹⁴¹.

4.3.5 Cancellation of parole¹⁴²

Once released on parole, his or her status changes from being a prisoner to a parolee who, although not enjoying unqualified freedom, does enjoy the "core values of liberty"¹⁴³, which core values correspond with those set out and protected in the South African Constitution, and particularly the Bill of Rights¹⁴⁴.

¹⁴⁰ See Chapter VI of the Correctional Services Act, 111 of 1998.

¹⁴¹ Section 51(2) read with s 58 of the Correctional Services Act, 111 of 1998.

¹⁴² See also the section in Chapter 3 under the heading "Cancellation of Parole, Day Parole or Correctional Supervision".

¹⁴³ See the American Supreme Court case of *Morrissey v Brewer* 1972 (408) US S.Ct 471.

¹⁴⁴ See *inter alia* ss 9, 10, 12, 14, 33 and 35 of the Constitution, Act 108 of 1996.

Such a parolee remains obliged to adhere to the imposed parole conditions until the expiry thereof, both in terms of the applicable provisions of the 1998 Correctional Services Act¹⁴⁵, and in particular the written agreement entered into between himself and the CSPB that he/she will adhere to, and work towards the implementation of, the imposed parole conditions. Should the parolee act in breach of any of the imposed parole conditions, the Commissioner of Correctional Services can reprimand him/her, or instruct him or her to appear before the court or CSPB or other body which imposed the community corrections¹⁴⁶, or such parole can be cancelled at the instance of the Commissioner of Correctional Services, on application to the CSPB or the court¹⁴⁷. The CSPB, CSPRB or court¹⁴⁸, as the case may be, is obliged both in terms of the provisions of the 1998 Correctional Services Act, 1977¹⁴⁹, and the Constitution¹⁵⁰, to consider such cancellation '... according to law'¹⁵¹. In practice, it means that the Commissioner, before and when deciding to issue a warrant for 'arrest' of the parolee who allegedly has acted in

¹⁴⁵ Section 73(5) of Act 111 of 1998, read with s 75 and 52 thereof.

¹⁴⁶ Section 70(1) of Act 111 of 1998, read with s 75(2) and (3) thereof.

¹⁴⁷ Section 70 read with s 75(6) and (8) and ss 77 and 78(4) of Act 111 of 1998.

¹⁴⁸ Section 70 read with s 75(6) and (8) and ss 77 and 78(4) of Act 111 of 1998.

¹⁴⁹ Section 75 thereof.

¹⁵⁰ Sections 12, 14, 32, 35(3), and particularly section 33, of the Constitution Act, 108 of 1998. See also the discussion under Chapter 5 *infra*. These provisions correspond with Article 9, and in particular Article 9(4), of the International Covenant on Civil and Political Rights (ICCPR) and Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁵¹ See the Australian case of *Parole Board ex parte Palmer* 1993 (68) A Crim. R 324 at 330-331; see also *Webster v Correctional Services Commissions* QLD SC 1998 (103) A Crim R 63 at 65; see also *R v Hull Prison Board of Visitors* 1979 (1) All E.R. 702 (CA); *Campbell & Fell v UK* 1984 (7) EHRR (Serie A); see also the discussion and references in Chapter 5 *infra*.

breach of his/her parole conditions¹⁵², would do so only on the basis of information or evidence on oath – which usually is in the form of an affidavit placed before him or her – similar to a warrant being issued in terms of the relevant provisions of the Criminal Procedure Act¹⁵³. The Commissioner is obliged to apply his/her mind carefully to the issues raised and the allegations under oath¹⁵⁴. He/she will also have to be satisfied that reasonable grounds exist before issuing such a warrant¹⁵⁵.

These requirements are important since the effect of the warrant will result in the arrest of the parolee and therefore a violation of his/her constitutionally guaranteed rights to freedom and security of his person, which includes the right not to be deprived of his/her freedom arbitrarily or without just cause¹⁵⁶. Such an arrest will also take place before all the evidence has been gathered and tested through cross-examination and hence such parolee's constitutional rights to the presumption of innocence¹⁵⁷ are also applicable.

¹⁵² In terms of s 70(3) of the Correctional Services Act, 111 of 1998.

¹⁵³ Act 51 of 1977, ss 20, 21 and 22. See also s 70(2) of the Correctional Services Act, 111 of 1998.

¹⁵⁴ *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) 152; *Roman v Williams* 1998 (1) SA 270 (C); *Stansfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C); *Minister of Correctional Services v Kwakwa* 2002 (4) SA 445 (SCA) paras 35–36.

¹⁵⁵ See s 70 of the Correctional Services Act 111 of 1998; see also *Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W); see also *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C); Du Toit et al: *Commentary on the Criminal Procedure Act* (Service 12 1993) 5–10, and the cases therein referred to, and *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 465–466; and *Minister of Justice v Ndala* 1956 (2) SA 777 (T).

¹⁵⁶ Section 12 read with s 35(2) of the Constitution, 108 of 1998.

¹⁵⁷ Section 35(2) of the Constitution.

The CSPB or the tribunal¹⁵⁸ responsible for deciding the issue of whether or not to cancel the parole will have to ensure, and be satisfied that:

- (a) all the procedural and constitutional rights of the parolee have been respected and adhered to; and
- (b) that the evidence at the end of its enquiry or hearing is sufficiently cogent to warrant a finding that justifies the cancellation of the parole¹⁵⁹.

If it is not so satisfied, the parolee must be released forthwith to complete the remainder of the parole period until its expiry¹⁶⁰.

4.4 Disciplinary procedures and complaints mechanisms: additional internal rights and remedies of a prisoner

Upon his or her admission to prison, each prisoner has a right to be informed, and the responsible correctional official is obliged to inform the prisoner, of his / her right to choose and consult with a legal practitioner

¹⁵⁸ It could be the Correctional Supervision and Parole Review Board in terms of s 75(8) read with s 77(1) of the Correctional Services Act 111 of 1998, or the Court acting in terms of s 78 of Act 111 of 1998.

¹⁵⁹ Section 75(3) read with s 77(1) and s 78, which prescribes the procedure to be followed as well as the information that must be considered by the CSPB, CSPRB or the Court, as the case may be.

¹⁶⁰ See s 75(3) read with s 70, further read with ss 77 and 78 of the Correctional Services Act 111 of 1998

and/or his or her right to legal representation at State expense where substantial injustice would otherwise result¹⁶¹.

An illiterate prisoner is furthermore entitled to have this explained to him or her in a language that he or she understands and, if necessary, through an interpreter. The prisoner must confirm that he or she has understood the information that has been explained to him or her¹⁶².

On admission, a prisoner must also be provided with a copy of the applicable rules which apply to him or her, the disciplinary requirements, the authorised channels of communication for complaints and requests, "... and all such other matters as are necessary to enable him or her to understand his or her rights and obligations"¹⁶³.

The correctional official who is authorised to deal with requests and/or complaints, must, after having recorded such complaint or request, deal with it promptly and, in the case of an assault, ensure that the injured prisoner or person gets the necessary medical attention¹⁶⁴. If the prisoner is not satisfied with the action and/or decision taken by the correctional official, he or she may appeal to the Head of the prison, who must then attend to it and attempt to resolve it¹⁶⁵. If this is unsuccessful, and the prisoner is still dissatisfied, the matter must then be referred to the Area

¹⁶¹Section 6(3) read with s 17 of the Correctional Services Act, 111 of 1998.

¹⁶²Section 6(4)(b) and (c) of the Correctional Services Act, 111 of 1998.

¹⁶³Section 6(4)(a) of the Correctional Services Act, 111 of 1998.

¹⁶⁴Section 21 of the Correctional Services Act, 111 of 1998.

¹⁶⁵Section 21(3) of the Correctional Services Act, 111 of 1998.

Manager who assesses the complaint and makes a decision thereon, which decision must be conveyed to the prisoner concerned¹⁶⁶. If the prisoner is still dissatisfied, or not satisfied with the response of the area manager, such prisoner seemingly has a choice of either 'appealing' to the Commissioner for intervention¹⁶⁷ or, secondly, by reporting it to the Independent Prison Visitor (IPV)¹⁶⁸. The IPV must then deal with this problem or complaint in terms of s 93 of the 1999 Correctional Services Act, which includes discussing the complaint with the Head of the Prison or the relevant subordinate official, with the objective of resolving the dispute¹⁶⁹.

If this is unsuccessful, the dispute must be referred to the Visitor's Committee¹⁷⁰.

In urgent matters, including matters where a prisoner has been sentenced by a disciplinary tribunal to solitary confinement, the IPV may refer the matter directly to the Inspecting Judge instead of the Visitor's Committee¹⁷¹. Where the matter or dispute has been referred to the Visitors' Committee¹⁷² and it still cannot be resolved, it must then be

¹⁶⁶ Section 21(3) and (4) of the Correctional Services Act, 111 of 1998.

¹⁶⁷ The right of the prisoner to approach the Commissioner, and the latter's power to intervene, is derived from s 24(7) of the Correctional Services Act, 111 of 1998, although the latter provision is stipulated in the context of disciplinary proceedings and, in particular, a grievance by the prisoner against a disciplinary tribunal's decision.

¹⁶⁸ Section 21(5) read with s 24(7) of the Correctional Services Act, 111 of 1998.

¹⁶⁹ Section 93(1)(d) of the Correctional Services Act, 111 of 1998.

¹⁷⁰ Section 93(5) and s 94 of the Correctional Services Act, 111 of 1998.

¹⁷¹ Section 35 read with s 90(2) and 2 93(5) of the Correctional Services Act, 111 of 1998.

¹⁷² In terms of s 93(5) of the Correctional Services Act, 111 of 1998.

referred to the Inspecting Judge who makes a decision which will be final¹⁷³.

Disciplinary proceedings against a prisoner are either conducted by the head of the prison or a disciplinary official who is given authority¹⁷⁴ to impose various penalties for disciplinary infringements¹⁷⁵.

The prisoner has the right at such disciplinary hearing to refute the allegation or allegations against him or her¹⁷⁶. He or she does not have the right to representation¹⁷⁷. He or she has the right to be informed of the allegation or allegations against him or her in writing and the right to be present throughout the hearing¹⁷⁸. He or she has the right to be heard, to cross-examine and to call witnesses¹⁷⁹. He or she has a right to be given reasons for the decision given by the disciplinary official¹⁸⁰.

Whenever a decision has been taken by a disciplinary tribunal in respect of a prisoner who has committed a disciplinary infringement, such prisoner has the right to take the decision on review to the Commissioner, who may confirm or set aside the decision or penalty of the disciplinary

¹⁷³Section 90(2) read with s 93(4) of the Correctional Services Act, 111 of 1998.

¹⁷⁴In terms of s 24 of the Correctional Services Act, 111 of 1998.

¹⁷⁵Section 22 read with sections 23 and 24 of the Correctional Services Act, 111 of 1998.

¹⁷⁶Section 24(2) of the Correctional Services Act, 111 of 1998.

¹⁷⁷Section 24(2) of the Correctional Services Act, 111 of 1998.

¹⁷⁸Section 4(a) and (b) of the Correctional Services Act, 111 of 1998.

¹⁷⁹Section 24(4)(c) of the Correctional Services Act, 111 of 1998.

¹⁸⁰Section 24(4) (d) of the Correctional Services Act, 111 of 1998.

tribunal and substitute it for an appropriate order¹⁸¹.

If, after the decision of the Commissioner is made known to the prisoner, and he/she is still dissatisfied with that decision, the Commissioner can then refer it to the IPV, who deals with it in terms of s 93 of the 1998 Correctional Services Act (ie he/she must try to resolve it principally by means of mediation)¹⁸².

In cases where solitary confinement is imposed upon the prisoner pursuant to a disciplinary hearing, the Commissioner must refer that matter directly to the Inspecting Judge and such prisoner must not be placed in solitary confinement until the decision of the Inspecting Judge has been taken and is known to such a prisoner¹⁸³.

4.5 Conclusion

Parole in South Africa is a multi-staged process¹⁸⁴ that involves essentially three stages, namely the pre-parole stage, the parole granting stage and the post-parole granting stage.

The **pre-parole** stage refers to and deals with:

¹⁸¹Section 24(7) of the Correctional Services Act, 111 of 1998.

¹⁸²Section 21(5) read with s 93 of the Correctional Services Act, 111 of 1998.

¹⁸³Section 25 read with s 35, s 19(2) and s 93(5) of the Correctional Services Act, 111 of 1998.

¹⁸⁴See the discussion under paragraph 4.3 above.

- (a) The **assessment** procedures of prisoners as it was/is practised under the 1959 Correctional Services Act and under the 1998 Correctional Services Act;
- (b) The **consideration** of prisoners for release on parole, again both in terms of the 1959 Correctional Services Act (by virtue of s 136 – the transitional provision of the 1998 Correctional Services Act) and the 1998 Correctional Services Act. Since it immediately precedes the recommendation and/or decision to grant parole, this stage necessarily includes an analysis of the actual parole procedure itself, including the parole boards, its functions and powers. It also includes representations, submissions and/or arguments by and/or on behalf of the prisoner to the parole board, whether written, oral or both, or via statements, affidavits, testimonials etc;
- (c) And the **parole hearing** itself, the form it takes, its procedure, the role and power of the parole board and its officials, and the rights and remedies, if any, of the prisoner.

The next stage is the recommendation by and/or the decision of the parole board and/or CSPB to grant and/or refuse parole¹⁸⁵. This would entail an evaluation of the manner in which the particular recommendation and/or decision was arrived at, the criteria that was used, an assessment

¹⁸⁵ See the discussion *infra*. See also ss 73 and 74 of the Correctional Services Act 111 of 1998.

of the reasons for their recommendation and/or decision, if any, especially where it is negative in the sense that no parole has been recommended for and/or granted to a particular prisoner.

The assessment, recommendation and the ultimate decision by either the Commissioner, the CMC, the CSPB, the CSPRB and/or the court¹⁸⁶ constitute conduct by a public official or tribunal and, as such, subject to review either in terms of the Constitution, the common law or the PAJA¹⁸⁷. It is trite that not every exercise of a public power will qualify as administrative action and therefore reviewable under PAJA or s 33 of the Constitution¹⁸⁸. If these assessments, recommendations or decisions of the CMC, the CSPB, the Commissioner the CSPRB or the Court do not qualify as administrative action, it will still be subject to review in terms of the constitutional principles of legality (lawfulness)¹⁸⁹ and reasonableness¹⁹⁰ and/or the established common law review grounds.¹⁹¹

¹⁸⁶ See the discussion under paragraph 4.3 above.

¹⁸⁷ See the discussion under paragraph 4.3 above.

¹⁸⁸ Hoexter *op cit* (n 34) 115–116. The author correctly submits that '... the practical effect of the elaborate definition in the PAJA (of administrative action) is to exclude much of what would have been reviewable under the 1994 Constitution'.

¹⁸⁹ See *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of RSA* 2000 (2) SA 674 (CC); *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 97. See, generally, Hoexter *op cit* (n 34) 225, para 51 where the author succinctly summarises it as follows:

The requirement of lawfulness of administrative action ... coincides completely with the content of the constitutional principle of legality ... This principle is an aspect of the rule of law, one of the founding values of our constitutional order and the mainspring of administrative law. The legality principle is also implicit in the South African Constitution, and applies to all exercises of public power, thus providing an essential safeguard when action does not qualify as "administrative action" for the purposes of PAJA or the Constitution.

¹⁹⁰ See Hoexter *op cit* (n 34) 293, 307–309, 321–323. See also the discussion in Chapter 5 *infra* under 'Reasonableness'.

¹⁹¹ See Hoexter *op cit* (n 34) 22–29; 108–113; 115–116; 167–168; 184–191; 216–218. See also *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the RSA* 2000 (2)

In the event of a positive recommendation or decision to grant parole, it is followed by the acceptance of the prescribed conditions¹⁹² by the prisoner in writing, in the absence whereof he/she would not be released on parole or subject to correctional supervision, despite a positive recommendation or decision to that effect.

The effect of a positive recommendation and/or decision to grant parole to the prisoner would result in the release of such a prisoner from a state of imprisonment to a state of freedom. This freedom of the prisoner is, however, subject to conditions to which he or she must adhere, which encumbers that state of freedom of the prisoner until the last day of the actual prison term imposed on such a prisoner (ie when such a prisoner is no longer subject to parole, with the total prison term having come to an end) or until such parole is revoked. In the case of life sentenced prisoners, such state of freedom remains circumscribed for the rest of his or her natural life, or until cancellation of that parole (usually as a result of a breach of one or more of the parole conditions).

The effect of a negative recommendation and/or decision (i.e. not to grant parole) would inevitably involve an evaluation of the internal

SA 674 (CC) paras 44, 45 and 85; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 20-22; *Johannesburg Stock Exchange v Witwatersrand Nigel (Pty) Ltd* 1988 (3) SA 132 (A) 152; *Traub case supra*; *Nortje and others v Minister of Correctional Services and others* 2001 (3) SA 472 (SCA); *Minister of Correctional Services and others v Kwakwa and another* 2002 (4) SA 445 (SCA); *Administrator Transvaal and Others* 1989 (4) SA 731 (AD) 756.

¹⁹² See ss 51(1)(c), 51(2), 73 of the Correctional Services Act 111 of 1998.

remedies of the affected prisoner against such recommendation and/or decision as well as a consideration and description of the external remedies available to the aggrieved prisoner (e.g. by bringing an application for it to be reviewed and set aside).

The last stage of this parole process is the post-parole granting stage, i.e. when the prisoner's status has become one of parolee. During this stage the prisoner's status differs materially from his/her status before being granted parole. In this last stage the prisoner is in an actual state of freedom, albeit circumscribed by certain conditions to which he or she must adhere for the duration of the parole period, ie until expiration of his or her actual term of imprisonment. This stage involves *inter alia* the whole procedure regarding the cancellation of parole, where a parolee has allegedly broken one or more of his or her parole conditions¹⁹³. This stage also includes the role played by, and the function of, the supervision committee attached to the community corrections office in terms of the 1998 Correctional Services Act¹⁹⁴, its report and/or recommendations to the Commissioner of Correctional Services and/or the CSPB regarding whether a parolee's parole should be cancelled or not, and the determination of the rights and/or remedies of the parolee in that context.¹⁹⁵ This stage furthermore involves the powers of the Commissioner of Correctional Services to issue a warrant of arrest by the

¹⁹³ See, generally, Chapter VI of the Correctional Services Act, 111 of 1998, as discussed in Chapter 3 above under the heading "Cancellation of Parole, Day Parole or Correctional Supervision", and in this Chapter 4 above.

¹⁹⁴ See s 51 read with s 58 of the Correctional Services Act, 111 of 1998.

¹⁹⁵ See Chapter VI of the Correctional Services Act, 111 of 1998, particularly ss 70, 71 and 72.

Commissioner and the legal requirements therefore¹⁹⁶, the subsequent enquiry and/or investigation into any alleged breach of a parole condition committed by the parolee, and the preliminary/provisional detention of such a parolee, the hearing, if any, to determine whether a breach of a parole condition has in fact occurred, the procedure to be adopted there as well as the legal requirements, followed by the decision and/or recommendation of that tribunal which may lead to the eventual cancellation of such a parolee's parole, and the rights and remedies of the parolee in this whole process.¹⁹⁷

These are inter-dependant stages of the parole process, preceding and including the actual granting or refusal of parole to a prisoner, during which rights and obligations are conferred in a continuous process on both the prisoner and Department of Correctional Services officials (DCS) and/or the Correctional Supervision and Parole Board or Review Board (CSPB / CSBRB). These rights, obtained during these stages, and throughout the parole process are crucial, from the prisoner's perspective, in determining whether or not a specific prisoner qualifies for parole. Its recognition and enforcement throughout the process are therefore very important.

¹⁹⁶ See ss 70(1)(c) and (4) of the Correctional Services Act, 111 of 1998 read with s 71(3) of the Correctional Services Act, 111 of 1998.

¹⁹⁷ See Chapter VI of the Correctional Services Act, 111 of 1998, particularly ss 70, 71 and 72 thereof. An analysis of the complexities of the cancellation of parole does not form the subject matter of this research.

As such, each right accrued to and/or enforceable by, a prisoner, during each of the different stages is crucial since it may eventually impact materially on the decision of the responsible authority (the Area Manager, Commissioner, the CSPB or the Court¹⁹⁸) whether or not to release a prisoner on parole. The sum total of these rights of the prisoner so accrued during all these stages, if these rights had been given effect to and respected by the DCS officials or CSPB, is that it can serve as a basis of a **legitimate expectation** as an enforceable right, on the part of the affected prisoner to be released on parole before the expiry of his or her actual prison term¹⁹⁹.

¹⁹⁸ See s 75 read with s 78 of the Correctional Services Act, 111 of 1998.

¹⁹⁹ See the discussion hereof in the following Chapter 5.

CHAPTER 5
IS PAROLE A RIGHT OR A PRIVILEGE?

The essential question of this thesis is whether a prisoner acquires an enforceable right to be released on parole after having served the non-parole period or the statutorily determined minimum period of imprisonment. The focus is on the status of the prisoner and the process relating to his/her continued incarceration in the period starting from when his or her non-parole period has ended to the actual date of his or her release from prison according to the sentence imposed on him by the sentencing judge/magistrate.

5.1 The approach under English law and other jurisdictions

(a) English Law

The English practice in this regard, and which is very instructive for the South African penal practice, has been set out by Lord Mustill in *Doody v Secretary of State for the Home Department and others*¹. This case gives an overview of the developments within the English penal system at the time which resemble, to a great extent, similar developments in South African penal law and practice. In dealing with a review application by a life sentenced prisoner against the Secretary of State for the Home

¹ (1993) 3 All ER 92 (HL) at 100 D-E and 103 C.

Department to have the latter's decision reviewed and set aside, the court also approached a life sentence as an indefinite sentence, and as such, divided it into two components, namely the 'penal element' and the 'risk element'². The penal element refers to a determinate number of years the prisoner must serve appropriate to the nature and gravity of the offence. The risk element refers to that period (which could be determinate or indeterminate) which the prisoner begins to serve once the penal element is exhausted. Lord Mustill stated further that the law and practice in England at the time '... now requires that in a great majority of cases the judge will quantify and enounce the penal element and will thereby fix directly the minimum period in custody the offender must serve, before the question whether it is safe to release him becomes decisive'³. Lord Mustill quoted the following passage from the decision of Shaw LJ in *Payne v Lord Harris of Greenwich*:

"A person sentenced to imprisonment could not expect to be released before the expiry of his sentence. Since the introduction of parole he may hope that part of his sentence may be served outside prison. If his offence was of a heinous kind, even that hope will be a frail one."⁴

Lord Mustill, referring to this passage as '... a crucial passage, concerning the grant of parole in general but particularly germane in the present context ...' expressed his disagreement with this approach as follows:

"This reasoning is however much weakened now that the

² (1993) 3 All ER 92 (HL) at 98.

³ (1993) 3 All ER 92 (HL) at 93, para c.

⁴ (1981) 2 All ER 842 (HL) at 850. Emphasis added.

indeterminate sentence is at a very early stage formally broken down into penal and risk elements. The prisoner no longer has to hope for mercy but instead knows that once he has served the "tariff" the penal consequences of his crime have been exhausted."⁵

In South Africa, the Supreme Court of Appeal⁶ has confirmed the lawfulness and the constitutionality of the imposition of non-parole periods of imprisonment upon convicted criminals as statutorily prescribed and/or judicially imposed⁷. It has also essentially followed the same approach and reasoning of its English counterpart in the cases of *Doody v Secretary of State for the Home Department and Others*⁸ and *R v Secretary of State for the Home Department Ex Parte Pierson*⁹.

The South African Supreme Court of Appeal in *S v Bull and another; S v Chavulla and others*¹⁰ considered the constitutionality of *inter alia* ss 286A and 286B of the Criminal Procedure Act, 1977¹¹. These provisions

⁵ (1981) 2 All ER 842 (HL) at 103 B–E. Emphasis added. See also *R v Secretary of State for the Home Department Ex Parte Pierson* 1996 (1) All ER 837 (CA).

⁶ *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 521–523; *S v Bull and Another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) 552–554.

⁷ See s 73 of the Correctional Services Act, 111 of 1998 and ss 286A and 286B of the Criminal Procedure Act 51 of 1977.

⁸ See s 73 of the Correctional Services Act, 111 of 1998 and ss 286A and 286B of the Criminal Procedure Act 51 of 1977; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 521–523; *S v Bull and Another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) 552–554; see also *Nortje and others v Minister of Correctional Services and Others* 2001 (3) SA 472 (SCA) at 480; *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 445 (SCA).

⁹ See n 5 above. See also s 73 of the Correctional Services Act, 111 of 1998 and ss 286A and 286B of the Criminal Procedure Act 51 of 1977; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 521–523; *S v Bull and Another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) 552–554; see also *Nortje and Others v Minister of Correctional Services and Others* 2001 (3) SA 472 (SCA) at 480; *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 445 (SCA).

¹⁰ See s 73 of the Correctional Services Act, 111 of 1998 and ss 286A and 286B of the Criminal Procedure Act 51 of 1977; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 521–523; *S v Bull and Another; S v Chavulla and Others* 2002 (1) SA 535 (SCA) 552–554; see also *Nortje and Others v Minister of Correctional Services and Others* 2001 (3) SA 472 (SCA) at 480; *Minister of Correctional Services v Kwakwa and Another* 2002 (4) SA 445 (SCA).

¹¹ The Criminal Procedure Act 51 of 1977.

deal with dangerous criminals and the imposition of indeterminate sentences and life sentences and thus, in effect, fixed non-parole periods imposed upon such criminals. The Supreme Court of Appeal upheld the constitutionality of these sections, but qualified it thus:

"Because ss 286A and 286B do not provide for any review during the initial period, the court, when fixing that period in terms of s 286B(1)(b) should have regard to what sentence it would have imposed as a determinate sentence. If that sentence would have been, say 20 years imprisonment, the accused would have been eligible for parole after 10 years and if the sentence would have been one of life imprisonment the accused could have been released on parole after 20 years (according to the current regime). In my view the initial period in excess of half the term of imprisonment which would have been imposed, or in excess of 20 years if a sentence of life imprisonment would have been imposed, could be unjustified as it would deprive the accused of the right to be considered for parole when he might no longer be dangerous."¹²

This case not only confirms the importance of the principle of parole in the South African criminal justice system, but also its constitutional necessity in that it prevents an indeterminate and/or life sentence in South Africa from being cruel, inhumane and degrading and thus unconstitutional. Parole, or the possibility thereof, saves these prison sentences from violating s 12 of the Constitution of the Republic of South Africa.¹³

Lord Mustill's *dictum* and approach in the *Doody* case¹⁴ has been

¹² *S v Bull and Another; S v Chavulla and Others supra* (n 6) 552–554. This matter was decided before the operation of the Correctional Services Act, 111 of 1998. See also *S v Tsoeb* 1996 (1) SACR 390 (NmS) 399–401; *S v Mhlakaza supra* (n 6); *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

¹³ *S v Bull and Another; S v Chavulla and Others supra* (n 6) 552, para 23; s 12(1)(c) of the Constitution, Act 108 of 1998 refers to punishment that is cruel, inhumane and degrading.

¹⁴ See n 1 above.

referred to with approval by South African courts.¹⁵

It is submitted that the *Doody* judgment signifies at least three important principles. Firstly, once a prisoner has served his or her 'penal term', ie the non-parole period, such prisoner has served the penal consequences of his crime and his or her possible release on parole is more than a 'mere hope'.¹⁶ Secondly, the crucial period within which to determine the prisoner's eligibility for parole and whether or not to release a prisoner on parole, is that period which the prisoner begins to serve after he/she has served the non-parole period, which is also referred to as the 'risk element'.¹⁷ Thirdly, although his Lordship does not state it explicitly, this approach implicitly acknowledges the existence of a substantive legitimate expectation in addition to the usual and accepted procedural legitimate expectation.¹⁸

Until recently, the existing English law only acknowledged the

¹⁵ See Van Zyl J in *Marais v Democratic Alliance* 2002 (2) All SA 424 (C); 2002 (2) BCLR 171 (C); 2003 (10) BCLR 950 (C) para 69; see also the SCA cases of *Nortje & Another v Minister of Correctional Services and others* 2001 (3) SA 472 (SCA), *Minister of Correctional Services v Kwakwa and another* (n 8, n 9).

¹⁶ *Doody v Secretary of State for the Home Departments and Others* (n 1).

¹⁷ *Doody v Secretary of State for the Home Departments and Others* (n 1) 98, para 3.

¹⁸ See also the bold arguments of Isobear Southwood, 'Legitimate Expectation: A Case of Paradigm Lost' (1998) 13 *SA Public Law* 197 at 210 *et seq.* who argues that essentially there is no such thing as a procedural expectation, because in the cases where an expectation is apparently procedural, the benefit to be derived from that procedure is actually substantive. With reference to the English case of *Council of Civil Service Unions v Minister of Civil Service* (see n 24) at 943–944, the author argues that the expected benefit herein was really the continued freedom to be a member of a trade union, rather than the benefit of being consulted. See also Hoexter *Administrative Law in South Africa* (2007) 382.

procedural legitimate expectation.¹⁹ According to Professor Robert E Riggs²⁰, the doctrine of legitimate expectation '... is but one aspect of the duty to act fairly'²¹, but its origins and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness. According to Riggs:

"... [t]he legitimate expectation doctrine has become a rationale for granting judicial review of administrative decisions in circumstances where the applicant had good reason to anticipate (ie a legitimate expectation) that the decision would be favourable or at least that he would be properly consulted before the adverse decision was made."²²

Accordingly, he is of the view that:

"[t]he doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations. That is the injured person may have legitimately expected a substantive benefit, such as renewal or retention of his cab driver's licence; or he may, rather, have expected an adequate opportunity to make representations before any unfavourable decision was made. Either expectation, if found to be "legitimate" is sufficient to invoke the doctrine..."²³

Thus, the duty to act fairly is seen as part of the doctrine of legitimate expectation but is confined to procedural fairness.²⁴

This position under English law (including other common law

¹⁹ *Administrator Transvaal and Others v Traub and Others* 1989 (4) SA 731 (AD) 756, per Corbett CJ. See also Riggs, 'Legitimate Expectation and Procedural Fairness in English Law' (1988) 36 *American Journal of Comparative Law* 395. See also Moses, 'Parole: Is it a Right or a Privilege' (2003) 19 *SAJHR* 263 at 266–269 for an exposition of the application of the doctrine of legitimate expectation in the context of parole in South African law, with reference to relevant case law. See also Hoexter *Administrative Law in South Africa* (2007) 382–385.

²⁰ Riggs *op cit* (n 19) 395.

²¹ Riggs *op cit* (n 19) 395.

²² Riggs *op cit* (n 19) 403.

²³ Riggs *op cit* (n 19) 404.

²⁴ *Council of Civil Service Union and others v Minister of Civil Service* 1984 (3) All ER 935 (HL) per Lord Diplock. See also Riggs 'Legitimate Expectation and Procedural Fairness in English Law' (1988) 36 *American Journal of Comparative Law*: 395 at 405.

jurisdictions such as Hong Kong²⁵) has been radically changed, following the decision by the Court of Appeal in *R v North and East Devon HA Ex Parte Coughlan*²⁶ which held that a legitimate expectation of a benefit which was substantive and which was induced by a public body (the health authority *in casu*) is legally enforceable, and frustrating that expectation might be so unfair as to amount to an abuse of power by the relevant public body. In such circumstances the court's role, when dealing with a claim based on legitimate expectation, would be as follows²⁷:

"[T]he starting point has to be asked what in the circumstances the member of the public could legitimately expect ... Where there is a dispute as to this, the dispute has to be determined by the court ... This can involve a detailed examination of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.

There are at least three possible outcomes: (a) The Court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it weight it thinks right, but no more, before deciding whether to change course. Here the Court is confined to reviewing the decision on **Wednesbury** grounds²⁸. This has been held to be the effect of changes in policy in cases involving the early release of prisoners: see *In re Findlay* [(1985) AC 318]; *R v Secretary of State for the Home Department ex p. Hargreaves* [(1997) 1 W.L.R. 906]. (b) On the other hand, the Court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the Court itself will require the **opportunity for consultation** to be given unless there is an **overriding** reason to resile from it in which case the Court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the Court

²⁵ See *Ng Siu Tung and others v Director of Immigration* 2002 (1) HKLRD 561, analysed in the *Hong Kong Law Journal* by Andrew S Y Li and Hester Wai-San Leung, 32 HKLJ 471 (2002 Sweet) 471–495.

²⁶ (2001) QB 213.

²⁷ *R v North and East Devon HA Ex Parte Coughlan* (n 26).

²⁸ In English law, this is the generally known reference to the concept of reasonableness as set out and defined in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223 at 229. The equivalent South African case would be *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (AA).

considers that a lawful promise or practice has induced a legitimate expectation of a **benefit which is substantive**, not 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. Here, once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied on for the change of policy.”²⁹

The court held further that although the public body (the Health Authority) could resile from the expectation which it had induced, it would only be allowed to do so ‘... if, and only if, an overriding public interest required it’³⁰. The court held that, on the facts of the case, the Health Authority failed to prove the existence of such an overriding public interest and therefore it was held to ‘... its promise to Ms Coughlan that Marden House would be her home for life ...’³¹.

This court of appeal therefore firmly established the principle that a legitimate expectation of a substantive benefit, once established, is enforceable in English law and that a public authority which induced that legitimate expectation could only resile from it if it was proven that there was an overriding public interest that required it, to resile from that promise.

²⁹ Emphasis in the original, case references inserted.

³⁰ *Coughlan supra* (n 27) 52.

³¹ *Coughlan supra* (n 27) 52. This case is highly acclaimed as having ‘given a new impetus to the development of substantive legitimate expectation’; See Eversley ‘Legitimate Expectation and the Creation of Procedural and Substantive Legal Rights in Commonwealth Caribbean Public Law’ (2004) 33, *Common Law World Review* 332 to 351 at 335; and as ‘the watershed in the development of the doctrine of substantial legitimate expectation’ by Andrew S Y Li and Hester Yai-San Leung, ‘The Doctrine of Substantive Legitimate Expectation: The Significance of *Ng Siu Tung and Others v Director of Immigration*’ HKLJ 2002 also cited as 32 HKLJ 471 (2002) at 475.

Richard Clayton³², having analysed this decision, and having compared it with prior decisions, also dealing with the concept of legitimate expectation, tries to draw a distinction between 'policy induced expectations' and 'the doctrine of legitimate expectations'³³ and contends therein: 'that policy induced expectations should not properly be regarded as illustrations of the doctrine of legitimate expectations'³⁴. According to him, policy induced expectations rather form part of 'the principle of consistency' which differs from the doctrine of legitimate expectations insofar as it '... ensures that real weight is given to the policy promulgated whilst acknowledging that a public body has a right to alter policy provided it does not act irrationally'³⁵.

This distinction seems to be rather artificial, because the author himself acknowledges that a policy *per se*, can indeed induce an expectation or expectations³⁶. Given that acknowledgment there is no merit in the contention that because it is a policy, it should therefore be taken out of the realm of legitimate expectations and/or that the court ought not to deal with it as part of, and/or in the context of, having induced a legitimate expectation on the part of the person or persons to whom the policy applies. The basis for this artificial distinction seems to be the author's reluctance³⁷ to acknowledge the fact that the English and

³² R Clayton 'Legitimate Expectations, Policy and the Principle of Consistency' (2003) *CLJ* 62.

³³ Clayton *op cit* (n 32) 97, 105.

³⁴ Clayton *op cit* (n 32) 97.

³⁵ Clayton *op cit* (n 32) 105.

³⁶ Clayton *op cit* (n 32) 97.

³⁷ Clayton *op cit* (n 32) 104, 105.

common law courts have not confined their role merely to procedural legitimate expectations, but have extended it to 'a legitimate expectation of a benefit which is substantive ...'³⁸.

Although it has been said that the law as set out in the *Coughlan* matter is 'not ... entirely unproblematic'³⁹, in English law, it has done what *Roman v Williams NO*⁴⁰ has done in South African administrative law: that the role of the courts is no longer confined to determining simply whether there was procedural fairness; its role has been extended to include dealing with the merits and substance of a decision as well⁴¹. In the context of legitimate expectation, the role of the court is no longer confined only to procedural legitimate expectations, it has been extended to include substantive legitimate expectations⁴². As the court, in *Coughlan*,

³⁸ *Coughlan*, *supra* (n 26) para 57.

³⁹ See Hoexter *op cit* (n 18) 384.

⁴⁰ 1998 (1) SA 270 (C); 1997 (9) BCLR 1267 (C), 1278 F–I.

⁴¹ *Coughlan* *supra* (n 26) paras 56, 57; *Roman v Williams NO* *supra* (n 40). It must be noted, however, that the decision in *Roman v Williams* *supra* centred around a provision in the 1993 Constitution (s 24 of Act 200 of 1993) which remained in force as a transitional provision under the 1996 Constitution (Act 108 of 1996) (item 23(2)(b)) which was subsequently, in 2000, replaced by the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Although this case was decided within the context of the language of the Interim Constitution of South Africa, s 24 of Act 200 of 1993, this approach of the court's role being extended to an assessment of the merits of a decision and not merely the procedural aspects thereof is in accordance with the view expressed by commentators such as Professor C Hoexter (*op cit* (n 19) 192, 193, 305, 317–318) and Isobeau Southwood *op cit* (n 18), and acknowledged by the Constitutional Court (the highest court on constitutional matters in South Africa) in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 43–456; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 109. In the Labour Appeal Court of South Africa this approach was accepted as an inevitability, in *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 306 (LAC) para 32. See also *Stansfield v Minister of Correctional Services* 2004 (4) SA 43 (C) where, it is submitted, the underlying ratio of the Court's decision is in accordance with this approach, namely an assessment of the merits of the decision of the functionary to determine whether it was fair or not. See also the discussion under the heading 'Parole must also comply with the requirement of reasonableness' *infra*.

⁴² However, as pointed out in the submissions dealing with legitimate expectation below, the South African courts are very reluctant to introduce the substantive legitimate expectation into

explains: 'Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied on for the change of policy'⁴³.

In this regard, English law therefore accords with '... the free standing principle of substantive legitimate expectation as established in EU law' and which principle is '... firmly rooted in European law [and as such] is likely to play a progressively more important part in English law, and the more so because it is closely allied to fairness....'⁴⁴

The approach adopted in the *Coughlan* matter⁴⁵ is but a variation of the proportionality test⁴⁶ as defined in the Canadian case of *R v Oakes*⁴⁷ where it was set out as follows:

"Once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R v Big M Drug Mart Limited* ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures

South African law. See *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 27 *et seq* and *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA).

⁴³ *Coughlan supra* (n 26) para 57.

⁴⁴ Wade & Forsyth *Administrative Law* 8 ed (2000) 373.

⁴⁵ Wade & Forsyth *Administrative Law* 8 ed (2000) 373 para 57.

⁴⁶ See Wade & Forsyth *Administrative Law*, 8 ed (2000) 368–370 where the authors set out the similarities between the English concept of reasonableness and the proportionality test, and suggest (at 369) that: '... proportionality is therefore a more exacting test in some situations ... but the House of Lords – the highest court in England – has declined to accept it as part of the English law because it requires ... the court to substitute its own judgment for that of the proper authority.' Despite this approach adopted by the House of Lords, proportionality is in fact being applied in English law which is '... evidenced already in the numerous references to [it] which judges are making freely, and which are paving the way for its general acceptance' (at 370). Emphasis added.

⁴⁷ (1986) 1 SCR 103, (1986) 26 DLR (4th) 200, at 228 (DLR).

adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd.* Third, there must be a proportionality between the **effects** of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".

The proportionality test has been accepted as part of South African law⁴⁸ and in fact has been applied in the case of *Roman v Williams NO*⁴⁹.

(b) Canadian Law

In Canada, there is also no automatic right (constitutional or otherwise) to be released on parole. The nature of the right of the prisoner in this context has been set out as follows:

"This Board [Parole Board] and the Appeal Division of the Board, are both entrusted with the duty not only to consider the release of prisoners on parole, and the granting or revocation thereof, and the appeals relating thereto, but in doing so, to ensure that decisions are fair and equitable and comply with the legislation and the Charter."⁵⁰

⁴⁸ See generally Erasmus, 'Limitation and Suspension. Reasonableness, Necessity and Proportionality' in Van Wyk, Dugard, De Villiers & Davis (eds), *Rights and Constitutionalism: The New South African Legal Order* (1994) 648–650, para 2.8. See also De Ville 'Proportionality as a Requirement of the Legality in Administrative Law in terms of the New Constitution' 1994 SA *Public Law* 360 to 377. Hoexter *op cit* (n 19) 309 regards it as one of the elements of reasonableness. The other element is rationality.

⁴⁹ 1998 (1) SA 270 (C); 1997 (9) BCLR 1267 (C). This test coincides with the principle of 'proportionality' suggested by Hudson *Penal Policy and Social Justice* (1993) 82, and with the concept 'rationality' in rational parole decisions advocated by Gottfredson and Gottfredson *Decision Making in Criminal Justice: Toward the Rational Exercise of Discretion* (1988) 2, 4, 7, 240–241. See also Hoexter *op cit* (n 19) 309.

⁵⁰ *Mooring v Canada (National Parole Board)*, 93 CCC (3d) 415 (1995) 437 (per Lambert JA), emphasis added. See also Moses *op cit* (n 19) 269. See also, in the South African context, *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 29.

It was also held that a decision of the Parole Board declaring an inmate ineligible for placement on parole amounted to a 'punishment' as contemplated in s 11(i) read with s 7 of the Canadian Charter of Rights and Freedoms and, since it affected the 'liberty interest' of a person, the fundamental rule of law '... that an accused must be tried and punished under the law in force at the time the offence is committed'⁵¹ applied.

(c) Australian Law

In Australia, prisoners have a right to apply for release on parole in accordance with certain procedures. Once an application is made, there is a corresponding, legally enforceable duty on the Parole Board to decide such an application. The Parole Board not only has the duty to consider the application, but must also do so 'according to laws'.⁵²

⁵¹ *Mooring v Canada National Parole Board* *supra* (n 50) 437 *et seq*; see also *R v Ferris* 1995 (93) CCC (3d) 497, 499 c—e, with reference to *R v Gamble* 1988 (45) CCC (3d) 204. Although this case deals with the principle against retrospective application of transitional provisions on inmates where it amounts to a greater punishment, it is authority for the fact that a person has a liberty interest in having his or her parole eligibility determined in accordance with the law at the time of the commission of the offence.

⁵² *Parole Board ex parte Palmer* 1993 (68) A Crim R 324 (QLD SC) 330–31. See also *Webster v Correctional Services Commissions* 1998 (103) A Crim R 63 (WLD SC) 65, where a decision of the Parole Board was set aside for failing to exercise their discretion according to law, since they refused to release a prisoner on parole, despite his good reports and credits, for the reason that he still protested his innocence and refused to attend a specific programme on the basis that he did not commit that crime and therefore did not need that therapy. The Court referred the matter back to the Parole Board for its proper consideration with a further indication that it ought to consider granting parole. See also *Walker v Corrective Services* 1998 (104) A Crim R (QLD SC) 127. See also *Moses op cit* (n 19) 268. See also *Meyer v Iscor Pension Fund* 2003 (2) SA 715 SCA para 27; *SA Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA).

(d) The European Court of Human Rights

In Europe, in the particular context of whether the granting of remission and consequent release on parole constitute a right or a privilege, the European Court of Human Rights⁵³ referred with approval to *R v Hull Prison Board of Visitors*⁵⁴. This court held that it does not matter whether the granting of remission and the subsequent release of a prisoner on parole amounts to a right or a privilege, the forfeiture of remission in effect amounts to a punishment, the ultimate result whereof is a prisoner's deprivation of liberty, which affects his or her 'liberty interest'.⁵⁵ This affords such a prisoner the right or remedy to invoke the guarantees of article 6 of the European Convention of Human Rights⁵⁶.

⁵³ See *Campbell & Fell v United Kingdom* 1984 (7) EHRR 165 paras 72–3.

⁵⁴ (1979) 1 All ER 702 (CA).

⁵⁵ *R v Hull Prison Board of Visitors* *supra* (n 54) para 72. This approach is identical to the one adopted by the US Supreme Court in *Morrissey v Brewer* 1972 (408) US 471 (S. Ct.); see further the discussion with regard to America, p 208 *et seq*.

⁵⁶ Which reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The European Court of Human Rights in *Weeks v United Kingdom*⁵⁷ also affirmed that, once a prisoner had been granted parole, that amounts to a state of liberty (in similar vein to the American Supreme Court case of *Morrissey v Brewer*⁵⁸), which affords such a parolee the guarantees of art 5 of the European Convention (the right to be free from arbitrary detention):

"Article 5 applies to everyone. All persons whether at liberty or in detention, are entitled to the protection of Article 5, that is to say not to be deprived of their liberty, save in accordance with the conditions specified in paragraph 1 and, when arrested or detained, to receive the benefit of the various safeguards provided by paragraphs 2 to 5 so far as applicable."

Quoted from Council of Europe, Directorate of Human Rights *European Issues: Human Rights in International Law: Basic Text* (1995) 162–63.

⁵⁷ See *Weeks v United Kingdom* 1987 (10) EHRR 293. Article 5 of Convention reads as follows:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) The lawful detention of a person after conviction by a competent court;
 - (b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or where it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

⁵⁸ 1972 (408) US 471.

Moreover, the concept of legitimate expectation is firmly rooted in European law⁵⁹ and the existence of a substantive legitimate expectation is acknowledged and applied as a 'free standing principle ...'⁶⁰ in addition to the procedural legitimate expectation.

(e) American Law

In America, the granting of parole was initially regarded as a privilege to be awarded at the discretion of the Prisons and Parole Board in a parental role:

"From our review of the nature and purposes of parole it can be seen that appellants (parolees) are neither totally free men who are being proceeded against by the government for commission of a crime, nor are they prisoners being disciplined within the walls of a federal penitentiary. They stand somewhere between these two. A paroled prisoner can hardly be regarded as a "free" man; he has already lost his freedom by due process of law and, while paroled, he is still a convicted prisoner whose tentatively assumed progress towards rehabilitation is in a sense being "field tested". Thus it is hardly helpful to compare his rights in that posture with his rights before he was duly convicted. ... Here we do not have pursuer and quarry but a relationship partaking of *parens patriae*. In a real sense the Parole Board in revoking parole occupies the role of parent withdrawing a privilege from an errant child, not as a punishment but for misuse of the privilege."⁶¹

⁵⁹ Wade and Forsyth *op cit* (n 44) (2000) 373.

⁶⁰ *Ibid.*

⁶¹ *Heyser v Reed* 1963 (318) F. 2d 225, 235; 237–38 (DC Cir). See also Carney *Probation and Parole: Legal and Social Dimensions* 257, who still regards parole as a privilege, despite acknowledging that it is a process that not only includes the negative aspects of an unbroken custody, but also included social and reconstructive elements. See also Palmer *Constitutional Rights of Prisoners* (8 ed) Chapter 9 in particular 199 *et seq.* The matter refers *inter alia* to the American Supreme Court case of *Greenholtz v Inmates of the Nebraska Penal and Correctional Complex* 442 US 1 (1979) which held that there is no protected liberty interest in the possibility of parole before the termination of sentence, and that states are not constitutionally required to establish a parole system – it is rather a discretionary decision of the state to determine when an inmate is ready for release before expiry of his/her sentence.

Subsequently, however, the United States Supreme Court, in an unprecedented judgment also described as the 'Morrissey revolution'⁶², held that a person released on parole has attained a 'state of liberty', and as such falls within the protection of the 14th Amendment of the American Constitution where it is being sought to revoke such liberty:

"[t]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberation and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege'. By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal."⁶³

In a later case of *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*⁶⁴, the American Supreme Court rejected the argument that, because the Nebraska Penal Code creates the possibility of parole, that such possibility creates "a reasonable entitlement to be released on parole". This argument was rejected on the basis that a prisoner "has no more than a mere hope" to the "benefit" of release on parole.⁶⁵

⁶² N Cohen *The Law of Probation and Parole* Volume 1 (2 ed) 1999 Ch 1 *et seq* referring to *Morrissey v Brewer* 408 US 471.

⁶³ *Morrissey v Brewer* 1972 (408) US 471 (S.Ct) quoted in Amos & Newman *Parole: Legal Issues / Decision Making / Research* 18–19. See also Abadinsky *Probation and Parole: Theory and Practice* (2006) 400.

⁶⁴ 1979 (442) US 1; 99 S. Ct 2100.

⁶⁵ Quoted in LS Branham and MS Hamden, *Cases and Materials on the Law and Policy of Sentencing and Corrections* (2002) 414–416.

In similar vein, it was held by the same court in a 1985 case⁶⁶ (where the issue was whether the findings of a prison disciplinary board that resulted in the loss of 'good time credits', must be supported by a certain amount of evidence to satisfy the due process requirements) that:

- (a) The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action;
- (b) Where a prisoner has a "liberty interest" in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the prisoner has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. Hence the finding that due process, in this case, requires the presence of some evidence which could support the finding of the prison disciplinary board.

The present position in America is summarised by Cohen as follows:

"Parole is a continuation of custody rather than a termination of imprisonment, and one cannot be simultaneously on parole and imprisoned at the same time ... In virtually all jurisdictions parole is a privilege, not a right. Ordinarily a prisoner has no constitutional right to parole. However, early release statutes may create a liberty interest protected by due process guarantees. When parole is granted, it is simply a grant of permission to serve the remainder of the parolee's sentence outside prison walls while remaining under

⁶⁶ *Superintendent, Massachusetts Correctional Institution, Walpole v Hill* 1985 (427) US 445.

the custody and supervision of the Department of Corrections or some similar agency.”⁶⁷

(f) Indian Law

In India, the approach adopted in cases of a ‘... convict’s application for premature release ...’ (parole) was comprehensively summarised by the High Court in the matter of *Dualat v State of UP (Allahbad High Court) – Lucknow Bench*.⁶⁸

“[I]t is within the domain of the State Government to commute the sentence or release the convict under the Act and it is also settled law that the Court should not stroll into the field of the executive in such matters where the executive has been authorised to take a decision and pass suitable order in accordance with law. ... The U.P. Prisoner’s Release on Probation Act, 1938 ... authorises the State Government to pass final orders. It is the duty of the State Government to pass an order in accordance with law but it cannot be said that the said orders are beyond the scope of judicial review. If any person is aggrieved by the said orders, he may file a petition in this Court under Article 226 of the Constitution of India and then the High Court can scrutinise the said order and if this Court feels that the State action cannot be sustained because it suffers from trivial arbitrariness and is against the evidence and with mala fide intention then, the Court can very well interfere with the said order and has jurisdiction to quash the same.”

In these circumstances, the role of the High Court is set out as

⁶⁷ Cohen *op cit* (n 62) 1-22 – 1-23. This approach corresponds with the custody theory in the USA as explained by Abadinsky *Probation and Parole: Theory and Practice* (2006) 201–202, which is different from the ‘Grace Theory’ and the ‘Contract Theory’. See also Palmer *op cit* (n 61, 237) who refers to a Montana statute (in the United States of America) which provided, *inter alia*, that a prisoner eligible for parole ‘shall’ be released when there is a reasonable possibility that no detriment will result to him or the community, and specified that parole shall be ordered for the best interests of society and when the State Board of Prisons believes that the prisoner is able and willing to assume the obligations of a law abiding citizen – which is the same liberty interest that was protected in the *Greenholtz* decision (see n 61, 64 above).

⁶⁸ 1999 (38) ACC (for Allahbad Criminal Cases) 899 at 903–905 paras 11, 12, 13 and 14.

follows⁶⁹:

- "(i) In cases where the convict moves a Petition directly before the High Court under Article 226 of the Constitution of India, or under Section 492 CR.P.C without approaching the State Government then, the High Court will not entertain the Petition as held by the Hon'ble Supreme Court in the case of Union Territory of Chandigarh v Charan Jeet Kaur (supra) and State of Punjab v Kesar Singh (supra).
- (ii) In the cases where the convict has already approached the State Government and moves an application in accordance with law for premature release and the same has been rejected by the State Government, then, the convict can approach the High Court under Article 226 of the Constitution of India for quashing of the said Order and in these cases it will be proper to [sic] the High Court to issue a direction to the State Government to reconsider the matter after quashing the impugned order of rejection of premature release.
- (iii) In exceptional cases, and where the Court comes to the conclusion that there will be no use to send the matter to the State Government because on the admitted facts, the Petitioner / convict is entitled to be released on licence, then the Court can direct the State Government to release the convict after getting the required conditions fulfilled in accordance with law."

With regard to the latter two sub-paragraphs, the court explains it thus⁷⁰:

"As pointed out above, it will be proper for the Court to quash the order if, the same is found illegal and direct the State to reconsider the matter again but in **exceptional cases**, if, the Court finds that the State has failed to discharge its duty in accordance with the directions of the Court and has not considered the case of the Petitioner in its true perspective and further if, the Court finds that there will be no use in sending the matter to the State Government for reconsideration because otherwise on admitted facts, the convict is entitled to be released and the technical grounds raised

⁶⁹ Dualat *supra* (n 68).

⁷⁰ Dualat *supra* (n 68) 904, para 13, emphasis added.

by the State Government are not sustainable in the eyes of Law then in that cases, this Court, in our opinion, can direct the State to release the convict if, the convict fulfils the other requirements."

This is substantially similar to the remedy afforded an aggrieved party for proceedings for judicial review in South Africa, as set out in s 8(1)(c) of the Promotion of Administrative Justice Act (PAJA),⁷¹ which reads as follows:

- "8(1) The court or tribunal, in proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable, including orders –
- (a) ...
 - (b) ...
 - (c) setting aside the administrative action and –
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases –
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation; ..."

The concept of legitimate expectation in Indian law is said, by the Supreme Court in India, to have developed both in the context of reasonableness and natural justice⁷².

In the case of *National Building Construction Corporation v S*

⁷¹ Act 3 of 2000.

⁷² *National Building Construction Corporation v S Ragunathan* 1998 (86) AIR 2779 (SC) which followed the principles laid down by the House of Lords in the English case of *Council of Civil Service Unions v Minister of Civil Service* 1984 All E.R. 934 (HL) per Lord Diplock at 943–944.

*Ragunathan*⁷³, it was accepted by the Indian Supreme Court that:

"The doctrine of legitimate expectation imposes in essence a duty on a public authority to act fairly by taking into consideration all relevant factors relating to such 'legitimate expectation'. Within the conspectus of fair dealing in a case of legitimate expectation the reasonable opportunities to make representations by the parties likely to be affected by any change of consistent policy come in."

With regard to whether such expectation constitutes an enforceable right, the court explains as follows⁷⁴:

"[T]he mere existence of a reasonable or legitimate expectation of a citizen ... may not by itself be a distinct enforceable right, but the failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined, not according to the Claimant's perception, but in the larger public interest, where other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A **bona fide** decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in the legal system in this manner and to this extent."

Having analysed the concept of legitimate expectation and its applicability within the Indian legal system, the Supreme Court came to the conclusion that:

⁷³ *National Building Construction Corporation v S Ragunathan supra* (n 72) 2784, para 23.

⁷⁴ *National Building Construction Corporation v S Ragunathan supra* (n 72) 2785, para 24.

"... Though the doctrine of legitimate expectation is essentially procedural in character and assures fair play in administrative action, it may, in a given situation, **be enforced as a substantive right.**"⁷⁵

5.2 Summary of the present state of the law in England and the common law jurisdictions regarding legitimate expectations

A person can legitimately expect both procedural fairness, referred to as a procedural legitimate expectation, and to receive a substantive benefit if/when induced by a public authority (ie referred to as a substantive legitimate expectation). Both are enforceable in law as legitimate expectations.

If and when a legitimate expectation to receive a substantive benefit (and/or to procedural fairness) is denied by a public authority, the court will enquire into the substance and merits of that decision of the public authority, to determine for itself whether such a denial was fair or not.

Should the court find that the decision denying the legitimate expectation in the particular circumstances of the case was so unfair as to amount to an abuse of power (as set out in the *Coughlan*⁷⁶ case) or irrational and/or disproportionate in relation to its effects (in terms of the

⁷⁵ *National Building Construction Corporation v S Ragunathan* supra (n 72) 2785, para 26, emphasis added.

⁷⁶ (2001) QB 213.

Oakes⁷⁷ test), that decision can be set aside and the court may order that the expectation be acknowledged as legitimate and enforced⁷⁸.

5.3 South African law

The general approach towards parole in South Africa is also to regard it merely as a privilege afforded to a prisoner to serve part of his or her sentence outside prison, and not as a right.⁷⁹

As will be demonstrated, this approach towards parole is oversimplified and does not accord with the developments which have taken place since the introduction of our constitutional democracy in South Africa and its effect on the criminal justice system in general, and penal law in particular.

Parole, in general, and the principle of release of a prisoner on parole is now recognised as an integral and necessary part of the South African criminal justice system in general and our penal system in particular, and

⁷⁷ *R v Oakes* supra 228 DLR. See also Erasmus, 'Limitation and Suspension, in Rights and Constitutionalism, the New South African Legal Order', D van Wyk, J Dugard, B de Villiers and D Davis (eds) (1994) 648–649.

⁷⁸ See Wade & Forsyth *op cit* (n 44, 45, 46) 372–373, and their reference at 373 to EU law and case law. See also the Indian Supreme Court case of *National Building Construction Corporation v S Ragunathan* (n 70).

⁷⁹ *S v Nkosi* 1983 (SA); *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C); *Combrink and Another* 2001 (3) SA 338 (D); Van Zyl Smit *South African Prison Law and Practice* (1992) 388 where the author, with reference to the duty to act fairly as developed in English law, made the point that once a parole system has been created, prisoners have a real interest in ensuring that it be operated in such a way that the possibility that they might be granted parole is properly considered. He, however, qualifies this with the following:

It should be emphasized that this argument does not necessarily proceed from the basis that a prisoner has a right to parole. It can be viewed simply as a procedural question.

has indeed been elevated to a constitutional prerogative without which the sentence of life imprisonment in South Africa would otherwise have been unconstitutional.⁸⁰

Prisoners in South African prisons (or correctional facilities, as they are now known) have therefore an enforceable legitimate expectation to be assessed and considered for parole before their sentences expire. The question is whether, in the parole process, involving that assessment and consideration for such a prisoner's eligibility for parole, he or she acquires an enforceable right, in the form of a legitimate expectation, to be released on parole before the expiry of his or her sentence.

In the parole process, when determining whether a prisoner is eligible for release on parole, the **assessment** of the prisoner by the Case Management Committee (CMC)⁸¹, the **consideration** of such prisoner for his/her possible release on parole by the Commissioner of Correctional Services⁸², the Correctional Supervision and Parole Board (CSPB)⁸³ or the Correctional Supervision and Parole Review Board (CSPRB)⁸⁴, and the

⁸⁰ In contravention of s 12 (not to be subjected to cruel, inhumane and degrading punishment), read with ss 9 (the right to dignity) and 10 (the right to equality) of the Constitution of South Africa Act 108 of 1996. See *S v Makwanyane* 1995 (6) BCLR 665 (CC) paras 123 and 134; *S v Tsoeib* 1996 (1) SACR 390 (NmS) (Namibian Supreme Court) per Mohamed CJ, as he then was, at 397 to 399 within the Namibian context. Mohamed CJ subsequently became the first black Chief Justice subsequent to the newly established constitutional democracy in South Africa in 1993: *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 521–523; *S v Siluile and Another* 1999 (2) SACR 102 (SCA) at 106–107; *S v Bull and Another*; *S v Chavulla and Others* 2002 (1) SA 535 (SCA) at 552, para 23.

⁸¹ Section 42(3) of the Correctional Services Act, 111 of 1998.

⁸² Section 75(7) of the Correctional Services Act, 111 of 1998.

⁸³ Section 75(1) of the Correctional Services Act, 111 of 1998.

⁸⁴ Section 77(1) of the Correctional Services Act, 111 of 1998.

decision whether or not to release such a prisoner on parole by the appropriate official or body⁸⁵, constitutes the exercise of public power which, as such, must comply with the Constitution⁸⁶ as well as the principle of legality and the requirements of administrative justice in terms of the Constitution.⁸⁷

The requirements of administrative justice are set out in s 33 of the Constitution which, *inter alia*, guarantees everyone's right, including prisoners, to:

- (i) administrative action,
- (ii) that is lawful,
- (iii) reasonable, and
- (iv) procedurally fair.⁸⁸

This section furthermore directs the government to create the legal framework for the protection of these rights by (a) making provision for the review of administrative action by a court or other competent tribunal; (b) imposing a duty on the state to give effect to the rights in ss 33(1) and

⁸⁵ See s 75 read with s 77 and s 78 (powers of the court in respect of prisoners serving life sentences) and s 82 (powers of the president to place a prisoner under correctional supervision or on parole) of the Correctional Services Act, 111 of 1998.

⁸⁶ Act 108 of 1996.

⁸⁷ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 20; *Bato Star (Pty) Ltd v MEC for Environmental Affairs and Others* 2004 (4) SA 490 (CC) 506 para 25. See also Hoexter *Administrative Law in South Africa* (2007) 27–28. See also s 33 of the Constitution Act 108 of 1996.

⁸⁸ Section 33(1) of the Constitution Act 108 of 1996. See also Mubangizi, *Constitutional Rights for Prisoners in South Africa: A Critical Review*, De Jure (2002) 42–64; Mubangizi, *The Constitutional Rights of Prisoners in South Africa: The Law versus The Practice* SACJ (2001) 14 310–326 at 310–312; Mubangizi *International Human Rights Protection for Prisoners: Which Way South Africa?* 2001 (26) SAYIL 86–113 at 87–88; 110–113. De Vos, *Prisoner's Rights Litigation in South Africa Since 1994: A Critical Review*, Law, Democracy and Development, Vol 9, Issue 1 (2005) 89–112 at 92–94, 97, footnotes 34–36; Bukurura, *Emerging Trends in the Protection of Prisoners Rights in Southern Africa*, African Human Rights Journal (2002) 2, 92–109 at 101–104.

(2)⁸⁹; and (c) promoting an efficient administration⁹⁰.

The national legislation which was enacted pursuant to s 33 of the Constitution is the Promotion of Administrative Justice Act, 2000⁹¹ (hereinafter referred to as *PAJA*)⁹².

5.4 Does the assessment and consideration for parole and the decision regarding parole constitute administrative action?

The process of parole typically involves various stages, including the assessment and consideration for parole which then culminates in the decision regarding the placement of the prisoner on parole⁹³.

All these different stages are inter-dependent of each other and involve decision-making which crucially and materially affects the next stage in the process. As such, it can properly be regarded as a 'multi-stage decision-making process'.⁹⁴ As Hoexter correctly points out, in the pre-democratic era no 'rights' were regarded as having been affected in the preliminary stages, ie 'by the investigations or advisory action, so that

⁸⁹ The right to just administrative action and to written reasons where a person's right has been adversely affected by administrative action.

⁹⁰ Section 33(3) of the Constitution, Act 108 of 1996.

⁹¹ Act 3 of 2000.

⁹² See the preamble to PAJA 3 of 2000.

⁹³ As discussed in Chapter 4 above. See also the discussion with reference to n 82 to 88 above.

⁹⁴ See Hoexter *Administrative Law in South Africa* (2007) 392.

the aggrieved party was not entitled to natural justice at all.⁹⁵ The attitude reflected in this approach continued well into the constitutional era.⁹⁶ This approach, however, was rejected by the Supreme Court of Appeal in *Director: Mineral Development: Gauteng Region v Save the Vaal Environment*⁹⁷ which is described by Hoexter as a 'bold step'.⁹⁸ In this case, the Supreme Court of Appeal rejected the argument that no 'rights' were violated at the first stage. The unanimous court found that the granting of first stage⁹⁹ licence:

"... opens the door to the licensee and sets in motion a chain of events which can, in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases, *inter alia* where it lays '... the necessary foundation for a possible decision ...' which may have grave results. In such a case the *audi* rule applies to the consideration of the preliminary decision."¹⁰⁰

The Supreme Court of appeal, in the *Save the Vaal Environment* case¹⁰¹ also rejected the argument that since the *audi* rule will be applied at the second stage, it need not be applied at the first stage.

This case was followed by the Full Bench of the Cape Provincial Division (per Griesel J), in *Earth Life Africa (Cape Town) v Director-General:*

⁹⁵ See Hoexter *op cit* (n 19) 393. "Pre-democratic era" refers to the period before the promulgation, on 28 January 1994, of the Interim Constitution of the Republic of South Africa, Act 200 of 1993.

⁹⁶ As pointed out by Hoexter with reference to cases *op cit* (n 19) 393.

⁹⁷ 1999 (2) SA 707 (SCA) paras 17-20.

⁹⁸ See Hoexter *op cit* (n 19) 393.

⁹⁹ A licence in terms of s 9 of the Minerals Act 50 of 1991.

¹⁰⁰ *Director: Mineral Development: Gauteng Region v Save the Vaal Environment supra* (n 97) para 17, with reference to a dictum of Schreiner JA in *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A) at 189 A-B. See also Hoexter *op cit* (n 19) 393-394.

¹⁰¹ *Director: Mineral Development: Gauteng Region v Save the Vaal Environment supra* (n 97).

*Department of Environmental Affairs and Tourism*¹⁰², a case concerning the construction of a pebble-bed nuclear reactor. In this case, the court pointed out that the initial step – the granting of authorisation by the Director-General – was not only a necessary prerequisite to further steps in the process, but also a final step as far as the Environmental Conservation Act, 1989¹⁰³ was concerned.¹⁰⁴

Later, in 2005, the Supreme Court of Appeal changed course in *Buffalo City Municipality v Gauss*¹⁰⁵, where the court considered the initial steps to be part of the bigger process which ultimately ceters for the right to be heard – in which cases a subsequent hearing would suffice ‘... provided of course that it does not cause prejudice and that the hearing itself is a fair one.’¹⁰⁶

This case is regarded by Hoexter as ‘... a retreat from the spirit of the *Save the Vaal* case’¹⁰⁷, noting that it had not been referred to by the Supreme Court of Appeal in the *Buffalo* case.

However, within the purview of PAJA, the ingredients of the Act’s definition of administrative action suggests that preliminary conduct, including recommendation of a body, fall outside the purview of the

¹⁰² 2005 (3) SA 156 (C).

¹⁰³ Act 73 of 1989.

¹⁰⁴ Hoexter *op cit* (n 19) 395–397, emphasis added.

¹⁰⁵ 2005 (4) SA 498 (SCA), paras 10–15.

¹⁰⁶ See also Hoexter *op cit* (n 19) 346 and 394.

¹⁰⁷ Hoexter *op cit* (n 19) 394.

PAJA.¹⁰⁸

This, according to Hoexter,¹⁰⁹ stems from the requirement in the PAJA of a 'direct' legal effect¹¹⁰, which seems to translate into a requirement of finality. This was also how the majority of the court in the Cape Provincial Division interpreted the term when it found, in *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO*¹¹¹, that recommendations of a pricing committee did not constitute administration action.¹¹²

This limiting effect of the PAJA¹¹³, 'which again invites the courts to return to pre-democratic reasoning'¹¹⁴ has been described as '... a great pity'.¹¹⁵

However, in *Minister of Health v New Clicks South Africa (Pty) Ltd*¹¹⁶, the Constitutional Court declined to treat the two stages of the process – the recommendations from the pricing committee and the subsequent regulations made by the Minister – as separate and independent decisions. To treat them thus, said Chaskalson CJ, 'would be to put form

¹⁰⁸ Such as in *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 571 (SCA) paras 13, 14, referred to by C Hoexter *op cit* (n 19) 396, emphasis added.

¹⁰⁹ Hoexter *op cit* (n 19) 395–397.

¹¹⁰ See s 1 of PAJA 3 of 2000.

¹¹¹ 2005 (2) SA 520 (C).

¹¹² *New Clicks supra* (n 107) paras 40 to 41, Hoexter *op cit* (n 19) 396.

¹¹³ 3 of 2003.

¹¹⁴ Hoexter *op cit* (n 19) 396–397.

¹¹⁵ Hoexter *op cit* (n 19) 396–397. See, however, the approach adopted by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) paras 21–25.

¹¹⁶ 2006 (2) SA 311 (CC).

above substance.¹¹⁷

According to Ngobo J, the enabling legislation 'contemplates a single process, consisting of several stages.'¹¹⁸ According to Moseneke J¹¹⁹, it is 'one continuous process' involving the committee and the Minister at different times¹²⁰. According to Hoexter,¹²¹ the PAJA¹²² could conceivably be thus interpreted so as to avoid this effect, which would be by viewing multi-staged processes '... more holistically'.

But even if these preliminary stages are interpreted to fall outside the 'cumbersome definition'¹²³ of administrative action in s 1 of PAJA, 2000 and as such do not qualify as administrative action (it not being final), this does not mean that it could not be tested on the other common law and/or constitutional review grounds such as not being in accordance with the constitutional principle of legality and/or reasonableness and/or being unfair in the circumstances¹²⁴. In *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*¹²⁵, the Supreme Court of Appeal considered the purportedly limiting effect of the definition of administrative action in s 1 of PAJA, 2000 and, in particular, the qualifying clauses, namely 'adversely affect the rights of any person' and 'a direct and external legal effect', to

¹¹⁷ *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 137.

¹¹⁸ *Minister of Health v New Clicks SA (Pty) Ltd* (n 117) para 441.

¹¹⁹ As he then was, now Deputy Chief Justice (DCJ).

¹²⁰ *Minister of Health v New Clicks SA (Pty) Ltd* (n 117) para 672.

¹²¹ Hoexter *op cit* (n 19) 397.

¹²² 3 of 2000.

¹²³ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 21.

¹²⁴ Hoexter *op cit* (n 19) 397.

¹²⁵ 2005 (6) SA 313 (SCA) para 23.

which administrative action is seemingly restricted. According to the Court, these two qualifications read together '... 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.' Accordingly, the court regarded 'administrative action', generally to mean:

"... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."¹²⁶

In the circumstances, the assessment and consideration for parole, and the decision regarding parole, constitute administrative action. As administrative action it is reviewable both in terms of the common law and the Constitution of the Republic of South Africa, 1996.¹²⁷ For this administrative action to be reviewable in terms of the common law, it must be shown that the public official and/or administrative tribunal concerned:

- (a) Failed to apply his/her/its mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice;
- (b) That the decision complained of was arrived at arbitrarily or capriciously or *mala fide*, or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper

¹²⁶ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* *supra* (n 115) para 24.

¹²⁷ Act 108 of 1996. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) para 45 and 49.

purpose;

- (c) That the public official and/or administrative tribunal misconceived the nature of the discretion conferred upon him/her/it and took into account irrelevant considerations or ignored relevant ones; and
- (d) That the decision was so grossly unreasonable as to warrant the inference that the public official and/or administrative tribunal failed to apply his/her mind to the matter in the matter.¹²⁸

Constitutional review in terms of the South African Constitution¹²⁹ is not only confined to administrative review of those actions found to be or defined as administrative action in terms of s 33 of the Constitution¹³⁰ read with the PAJA¹³¹, but also extends to review of the exercise of public power on the basis of the principle of legality.¹³²

In the seminal Constitutional Court case of *Pharmaceutical Manufacturers Association of South Africa and another: in re Ex Parte*

¹²⁸ *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (AD) at 152 A-E; See also *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115 wherein Innes CJ described the High Court's common law jurisdiction as follows:

Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court

These principles have also been incorporated in, and given legal effect, in ss 4 and 6 of PAJA 3 of 2000.

¹²⁹ Act 108 of 1996.

¹³⁰ Act 108 of 1996.

¹³¹ Section 1 read with s 6 of the Promotion of Administrative Justice Act 3 of 2000.

¹³² *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).

*President of the Republic of South Africa and others*¹³³, Chaskalson P (who later became the Chief Justice of South Africa), gave a clear and definitive exposition of constitutional review on the basis of the principle of legality, constitutional review of the exercise of public power and the inter-relationship between common law review and constitutional law review:

"The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the Interim Constitution this control was exercised by the Courts through the application of common law constitutional principles. Since the adoption of the Interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."¹³⁴

Chaskalson P concluded:

"What would have been *ultra vires* under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of s 24 of the Interim Constitution. What is "lawful administrative action", "procedural fair administrative action" and administrative action "justifiable in relation to the reasons given for it" cannot mean one thing under the Constitution and another thing under the common law."¹³⁵

¹³³ 2000 (2) SA 674 (CC), para 20.

¹³⁴ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* (n 127, 132) para 33, p 693 E–G.

¹³⁵ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* (n 127) para 50, p 698. See also *Bato Star (Pty) Ltd v MEC for Environmental Affairs and Others supra* (n 87), in which O'Regan J applied and followed these principles. See also *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* (n 115, n 123).

Despite the fact that this judgment was given under the Interim Constitution¹³⁶, the principles enunciated therein are still applicable and are in fact reflected in s 33 of the 1996 Constitution, which guarantees to everyone the right to administrative action that is lawful, reasonable and procedurally fair¹³⁷. These principles have also been expressly incorporated in ss 3 and 6 of the PAJA¹³⁸. Section 3 of PAJA guarantees the **procedural right** to administrative justice of any person, by requiring administrative action that materially and adversely affects the right or legitimate expectation of any person to be procedurally fair.

The scope of review under our new constitutional dispensation includes the common law review grounds, review in terms of s 33 of the Constitution read with the PAJA and constitutional review of the exercise of public power on the basis that it violates the principle of legality or if 'the action is otherwise unconstitutional or unlawful'¹³⁹.

¹³⁶ South Africa Constitution Act 200 of 1993.

¹³⁷ See s 33(1) of the Constitution, Act 108 of 1996. emphasis added.

¹³⁸ PAJA 3 of 2000.

¹³⁹ Section 6(2)(i) of the PAJA 3 of 2000. See also Hoexter *Administrative Law in South Africa* (2007) 116–117; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 59; *S v Mabena* 2006 SA 132 (SCA) wherein Nugent JA noted that 'the cardinal tenet of the rule of law ... admits of no exception' and applies to all state authority, including judicial authority. As referred to in Hoexter *op cit* (n 19) 117. See also *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148. See also *Pharmaceutical Manufacturers Association of SA and Another: In re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) wherein it was clearly stated that the exercise of public power must not be arbitrary or irrational, at para 88:

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny, the exercise of public power by the executive and other functionaries must at least, comply with this

Given the fact that not every exercise of public power will qualify as administrative action, and thus qualify to be reviewed under s 33 of the Constitution¹⁴⁰ or under the PAJA¹⁴¹ - and despite the elaborate definition of administrative action in PAJA¹⁴², the principle of legality is correctly described as acting as 'a safety net' which will be invoked by the court in those cases where the action in question does not qualify as administrative action for the purposes of s 33 of the Constitution or PAJA but still involves the use of public power¹⁴³.

The concept of administrative action as developed by the Constitutional Court is not identical to the concept as envisaged and defined in terms of the PAJA¹⁴⁴. As Professor Hoexter correctly points out '... the practical effect of the elaborate definition in the PAJA [of administrative action] is to exclude much of what would have been reviewable under the 1994 Constitution¹⁴⁵.' In both instances, however, for judicial review it is first necessary to establish whether the action in question passes the threshold test of administrative action¹⁴⁶. As such, this threshold functions as a limiting device in both instances where it has

requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

¹⁴⁰ Act 108 of 1996.

¹⁴¹ Act 3 of 2000.

¹⁴² Section 1 of Act 3 of 2000.

¹⁴³ Hoexter *op cit* (n 19) 118.

¹⁴⁴ Section 1 of Act 3 of 2000; see also Hoexter *op cit* (n 19) 115.

¹⁴⁵ Hoexter *op cit* (n 19) 115–116, referring to the Interim Constitution Act 200 of 1993.

¹⁴⁶ Hoexter *op cit* (n 19) 115.

been developed by the Constitutional Court and in terms of the PAJA¹⁴⁷.

5.5 Parole must also comply with the requirement of lawful administrative action

This requirement of lawfulness in relation to administrative action is informed by the common law principle of *ultra vires* which now, under the constitutional dispensation, finds expression in the doctrine of legality¹⁴⁸.

In terms of this requirement, therefore, the exercise of all public power insofar as it passes the threshold of administrative action, must be exercised as authorised by law¹⁴⁹. This requirement also finds expression in the PAJA, which expressly makes provision for judicial review of administrative action which 'contravenes a law or is not authorised by the empowering provision'¹⁵⁰. An empowering provision as defined in PAJA¹⁵¹ means 'a law, a rule of common law, customary law or an agreement,

¹⁴⁷ Hoexter *op cit* (n 19) 115 and 163 *et seq.*

¹⁴⁸ See *Johannesburg Stock Exchange v Witwatersrand Nigel* 1988 (3) SA 132 (A) (n 128) 152. See also *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council supra* (n 128) at 115. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of RSA and Others supra* (n 127), paras 44–45. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 22 wherein O'Regan J cautions that the continuing use of the common law would have to be worked out on a case by case basis, despite the fact that the role of the common law was confirmed in *Pharmaceutical Manufacturers Association of SA and Another, In Re: Ex Parte President of RSA and Others supra* (n 127), as an important interpretive and supplementary resource.

¹⁴⁹ Hoexter *op cit* (n 19) 28–29; Corder *Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985–2000*; SALJ Vol 18 (2001) 772–793 at 788–789.

¹⁵⁰ Section 6(2)(f) read with s 6(2)(i) of PAJA 3 of 2000, which makes provision for the review of that administrative action if 'the action is otherwise unconstitutional or unlawful'.

¹⁵¹ Section 1 of PAJA 3 of 2000.

instrument or other document¹⁵²;

This requirement of lawfulness in relation to administrative action is said to coincide:

"... completely with the content of the constitutional principle of legality. ... This principle is an aspect of the rule of law, one of the founding values of our constitutional order and the mainspring of administrative law. The legality principle is also implicit in the South African Constitution, and applies to all exercises of public power, thus providing an essential safeguard when action does not qualify as "administrative action" for the purposes of PAJA or the Constitution."¹⁵³

As Hoexter points out, with reference to the New Clicks case¹⁵⁴, the principle of legality has also been described as 'an evolving concept in our jurisprudence whose full creative potential will be developed in a context driven and incremental manner'.¹⁵⁵

The remedies afforded to an aggrieved person in the event of non-compliance with this requirement of lawful administrative action, or in the event of a violation of this principle of legality, are contained in s 34 of the Constitution, which guarantees every person's right of access to a court or another independent and impartial tribunal to resolve any dispute in accordance with law¹⁵⁶, s 35(2)(d) which refers to the rights and remedies

¹⁵² Hoexter *op cit* (n 19) 29.

¹⁵³ See Hoexter *op cit* (n 19) 225, and at 118. See also *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC), para 97.

¹⁵⁴ See Hoexter *op cit* (n 19) 225, and at 118. See also *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC), para 97.

¹⁵⁵ Per minority judgment of Sacks J in the *New Clicks* case (n 153), Hoexter *op cit* (n 19) 118.

¹⁵⁶ Section 34 of the Constitution Act 108 of 1996 reads as follows:

of detained persons, including sentenced prisoners, and guaranteeing their rights to challenge the lawfulness of such imprisonment or detention¹⁵⁷, s 38 which guarantees every person's right to approach any competent court to enforce and protect his/her rights¹⁵⁸, and generally s 8 of PAJA, which provides in detail for the remedies for aggrieved persons in judicial review.¹⁵⁹

Section 8 of PAJA, 2000 authorises a review court or review tribunal to 'grant any order that is just and equitable'¹⁶⁰ which can include the following:

- (1) It can set aside the administrative action complained of¹⁶¹; and
- (2) It can remit the matter to the relevant authority who took the administrative action, with or without any directions, taking into account the available information¹⁶²; or
- (3) In exceptional circumstances, it can substitute its own decision for that of the administrative action or it can vary that administrative

Every one has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

¹⁵⁷ Section 35(2)(d) reads as follows:

Everyone who is detained, including every sentenced prisoner has the right – (a) ...; (b) ...; (c) ...; (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released; (e) ...; (f) ...

¹⁵⁸ The relevant part of s 38 reads 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.

¹⁵⁹ Section 8 of PAJA 3 of 2000.

¹⁶⁰ Section 8(1) of PAJA 3 of 2000. See Ngobobo J's analysis of and approach to this power of the court in *Hoffman v South African Airways* 2001 (1) SA 1 (CC) 21F-G paras 42 and 45.

¹⁶¹ Section 8(1)(c) of PAJA 3 of 2000.

¹⁶² Section 8(1)(c)(i) of PAJA 3 of 2000.

action or it can correct a defect resulting from the administrative action¹⁶³; or

- (4) It can direct, also in exceptional cases, the administrator or any other party to these review proceedings to pay compensation¹⁶⁴; or
- (5) It can give a declaration of rights in respect of any matter to which the administrative action relates¹⁶⁵;
- (6) It may grant a temporary interdict or other temporary relief¹⁶⁶; or
- (7) It may make an order as to costs¹⁶⁷.

No definition is given in the PAJA of what is meant by 'exceptional circumstances'. It is settled law in South Africa that the determination of whether or not exceptional circumstances exist is not a matter of judicial discretion, but depends on the objective facts of the particular case. It is thus a factual enquiry.¹⁶⁸

Judicial discretion only comes into play once a factual finding as to the existence or otherwise of exceptional circumstances has been made.¹⁶⁹

¹⁶³ Section 8(1)(c)(ii)(aa) of PAJA 3 of 2000.

¹⁶⁴ Section 8(1)(c)(ii)(bb) of PAJA 3 of 2000. See also *Minister of Defence and Others v Dunn* 2007 (6) SA 52 (SCA) paras 34–40.

¹⁶⁵ Section 8(1)(d) of PAJA 3 of 2000.

¹⁶⁶ Section 8(1)(e) of PAJA 3 of 2000.

¹⁶⁷ Section 8(1)(f) of PAJA 3 of 2000.

¹⁶⁸ *MV Ais Mamas, Seatrans Maritime v Owners, MV Ais Mamas and Another* 2002 (6) 150 (C) at 156H–157C; *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) at 492D–E (para 22); *IA Essack Family Trust v Kathree*; *IA Essack Family Trust v Soni* 1974 (2) SA 300 (D) at 304B.

¹⁶⁹ *MV Ais Mamas, Seatrans Maritime supra* (n 168) 156H–157C; *MEC for Agriculture, Conservation, Environment and Land Affairs supra* (n 168) para 22; *IA Essack Family Trust supra* (n 168) 304B.

5.6 Parole must also comply with the requirement of reasonableness

The constitutional requirement of **reasonableness** in relation to administrative action entails an objective enquiry and is ultimately dependant upon the facts and circumstances of the particular case.¹⁷⁰

The review court or tribunal, in determining whether the administrative action was reasonable or not, must have regard to the reasons which the administrator/decision-maker is obliged to furnish to justify his or her or its decision / administration action.¹⁷¹

In having regard for those reasons furnished by the administrator, the

¹⁷⁰ *Roman v Williams NO supra* (n 40). Corder 'Administrative Justice'; in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 387, 387, 399–400; Erasmus 'Limitation and Suspension' *op cit* (n 48, n 77) 648–650. See also Wade and Forsyth 8th ed (2000) 365 where the authors define the standard of reasonableness within the English context as follows:

The standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called "Wednesbury-unreasonableness" after the now famous case in which Lord Greene MR expounded it as follows (quoting from *Associated Provincial Picture House Limited v Wednesbury Corporation* 1948 (1) KB 223 at 229): It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. ... (Wade & Forsythe (2000) 365).

This standard has been adopted in South African administrative law (s 6(2) of the Promotion of Administrative Justice Act 3 of 2000) and was part of our common law by virtue of the South African equivalent of the *Wednesbury Corporation* case (n 28) referred to above which, in South Africa, is the *locus classicus*, *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152. The standard has been criticised in South Africa by Hoexter *op cit* (n 19) 311 as 'unhelpfully circular' and also in *Bato Star Fishing (Pty) Ltd* case (n 87, 132) paras 43–44.

¹⁷¹ *Roman v Williams NO supra* (n 40). See also s 33(2) of the Constitution Act 108 of 1996, s 5 of PAJA 3 of 2000.

review court or administrative tribunal must assess and determine whether '... the administrative action, taken in relation to the affected party, was justifiable in relation to the reasons given for it'.¹⁷²

What is clear from these provisions¹⁷³ is that the reasons furnished are but a factor which must be taken into consideration by the court or administrative tribunal to determine whether the administrative action was reasonable or not. The scope of the right to administrative justice and the constitutional protection under these provisions¹⁷⁴ have therefore been extended from merely requiring the administrative action to be '... justifiable in relation to the reasons given for it'¹⁷⁵ to the much broader, more protective constitutional requirement of 'reasonableness'.¹⁷⁶ The scope of this constitutional right to administrative justice and protection under s 33 of the Constitution¹⁷⁷ is therefore much wider than both the common law and the provisions of s 24 of the 1993 Constitution (Act 200 of 1993).

Therefore, the court or administrative tribunal, in determining whether

¹⁷² *Roman v Williams NO supra* (n 40); s 24 of the Constitution Act 200 of 1993 which was incorporated under the Constitution Act 108 of 1996 in terms of Schedule 6, item 23 of the 1996 Constitution, before its modification by s 33(1) of the Constitution Act 108 of 1996 and ss 3 and 6, read with s 8 of PAJA, 3 of 2000.

¹⁷³ Section 33 of the Constitution Act 108 of 1996 and ss 3, 6 and 8 of PAJA, 3 of 2000.

¹⁷⁴ Section 33 of the Constitution, Act 108 of 1996 and ss 3, 6 and 8 of PAJA, 3 of 2000.

¹⁷⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 43–46; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) paras 107–108; *Roman v Williams NO op cit* (n 40); *Corder op cit* (n 170) 389–400; *G Erasmus op cit* (n 48); *Hoexter op cit* (n 19) 306–309.

¹⁷⁶ See *De Ville op cit* (n 48), *Corder op cit* (n 170), *Erasmus op cit* (n 48); *Hoexter op cit* (n 19) 306–309.

¹⁷⁷ Read with the relevant provisions of PAJA, 3 of 2000.

the administrative action was justifiable in relation to the reasons given for it, will have regard to '... the three requirements of **suitability, necessity and proportionality** ...'.¹⁷⁸ However, the court or administrative tribunal is not confined, in determining whether the administrative action was reasonable or not, to these abovementioned requirements. The court or tribunal may take into account other factors and circumstances, insofar as it may be relevant to the determination of **reasonableness** of the administrative action in the particular circumstances of each case, including suitability, necessity and/or proportionality.¹⁷⁹

Under the common law, the mere unreasonableness would not render any administrative decision or action reviewable. For it to be reviewable, there must have been 'gross unreasonableness'¹⁸⁰ which consists of 'the well established grounds relating to abuse of discretion', namely *malafides*, ulterior motive and failure to apply the mind.¹⁸¹

The Interim Constitution guarantees a person a right to *inter alia* 'administrative action which is justifiable in relation to the reasons given for it where any of their rights are affected or threatened'.¹⁸²

¹⁷⁸ *Roman v Williams NO supra* (n 40) p 284 H-I. See also De Ville *op cit* (n 48), Corder *op cit* (n 170) and Erasmus (n 48).

¹⁷⁹ *Roman v Williams NO supra* (n 40) 284 H-I. See also De Ville (n 48), Corder *op cit* (n 170) and Erasmus (n 48).

¹⁸⁰ As per Stratford JA in *Union Government v Union Steel Corporation SA Ltd* 1928 AD 220 at 237.

¹⁸¹ See Hoexter *op cit* (n 19) 294-295. See also *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152.

¹⁸² Section 24(d) of the Constitution Act 200 of 1993. This whole s 24 of Act 200 of 1993 was re-enacted in the 1996 Constitution as Schedule 6, item 23(2), which was how s 33(1) and (2) had to be read until PAJA 3 of 2000 was enacted. See also Hoexter *op cit* (n 19) 309.

In *Roman v Williams NO*¹⁸³, which was one of the first cases that pertinently dealt with the concept of reasonableness under the new constitutional dispensation in South Africa, the late Van Deventer J summarised it as follows:

"A decision of the Commissioner of Prisons to reimprison a probationer as provided for by Section 84B(1) *supra* (read in here the assessment, consideration and the decision whether or not to release a prisoner on parole) is reviewable administrative action within the purview of s 33(1) and (2) of the Constitution, Act 108 of 1996. ... and such a decision must be justifiable in relation to the reasons given for it.¹⁸⁴ Justifiability as specified is to be objectively tested.

The scope of this constitutional test is clearly much wider than that of the common law test and it overrides the common law review grounds as set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd (supra)*.

Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality, which requirements involve a test of reasonableness. Gross unreasonableness is no longer a requirement for review.

The constitutional test embodies the requirement of proportionality between the means and the end. The role of the Courts in judicial reviews is no longer confined to the way in which an administrative

¹⁸³ 1998 (1) SA 270 (C) at 284 F–285 A. and also referred to as 1997 (BCLR) 1267 (C) at 1278 F–I.

¹⁸⁴ This language persists in the final Constitution 108 of 1996 until February 2000, in the form of the transitional provision, item 23(2)(b), which was an exact replica of s 24 of the Interim Constitution 200 of 1993. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is the national legislation provided for in s 33 of the 1996 Constitution which was enacted in February 2000, and thereby replacing the aforesaid item 23(2)(b).

decision was reached but extends to its substance and merits as well.¹⁸⁵

In *Stansfield v Minister of Correctional Services & 3 Others*¹⁸⁶, the Applicant was serving a 6 year prison sentence after having been found guilty of fraud. While serving his sentence he was diagnosed as suffering from lung cancer for which he received medical treatment whilst in prison. The medical opinion, more particularly that of the medical official appointed by the Respondents, was that with the appropriate medical treatment (chemotherapy) the Applicant had, at that time, approximately 6 to 8 months to live, a one year survival of less than 20 per cent and a two year chance of survival of less than 10 per cent. Based on this diagnosis, the Applicant applied to the Parole Board to be released on parole on medical grounds¹⁸⁷. This application was heard by the Parole Board on 13 June 2003. The medical official had also recommended at the time that the prisoner (Applicant) be released on medical grounds. At the time

¹⁸⁵ Although this administrative action relates to the decision of the Commissioner to re-imprison a probationer who had been released under correctional supervision, for breach of those correctional supervision conditions, the principle thereof is equally applicable to the assessment, the consideration and the decision regarding parole. See also Hoexter *op cit* (n 19) 305 who regards this approach of Van Deventer J as 'bold' but does not, correctly so, argue that it is wrong. This dictum must, however, be read and understood in the context of the Interim Constitution 200 of 1993, s 24, which continued to be applicable as a transitional arrangement under the 1996 Constitution (Act 108 of 1996), Schedule 6, Item 23(2)(b). This latter provision ceased to be operative in February 2000 with the adoption and promulgation of the Promotion of Administrative Justice Act (PAJA) 3 of 2000. The principles enunciated in this case must also be interpreted and applied subject to, and in accordance with, the Constitutional Court case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 43–45 in particular, and *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 108 in particular. As Professor Hoexter also points out the criterion according to which administrative action under the 1996 Constitution and PAJA 3 of 2000, will be assessed – in addition to the principle of legality – is that of reasonableness which consists of two elements, namely rationality and proportionality (Hoexter *op cit* (n 19) 306).

¹⁸⁶ 2004 (4) SA 43 (C)

¹⁸⁷ Medical parole in terms of s 69 of the Correctional Services Act, 8 of 1959, which is the forerunner of the present s 79 of the Correctional Services Act, 111 of 1998.

of this application to the Parole Board to be released on parole on medical grounds, he had served less than one third of his 6 years imprisonment. This was his second such application to the Parole Board after the first one was unsuccessful. After consideration of the Applicant's application to be released on medical grounds, the Parole Board refused to recommend his immediate release on parole at that stage, and recommended that he only be reconsidered for possible placement on parole some 4 months later, on 1 October 2003. The delegated official who was authorised to take such a decision on behalf of the Commissioner (the Third Respondent in this application) refused this application by Stansfield to be released on medical parole. Stansfield thereupon took this decision, as well as the recommendation of the Parole Board, on review to the Cape High Court.

On 4 August 2004, the Court (per Van Zyl J) after having heard the arguments of both the Applicant and the Respondents, ordered that the Applicant be released from prison forthwith.

The Court found, *inter alia*, that the Third Respondent (the delegated official) had:

"... misinterpreted the relevant provisions of s 69 of the Act by reading into it non-existent requirements, or by allowing himself to be wrongly influenced by departmental guidelines and the provisions of an Act that have not yet become operative. By misinterpreting the concept of

"physical condition" he could not apply his mind properly to the expediency of placing the Applicant on parole on medical grounds."¹⁸⁸

This led Van Zyl J to reach the conclusion:

"... that the Third Respondent's decision to refuse the Applicant parole on medical grounds was, objectively, so irrational and unreasonable that the inference must necessarily be drawn that he failed to apply his mind to the relevant facts and circumstances. He clearly misconstrued and misinterpreted section 69 of the Correctional Services Act, 8 of 1959 by allowing himself to be influenced by extraneous guidelines not included in or required by the said section."¹⁸⁹

On this basis, *inter alia*, Van Zyl J concluded that Applicant's release on parole on medical grounds was:

"... clearly expedient with reference to his physical condition. The Applicant is fully entitled to spend the remaining portion of his life ensconced in his own home in the consolatory embrace of his family. When the time comes for him to pass on, he must be able to do so peacefully and in accordance with his inherent right to human dignity."¹⁹⁰

This judgment suggests that the decision of the official not to release the prisoner on medical parole – which constitutes administrative action within the purview of PAJA 3 of 2000 – is subject to an objective test. The criteria according to which the validity of that decision will be assessed include rationality and reasonableness.¹⁹¹ The court clearly also extended

¹⁸⁸ *Stansfield v Minister of Correctional Services and Three Others supra* (n 186) para 115.

¹⁸⁹ *Stansfield v Minister of Correctional Services and Three Others supra* (n 186) para 130.

¹⁹⁰ *Stansfield v Minister of Correctional Services and Three Others supra* (n 186) para 132.

¹⁹¹ *Stansfield v Minister of Correctional Services and Three Others supra* (n 186) para 130.

the enquiry beyond procedural fairness; it enquired into the **substance** and **merits** of the decision as well.¹⁹²

This judgment suggests that once a prisoner's medical condition has reached such a state where his/her release on parole on medical grounds is expedient with reference to his physical condition, he/she is fully entitled to be released. A prisoner in these circumstances therefore acquires an enforceable right to be released on parole on medical grounds. The judgment further suggests that such a prisoner's inherent right to dignity would be violated if he/she is not released from prison on medical parole. It furthermore suggests that to die in prison in such circumstances would in itself be a violation of a prisoner's inherent right to dignity.

Both the decisions in *Roman v Williams NO*¹⁹³ in which Van Zyl J concurred with Van Deventer J and the principles enunciated in the *Stansfield* case¹⁹⁴ are still the applicable law as neither has been criticised nor rejected to date by either the Supreme Court of Appeal or the Constitutional Court.¹⁹⁵ These principles must, however, be applied

¹⁹² *Stansfield v Minister of Correctional Services and Three Others supra* (n 186) para 130.

¹⁹³ *Supra* (n 40).

¹⁹⁴ *Supra* (n 186). See also *Du Plooy v Minister of Correctional Services and Others* 2004 (3) All SA 613 (T) 621–622; *Mazibuko v Minister of Correctional Services* 2007 (2) SACR 300 (T) 307–380.

¹⁹⁵ It must be noted that the Respondents in the *Stansfield* matter noted an application for leave to appeal on the grounds, *inter alia*, that the court erred in finding that respondents violated the applicant's (Stansfield's) right to human dignity, because:

... they (the Respondents) duly recognised his medical condition / disease and his limited life expectancy as a result thereof; his physical debilitation, when it occurs would be due to his disease and not to his whereabouts or due to any action on the part of the Respondents; it was not irrational or inhumane for Respondents to have opted for the continual observation of Mr Stansfield and an automatic reconsideration of the expediency of his release should his physical condition deteriorate as proposed by Respondents; and that the

subject to and in accordance with those principles developed and enunciated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*¹⁹⁶ and *Minister of Health v New Clicks SA (Pty) Ltd*.¹⁹⁷

The Constitutional Court also considered this requirement of reasonableness in:

- (a) *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*¹⁹⁸ wherein O'Regan J equates reasonableness with proportionality (a reasonable balance or equilibrium¹⁹⁹); and
- (b) *Minister of Health v New Clicks SA (Pty) Ltd*²⁰⁰ where Chaskalson CJ described the requirement of reasonableness in relation to reasonable administrative action as 'a variable but higher standard than that of section 24(d)' of the 1994 Constitution, and which calls for '... a more intensive scrutiny than would have been competent under the Interim Constitution'. The approach led Hoexter to ask

court erred in substituting its decision for that of Respondents and by not referring the matter back for reconsideration by the Respondents, because there was no mala fides on the part of any of the Respondents, nor any exceptional circumstances which justified the Court in assuming the authority of the Respondents to decide the issue of parole which falls intimately within the Respondents' expertise and skills

Quoted from paras 4 and 5 of Respondents' 'Amplified Notice of Application for Leave to Appeal' dated 4 November 2003, in the matter of *Colin Stansfield v The Minister of Correctional Services and three Others*, Cape Provincial Division case number 5075/2003, reported at 2004 (4) SA 43 (C), which application was refused by Van Zyl J. The Respondents subsequently abandoned an application to the Supreme Court of Appeal for leave to appeal. On 5 October 2004 it was reported that Mr Stansfield passed away and was subsequently buried on 9 October 2004.

¹⁹⁶ See n 175, paras 43–45.

¹⁹⁷ See n 175, para 108. See also Hoexter *op cit* (n 19) 306.

¹⁹⁸ 2004 (4) SA 490 (CC) para 43–45.

¹⁹⁹ Paras 44, 45 and 49.

²⁰⁰ 2006 (2) SA 311 (CC) para 108.

whether 'this ground in fact obliterates the distinction between appeal and review?'²⁰¹

According to Professor Hoexter, 'reasonableness' consists of the two elements of rationality and proportionality.

Rationality, meaning:

"... in essence that a decision must be supported by the evidence and information before the administrator as well as the reasons given for it. It must also be objectively capable of furthering the purpose for which the power was given and for which the decision was purportedly taken."²⁰²

It also means rationality as set out in s 6(2)(f)(ii) of the PAJA²⁰³, ie the reasons advanced for the decision must be rationally connected to:

- (a) The purpose for which it was taken;
- (b) The purpose of the empowering provision;
- (c) The information before the administrator; or

²⁰¹ See Hoexter *op cit* (n 19) 306. O'Regan J, in *Bato Star Fishing (Pty) Ltd case supra* (n 175, 198) also recognised the substantive element within the concept of reasonableness which also led her to advocate a cautious approach and persisting '... that the distinction between appeal and review continues to be significant' (at para 45).

²⁰² Hoexter *op cit* (n 19) 306–307. This approach of Hoexter coincides with that propagated by Gottfredson and Gottfredson *op cit* (n 49), preface IV, VI, 2, 4, 7 and 213 and by Hudson *op cit* (n 49) 81, who advocated proportionality based on the principle of fairness. See also *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) para 21; *Rustenberg Platinum Mines v CCMA* 2007 (1) SA 576 (SCA) para 25. See also *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa supra* (n 127) paras 85, 86, 90 wherein it has been authoritatively stated that: "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power is given. ... Rationality is a minimum threshold requirement applicable to the exercise of all public power".

²⁰³ The Promotion of Administrative Justice Act, 3 of 2000.

- (d) The reasons given for it by the administrator.

Section 6(2)(h) of PAJA is very similar to the English *Wednesbury* case, developed by Lord Greene MR wherein he referred to a decision 'that is so unreasonable that no reasonable authority could ever have come to it'.²⁰⁴ However, Hoexter acknowledges that:

"Section 6(2)(h) and its counterpart in *Wednesbury* offer no real clues as to the content or meaning of reasonableness. Rather, they are unhelpfully circular, merely linking reasonableness of the action to the reasonableness of the actor".²⁰⁵

It is submitted that the requirement of careful scrutiny as stated by Chaskalson CJ in the *New Clicks* case²⁰⁶ for determining what is reasonable in the circumstances, as prescribed by s 33(1) of the Constitution is the appropriate and elevated standard in terms of which any conduct will be measured, including administrative action and the reasons for the administrative action/decision. This in fact means that, to determine its reasonableness, the court is in fact evaluating and dealing with the merits/substance of the matter. The court must have regard to the reasons of the administrator to determine its ratio. To determine the ratio, the court must therefore deal with the substance of the matter as reflected by the reasons.²⁰⁷ To again assess the merits/substance of the matter, including the administrative action, does not necessarily require

²⁰⁴ *Associated Provincial Picture Houses Ltd v Wednesday Corporation* 1947 (2) All ER 680 (CA) at 683 E and 685 C.

²⁰⁵ Hoexter *op cit* (n 19) 311. See also *Bato Star Fishing (Pty) Ltd* (n 175, 198) paras 43–44.

²⁰⁶ *Minister of Health v New Clicks SA (Pty) Ltd* (n 175, 200) para 108. See also Hoexter *op cit* (n 19) 311. See also *Bato Star Fishing (Pty) Ltd* (n 175) paras 43–44.

²⁰⁷ See Hoexter *op cit* (n 19) 317; see also *Rustenberg Platinum Mines v CCMA* (n 211); *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 32.

the court to make a finding as to whether the decision was right or wrong. The court may well find that the decision was a reasonable decision, despite any deficiencies, but, after having had regard to *inter alia* the substance or merits of the particular case as well as the decision eventually given by the administrator. It is submitted that should it transpire to the court that, having regard to the merits of the case, the decision was plainly wrong, the court will no doubt regard that as a factor, if not the determining factor, in coming to a finding as to whether it was reasonable or not and to make a finding thereon. Hoexter also recognises, correctly so, what she refers to as the 'substantive ingredient'²⁰⁸ of the reasonableness requirement of administrative justice in terms of s 33(1) of the Constitution. This, she concedes, in effect means that the substance/merits of a decision must necessarily be scrutinised by the court in order to determine whether it was reasonable or not.²⁰⁹

This, as she correctly points out, is also true of several other innocent sounding grounds of review, such as *ulterior purpose/motive* and *failure to apply the mind*.²¹⁰

This also seems to have been acknowledged, implicitly so, by Cameron JA in *Rustenburg Platinum Mines v CCMA*.²¹¹ In this case, the

²⁰⁸ Hoexter *op cit* (n 19) 317.

²⁰⁹ Hoexter *op cit* (n 19) 317.

²¹⁰ Hoexter *op cit* (n 19) 317–318.

court actually made a finding in respect of the reasons which had been advanced by the Administrator and described it as plainly bad. As such, this must have involved scrutinising carefully those reasons and, in effect, the merits of that decision. This is what Hoexter correctly refers to as the 'substantive ingredient' of the reasonableness element.²¹²

This acknowledgment by the commentators, including Hoexter, led them to propagate 'a cautious approach to reasonableness review'.²¹³

The second element of reasonableness is proportionality which, according to Hoexter, remains 'somewhat controversial', and which refers to:

"... the notion that one ought not to use a sledgehammer to crack a nut. Its purpose is to avoid an imbalance between the adverse and beneficial effects ... of an action and to encourage the administrator to consider both the need for action and the possible use of less drastic or oppressive means to accomplish the desired end."²¹⁴

²¹¹ 2007 (1) SA 576 (SCA) para 34.

²¹² Hoexter *op cit* (n 19).

²¹³ Hoexter *op cit* (n 19) 312. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 45 wherein O'Regan J also cautioned that '... the courts must take care not to usurp the functions of administrative agencies'. See also *Corephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) para 32 and particularly para 36 where the Labour Appeal Court also acknowledged this blur between appeals and reviews in the following way:

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining the [issue] is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.

²¹⁴ Hoexter *op cit* (n 19) 309; see also De Waal 'Proportionality as a Requirement of Legality in Administrative Law in terms of the New Constitution' 1994 *SA Public Law* 360 at 374 where the author refers to the opinion of the SA Law Commission, which opinion to a large extent informs the present 1996 Constitution, as follows: '... unreasonableness should be recognised as a ground of review of all administrative acts: decisions which no reasonable organ could have made would be reviewable'. Despite this opinion, the author's view was that 'under the new Constitution, the ensuing application of the principle of proportionality will render unreasonableness an unnecessary ground of review'. It is submitted that the inclusion, as part of

5.7 Parole as administrative action must also be fair: procedural fairness, substantive fairness and legitimate expectations

The duty to act fairly within the context of administrative justice in South Africa is no longer confined only to State officials; it is binding upon all administrators²¹⁵. That duty to act fairly, of which the concept of legitimate expectation is but one aspect, is no longer confined to procedural fairness.²¹⁶ The duty to act fairly has now been extended beyond, but including, procedural fairness - it now includes lawfulness, which refers to the principle of legality, and reasonableness.²¹⁷

s 33(1) of the Constitution Act 108 of 1996, of the term reasonable is in line and reflects the opinion of the SA Law Commission. In other words, gross unreasonableness is no longer required to review an administrative action. See also Corder 'Administrative Justice' in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism in the New South African Legal Order* (1994) 399; Erasmus 'Limitation and Suspension' in Van Wyk et al (eds) *op cit* (n 48) 629 at 648-649.

²¹⁵ Section 1 of PAJA, 3 of 2000, defines administrator as 'an organ of State or any natural or juristic person taking administrative action'.

²¹⁶ *Administrator Transvaal and Others v Traub and Others supra* (n 19).

²¹⁷ See s 33 of the Constitution Act 108 of 1996, s 6 of PAJA 3 of 2000. See *Roman v Williams NO supra* (n 40). See also *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) paras 27 et seq. See also *SA Veterinary Council and another v Szymanski* 2003 (4) SA 42 (SCA) at 48 per Cameron JA, which still confines the duty to act fairly to procedural fairness. See further *Administration Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 756-759; *Du Preez and Another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A) at 231 G-H where this principle was summarised as follows:

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 ... The duty to act fairly, however, is concerned only with the manner in which the decisions are taken: it does not relate to whether the decision itself is fair or not ...

See also *Nortje en 'n ander v Minister van Korrektiewe Dienste en andere* 2001 (3) SA 472 (SCA) 479 D-480 D; *Minister of Correctional Services v Kwakwa supra* (n 8).

5.8(a) Procedural fairness

The duty to act fairly within the context of the common law meaning of procedural fairness, now finds expression in s 3 of PAJA²¹⁸. Everyone, including a sentenced prisoner, is entitled to an enforceable right to procedurally fair administrative action, particularly where his rights or legitimate expectations are materially and adversely affected by such administrative action.

The meaning of 'fairness', as part of procedural fairness or the duty to act fairly within the general administrative justice context, is not easy to define. In fact, it has been referred to as an 'illusive concept'²¹⁹, and a 'highly variable concept'²²⁰, which '... must be decided in the circumstances of each case'²²¹. In *Administrator, Transvaal & Others v Theletsane & Others*²²² dealing with the concept of fairness in the context

²¹⁸ Section 3(1) reads as follows: 'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.' For a discussion of procedural fairness within the context of s 24 of the Constitution Act 200 of 1993 – the predecessor of s 33 of the Constitution Act 108 of 1996, see Cachalia, Cheadle, Davis, Haysom, Meduna and Marcus, *Fundamental Rights in the New Constitution: An Overview of the New Constitution and a Commentary on Chapter 3 of Fundamental Rights* (1994) 72-74.

²¹⁹ *Administrator, Transvaal & Others v Theletsane & Others* 1991 (2) SA 192 A at 206C-D.

²²⁰ Hoexter *op cit* (n 19) 328.

²²¹ *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 6 (SCA) para 13 per Conradie JA. See also *Bongoza v Minister of Correctional Services* 2002 (6) SA 330 (Tk) paras 21-25. See also generally as regards the importance of fairness, Hoexter *op cit* (n 19) 293, 347; and with regards to fairness in the context of pre-1994 administrative justice and the *audi alteram partem* rule, see H Corder *The Content of the Audi Alteram Partem Rule in South African Administrative Law* (1980) 43 THRHR 156.

²²² 1991 (2) SA 192 (A) 206 C-D.

of the *audi alteram partem* rule, Smalberger JA provides the following description:

"What the audi rule calls for is a fair hearing. Fairness is often an illusive concept; to determine its existence within a given set of circumstances it is not always an easy task. No specific all encompassing test can be laid down for determining whether a hearing was fair – everything will depend upon the circumstances of a particular case. There are, however, at least two fundamental requirements that need to be satisfied before a hearing can be said to be fair: there must be notice of the contemplated action and a proper opportunity to be heard."

In England, the concept of fairness was also the subject of an incisive analysis, within the context of administrative law and more particularly concerning the rights or legitimate expectations of a prisoner, in the matter of *Doody v The Secretary of State for the Home Department and Others*.²²³ In this case, Lord Mustill refers during his speech, to the dictates of fairness – which have been referred to with approval by South African Courts²²⁴ which he describes as follows:²²⁵

"Where an act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.

The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type.

²²³ (1993) 3 All ER 94

²²⁴ *Marais & Another v Democratic Alliance* 2002 (2) BCLR 171 (C) para 69; [2002] 2 All SA 424 (C) para 69; *Du Preez and another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) 232 B–C; *Nortje en 'n ander v Minister van Korrektiewe Dienste en andere* 2001 (3) SA 472 (SCA) 480 E–F.

²²⁵ *Doody* (n 1) at 108E–H. This case was referred to with approval and its principles applied in another English case of *R v Secretary of State for the Home Department Ex Parte Pierson* 1996 (1) All ER 837 at 851, where it was reiterated that representations made by or on behalf of the prisoner, for consideration to be placed on parole, must be 'considered fairly, objectively and without a preconceived intention to reject them.' (Emphasis added)

The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.

An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to securing its modification, or both.

Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer."

According to MR Gottfredson and DM Gottfredson²²⁶ a distinction ought to be made between the concept of fairness and the concept of justice. While pointing out the differences between the two concepts, they also forcefully demonstrate the inter-relationship between the two concepts and that fairness is essentially invoked and/or required to attain justice:

"The concept of **fairness** is not the same as the concept of **justice**. There may be, however, reasonable agreement that justice requires fairness or that "justice includes fairness, but is more demanding" (Wilkins, 1975b). Similarly, it appears that fairness includes the concept **equity**, which may be taken to mean that similar persons are dealt with in similar ways in similar situations. It is trite, but nevertheless true, that equal injustice is no better than unequal justice; ..."²²⁷

²²⁶ Gottfredson and Gottfredson *op cit* (n 49) 240–241.

²²⁷ Gottfredson and Gottfredson *op cit* (n 49) 240–241.

The PAJA is legislation of a general kind whose provisions, including ss 3(2)(i), 3(2)(a) and 3(3) thereof, '... thus apply where the relevant enabling legislation is silent on the subject of fair procedures'.²²⁸ Thus Ngcobo J emphasises the fact, with reference to the requirement of fairness, in *Zondi v MEC for Traditional & Local Government Affairs*²²⁹, that 'decision makers who are entrusted with the authority to make administrative decisions by any statute ... are required to do so in a manner that is consistent with PAJA. These provisions will either be read into, or supplement, the enabling legislation'. Where the enabling legislation stipulates its own special requirements relating to fairness such as in the case of the Correctional Services Act²³⁰, this is permitted and acknowledged by s 3(5) of the PAJA²³¹, provided that the different procedure is 'fair'.²³²

The matter of *Zondi v MEC for Traditional & Local Government Affairs*²³³ refers to 'fairness' as a relative concept which is informed by the circumstances of each particular case:

"Procedural fairness, by its very nature, imports the element of fairness. And fairness is a relative concept which is informed by the circumstances of each particular case. In each case the

²²⁸ Hoexter *op cit* (n 19) 330.

²²⁹ 2005 (3) SA 589 (CC) paras 101, 113–114.

²³⁰ Act 111 of 1998.

²³¹ 3 of 2000.

²³² See s 3(5) of PAJA 3 of 2000, which reads as follows:

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

²³³ 2005 (3) SA 589 (CC) para 113–114.

question is whether fairness demands that steps be taken to trace the identity of the person against whom a decision is to be made. It is therefore neither possible nor desirable to attempt to define the circumstances where the dictates of fairness will require the decision maker to take steps to ascertain the identity of the livestock owner. ...

The question whether fairness requires the decision maker to take some steps to ascertain the identity of the person against whom the decision is to be made must be determined with due regard to the circumstances of each case. The overriding consideration will always be what does fairness demand in the circumstances of a particular case. The availability of information which, with the exercise of reasonable diligence, renders it possible to ascertain the identity of a person is a relevant consideration. So is the urgency required in making the decision.²³⁴

These considerations have both informed and formed part of s 3 of the Promotion of Administrative Justice Act (PAJA). The procedural rights enumerated in s 3 of PAJA correspond substantially with the procedural rights of prisoners as contained in the Correctional Services Act, 111 of 1998²³⁵ and as set out in the preceding chapter.

5.8(b) **Fairness as a substantive dimension**

Since the introduction of a constitutional dispensation in South Africa, fairness, is no longer confined merely to the fairness of the decision-making procedures, but also to the fairness of the decision itself, that is

²³⁴ *Zondi v MEC for Traditional and Local Government Affairs* (n 229, 233) paras 113–115. See also Curry and Klaaren 'Remedies for Non-Compliance with Section 3 of the Promotion of Administrative Justice Act' in Lange & Wessels (eds) *The Right to Know: South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004), para 3.1 *et seq.*

²³⁵ See ss 21 of the Correctional Services Act 111 of 1998 (Complaints and Requests), 24 (Procedures and Penalties) and 72 (Complaints and Requests).

fairness in relation to its substance and merits as well: 'The role of the courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well'.²³⁶

The purported objective of the legislature through s 33 of the Constitution²³⁷ and the PAJA²³⁸ is to seek to limit the requirement of fairness to procedural fairness only, in relation to administrative justice.²³⁹

That objective is however not only being frustrated but also ultimately thwarted by other provisions in the Constitution as well as other applicable legal principles, such as the requirement of reasonableness.²⁴⁰

²³⁶ *Roman v Williams NO* (n 40). See also *Hoexter op cit* (n 19) 316–317; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (n 175); *Minister of Health v New Clicks SA (Pty) Ltd* (n 175); *Carephone (Pty) Ltd v Marcus NO* (n 207, 213).

²³⁷ Act 108 of 1996.

²³⁸ Specifically s 3 of PAJA 3 of 2000.

²³⁹ This is reflected in *Du Preez & Another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A) at 231 G–H where this principle was summarised as follows:

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 ... The duty to act fairly, however, is concerned only with the manner in which the decisions are taken; it does not relate to whether the decision itself is fair or not.

See also *Nortje en 'n Ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA) 479 E–480 D; *Minister of Correctional Services v Kwakwa* 2002 (4) SA 445 (SCA) paras 35–36.

²⁴⁰ Section 33 of the Constitution Act 108 of 1996, read with ss 1, 7, 10, 12 and 195 which affirms the foundational and democratic values of our new constitutional dispensation which are applicable to public administration in general and administrative justice in particular and which, it is submitted, form part of the broad objective 'to ... establish a society based on democratic values, social justice and fundamental human rights' (Preamble to the Constitution), all of which contain the element of fairness as an essential ingredient. See also *Roman v Williams NO supra* (n 40) and *Stansfield v Minister of Correctional Services* 2004 (4) SA 43 (C).

According to Gottfredson & Gottfredson²⁴¹, although fairness is not the same as justice; fairness is an essential requirement of justice. Fairness also includes the concept of equity.

Barbara Hudson²⁴², also propagates proportionality based on the grounds of **fairness** to achieve not only penal justice but also social justice. According to the author, the dilemma of penal policy is that decisions about which factors to include in criteria for imprisonment or community corrections or for sentence length or for parole or remission, cannot be derived from abstract principles such as 'justice, desert or culpability'.²⁴³ There is an inescapable conflict, she points out, with trying to treat people **fairly** and treating acts consistently.²⁴⁴ There are still further tensions between trying to treat offenders equitably and other objectives such as crime control and public policy.²⁴⁵ The answer suggested by the author to resolve this dilemma is the application of 'the principle of proportionality based on the grounds of fairness'.²⁴⁶ The author notes further, being mindful of the difficulties involved in achieving that objective, that '(a) ... penal policy cannot be expected to solve all the dilemmas of criminal

²⁴¹ Gottfredson and Gottfredson *op cit* (n 49, 226) 240–241. The relevant quotation is *infra* (n 226).

²⁴² Hudson *Penal Policy and Social Justice* (1993) 80–81.

²⁴³ Hudson *op cit* (n 242) 81.

²⁴⁴ Hudson *op cit* (n 242).

²⁴⁵ Hudson *op cit* (n 242).

²⁴⁶ Hudson *op cit* (n 242) 81.

justice, let alone social justice, it at least ought to be consistent with the ideal of justice and should not be adding to the sum of social injustice'.²⁴⁷

The concept of justice in relation to the term 'interest of justice' has, in South African law, authoritatively been described as meaning '... in the context in which that expression is used, ... essentially a value judgment based on general consideration of equity and fairness to both parties, viewed against the factual matrix of each case'.²⁴⁸

Similarly, fairness involves a value judgment²⁴⁹ which is based on, and informed by, considerations of justice and equity including the value of our Constitution which expressly requires public administration service to be provided '... impartially, fairly, equitably and without bias'.²⁵⁰

Although these values²⁵¹ do not create or confer enforceable rights.²⁵²

(a) each one of them has a corresponding right or bundle of rights with

²⁴⁷ Hudson *op cit* (n 242) 81.

²⁴⁸ *Mugwena and Another v Minister of Safety & Security* 2006 (4) SA 150 (SCA) 155 para 12.

The question whether the granting of an application in terms of section 57(5) of the Act (the Police Act) would be in the interests of justice in the context in which that expression is used involves, in my view, essentially a value judgment based on general considerations of equity and fairness to both parties viewed against the factual matrix of each case (*Lek v Estate Agents' Board* 1978 (3) SA 160 (C) at 171 C).

²⁴⁹ Corder *op cit* (n 214) 399–400.

²⁵⁰ Section 195(1)(d) of the Constitution Act 108 of 1996. See also ss 1 and 7 of the Constitution, which set out the founding and democratic values and principles upon which the South African Constitution dispensation is based.

²⁵¹ Section 1 of the Constitution Act 108 of 1996 sets out these values:

The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) human dignity, the achievement of equality and the advancement of human rights and freedoms;

(b) non-racialism and non-sexism;

(c) supremacy of the Constitution of the rule of law

which it can be matched²⁵³; (b) it creates obligations/duties which must be adhered to or given effect to, such as the obligation created by 'the first aspect of the rule of law' which is the obligation on the state to provide mechanisms to resolve disputes, and which have as its corollary, the right to have access to court guaranteed in s 34 of the Constitution²⁵⁴; and (c) it plays a very significant role in informing the interpretation of the Constitution and other laws and sets positive standards with which all law must comply in order to be valid.²⁵⁵

Fairness therefore also has a subjective ingredient reflected in a 'value judgment' which must be made by the responsible adjudicator or official or other decision maker, which is acknowledged in our law²⁵⁶ but which is also authorised and necessitated by the Constitution.²⁵⁷

This value judgment will have a direct impact on the ultimate decision of the decision making authority, be it the administrative authority,

(d) universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Section 7: '(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom;

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

Section 195. 'Basic values and principles governing public administration.'

²⁵² Hoexter *op cit* (n 19) 17–18; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 21; *Transnet v Chinwa* 2006 (27) ILJ 2294 (SCA).

²⁵³ Hoexter *op cit* (n 19) 18, who also refers to the Constitutional Court case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 39.

²⁵⁴ Hoexter *op cit* (n 19) 18, who also refers to the Constitutional Court case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 39.

²⁵⁵ Hoexter *op cit* (n 19) 18. See also *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) para 19.

²⁵⁶ See *Mugwena's case supra* (n 248).

²⁵⁷ See n 238 with reference to ss 1, 7 and 195 of the Constitution Act 108 of 1996 (referred to in 248 above). See Corder *op cit* (n 214).

administrator or the review court, not only on whether the decision was fair in relation to its procedure, but also whether it was fair in relation to its merits or substance. This value judgment will also have to be exercised in a context where there are a myriad other competing value systems which '... all interact as a complex system to determine the time finally served in prison by inmates'.²⁵⁸

This is pertinent in that it refers to and deals with the complicated parole decision-making process. In South Africa, however, that value judgment must be exercised in accordance with, and is pertinently guided by, the constitutional values set out and referred to above.²⁵⁹

Fairness, inasmuch as it has been referred to as an 'illusive concept'²⁶⁰ or a relative concept²⁶¹ or 'a highly variable concept'²⁶², is the pervasive ingredient of justice. Reasonableness, which consists of rationality and proportionality²⁶³, is also an essential ingredient of justice. Just as the objective of the requirement of reasonableness is the attainment of justice, so is the objective of fairness. Justice includes considerations of fairness and equity.²⁶⁴ Fairness includes equity but also involves, as a subjective ingredient, a value judgment which must be exercised in its quest for judgment in accordance with those values

²⁵⁸ Gottfredson & Gottfredson *op cit* (n 49) 234.

²⁵⁹ Sections 1, 7 and 195 of the Constitution Act 108 of 1996.

²⁶⁰ Sections 1, 7 and 195 of the Constitution Act 108 of 1996.

²⁶¹ As set out in the *Zondi* case per Ngcobo J, *supra* (n 233) para 113.

²⁶² Hoexter *op cit* (n 19) 328.

²⁶³ Hoexter *op cit* (n 19) 307 and 309.

²⁶⁴ *Mugwena* (n 248).

prescribed in the Constitution.²⁶⁵ It is this subjective ingredient, in the form of a value judgment, that will lead courts to enquire into the fairness not only of the procedure relating to the decision but also in terms of the merits and substance thereof. It is through these twin requirements of reasonableness and fairness that courts increasingly but cautiously²⁶⁶ seek to effect not only formal justice as referred to in s 33 of the Constitution and s 3 of PAJA, but also substantive justice including substantive fairness in the sense that: 'the role of the courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well'.²⁶⁷

Although PAJA²⁶⁸ and s 33 of the Constitution²⁶⁹ seek to limit the requirement of fairness only to procedure in relation to administrative justice, fairness still finds application as a general constitutional requirement as an essential ingredient of justice, in concert with the requirement of reasonableness, and as part of the values prescribed by the Constitution.²⁷⁰

²⁶⁵ See ss 1, 7 and 195 of the Constitution act 108 of 1996.

²⁶⁶ See the caution against judicial over-zealousness and judges preferring their own views as to the correctness of the decision; Hoexter *op cit* (n 19) 318. See also O'Regan in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45, who cautions that 'the Courts must take care not to usurp the function of administrative agencies'.

²⁶⁷ *Roman v Williams NO supra* (n 40) 284–285A.

²⁶⁸ The Promotion of Administrative Justice Act 3 of 2000.

²⁶⁹ The Constitution of the Republic of South Africa Act 108 of 1996.

²⁷⁰ Sections 1, 7 and 195 of the Constitution, Act 108 of 1996.

5.9 The concept of legitimate expectation has a procedural dimension and a substantive dimension²⁷¹

A legitimate expectation in South African jurisprudence is a facet of the duty to act fairly and is founded on a promise or past practice²⁷². In the Appellate Division case (as the Supreme Court of Appeal was then known) of *Administrator Transvaal and Others v Traub and Others* (hereinafter referred to as '*Traub*')²⁷³, Corbett JA as he then was²⁷⁴ gave an incisive analysis of the legitimate expectation doctrine, which he subsequently found to be part of South African law and referred with approval to the article on legitimate expectations, by Professor Robert E Riggs²⁷⁵.

The doctrine of legitimate expectation which is one facet of the general duty to act fairly has, in its application, in terms of our common law and under the constitutional dispensation in South Africa after 1993, been confined to the question of procedural fairness²⁷⁶. In terms of this approach:

²⁷¹ See Robert E Riggs *op cit* (n 19) 405.

²⁷² *Administrator Transvaal and Others v Traub and Others* 1989 (4) SA 731 (AD) 748; Van Zyl Smit *South African Prison Law and Practice* (1992) 368; Hoexter *op cit* (n 19) 371–381; see also Riggs *op cit* (n 19) 403.

²⁷³ 1989 (4) SA 731 (AD) (n 19).

²⁷⁴ Later becoming the Chief Justice of South Africa.

²⁷⁵ Riggs *op cit* (n 19).

²⁷⁶ See *Traub* (n 19) 758–759 where it was said that:

It is not for the Courts to judge whether a particular decision is fair. The Courts are only concerned with the manner in which the decision was taken and the extent of the duty to act fairly will vary greatly from case to case.

"... the person concerned may have a legitimate expectation that the decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing. ... As has been pointed out this is simply another, and preferable, way of saying that a decision maker must observe the principles of natural justice....

Many features will come into play including the nature of the decision and the relationship of those involved before the decision was taken; ... and a relevant factor might be the observance by the decision maker in the past of some established procedure or practice. It is in this context that the existence of a legitimate expectation may impose on the decision maker a duty to hear the person affected by his decision as part of his obligation to act fairly".²⁷⁷

There is still a great reluctance on the part of the South African courts to depart from this common law approach to, and meaning of, the doctrine of legitimate expectation.²⁷⁸

It is trite that under South African law, particularly administrative law,

In *Du Preez and Another v Truth & Reconciliation Commission* 1997 (3) SA 204 (A), at 231 G–H, this approach was confirmed:

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. ... The duty to act fairly, however, is concerned only with the manner in which the decisions are taken; it does not relate to whether the decision itself is fair or not.

See also *Nortje & 'n ander v Minister van Korrektiewe Dienste en Andere* 2001 (3) SA 472 (SCA) 479 E–480 D; *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) para 27; *South African Veterinary Council and another v Szymanski* 2003 (4) SA 42 (SCA) 48 paras 14–19.

²⁷⁷ *Traub* (n 19) 758–759.

²⁷⁸ This was particularly evident in *Meyer v Iscor Pension Fund supra* (n 276) para 27, in which a clear reluctance was displayed by the Supreme Court of Appeal to introduce the 'difficult and complex' concept of the substantive legitimate expectation doctrine into South African law and suggested that it should be confined to English law. See also *South African Veterinary Council and another v Szymanski supra* (n 276); *Nortje en 'n ander v Minister van Korrektiewe Dienste en Andere supra* (n 276); see also Van Zyl Smit *South African Prison Law and Practice* (1992) 368 where the author, with reference to the duty to act fairly in South Africa, as developed in English law, made the point that once a parole system has been created, prisoners have a real interest in ensuring that it be operated in such a way that the possibility that they might be granted parole is properly considered. He, however, qualifies this with the following: 'It should be emphasised that this argument does not necessarily proceed from the basis that the prisoner has a right to parole. It can be viewed simply as a procedural question.'

the law protects an expectation when such an expectation is legitimate.²⁷⁹ The expectation must be a legitimate one in an objective sense.²⁸⁰ Whether an expectation has been created is always a question of fact and thus not a matter of judicial discretion. It is thus a factual enquiry to be determined in relation to the circumstances of the particular case.²⁸¹

Conversely, the law does not protect an expectation if it is not legitimate or if it is *ultra vires* or if it amounts to an expectation of preventing a functionary from discharging his or her statutory duty.²⁸² An alleged legitimate expectation which is founded on the wrong premise, and therefore misplaced, would also not be enforceable.²⁸³

²⁷⁹ See Traub (n 19); Du Preez and another v Truth & Reconciliation Commission supra (n 276); Nortje en 'n ander v Minister van Korrektiewe Dienste en Andere (n 276); Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (Tk-AD) at 31–33; Meyer v Iscor Pension Fund supra (n 276); South African Veterinary Council and Another v Szymanski supra (n 276).

²⁸⁰ South African Veterinary Council and Another v Szymanski supra (n 276). See also Hoexter op cit (n 19) 378.

²⁸¹ Hoexter op cit (n 19) 378.

²⁸² University of the Western Cape v MEC for Health and Social Services 1998 (3) SA 124 (C) at 134 A–D; National Director of Public Prosecutions v Phillips and others 2002 (4) SA 16 (W), para 28; South African Veterinary Council and another v Szymanski supra (n 276). See also Hlophe 'Legitimate Expectation and Natural Justice: English, Australian and South African Law' 1987 SALJ 165 at 182 where the author, later the Judge President of the Cape Provincial Division of the High Court, replied as follows to the fear that the extension of this concept would overburden the administration of justice with claims of alleged legitimate expectations, as follows:

However, while this fear is not unjustified, the legitimate expectation test meets it, for not every expectation is legitimate or reasonable for the purposes of natural justice. Therefore a pest cannot be said to have a legitimate expectation to be heard. The same is true of a person whose expectation is unreasonable.

²⁸³ Winckler & Others v Minister of Correctional Services and others 2001 (2) SA 747 (C) at 756 F–H. This decision, however, was criticised and not followed by Mr Acting Justice Smuts in the South Eastern Cape Division case of Mohamed v Minister of Correctional Services and others 2003 (6) SA 169, particularly at 188. If the premise of the judgment is the retrospective effect of the policy direction dated 23 April 1998, as it appears to be, then this judgment of Smut AJ cannot, with respect, be supported. As Moosa J correctly points out in the Winckler case, the policy in existence at the time, ie 24 November 1994, which would also apply to the applicants in the Mohamed case – he had been sentenced on 9 May 1995 to an effective 12 years imprisonment – was in fact more onerous than the policy directive of 23 April 1998. See also Combrinck v Minister of Correctional Services 2001 (3) SA 338 (D) 343.

The constitutional right guaranteed to any person, to administrative action that is procedurally fair, lawful and reasonable, also confers on that person and includes the legitimate expectation to administrative action that is procedurally fair, lawful and reasonable.²⁸⁴ Fairness, which is the essence of the duty to act fairly and of which the concept of legitimate expectation is a facet, has, under our common law and as developed under and in accordance with the Constitution of South Africa, apart from its procedural dimension also a substantive dimension which confers on the affected person the right to substantive fairness.²⁸⁵ This includes the rights to have the merits and substance of an administrative action assessed and determined by the reviewing court or tribunal, and set aside or substituted or corrected, if it is found to be in breach of the affected person's right to administrative justice in the particular circumstances of the case.²⁸⁶

This substantive dimension of legitimate expectation is further reflected in the remedies afforded to an aggrieved party in s 8 of the PAJA:²⁸⁷ the court or tribunal hearing or dealing with an application for judicial review has the power to make or grant 'any order that is just and equitable'.²⁸⁸ This clearly contemplates that the substance and merits of a

²⁸⁴ Section 33 of the Constitution Act 108 of 1996 read with s 6 of PAJA 3 of 2000.

²⁸⁵ See the discussion and exposition on substantive fairness above.

²⁸⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* supra (n 175) para 45; *Minister of Health v New Clicks SA (Pty) Ltd* supra (n 175); *Hoexter op cit* (n 19) 306; *Roman v Williams NO* supra (n 40); see also *Stansfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C) para 130–132; see also *Du Plooy v Minister of Correctional Services and Others* 2004 (3) All SA 613 (T) 621–622; *Masibuko v Minister of Correctional Services and Others* 2007 (2) SACR 303 (T) 307–308.

²⁸⁷ Act 3 of 2000.

²⁸⁸ Section 8(1) of PAJA 3 of 2000.

decision by an administrator are also subject to judicial review by the review court or tribunal. In other words, it is empowered to deal not only with the procedure but also with the merits and substance of the decision.²⁸⁹

The review court or tribunal is also empowered to set aside the administrative action complained of and, in addition, could remit the matter for reconsideration by the person who took the decision, with or without directions.²⁹⁰ This is the traditional common law remedy.

In addition, the review court or tribunal is now also authorised, after having set aside the impugned administrative action, to **substitute** or vary the administrative action or correct a defect which resulted from the administrative action.²⁹¹ This also clearly contemplates a determination by the review court or tribunal of whether the decision (administrative action) was right or wrong in the circumstances. In other words, the review court or tribunal is empowered to deal with the merits and substance of the administrative action itself. This, however, is authorised only in exceptional cases.²⁹² No definition is given in PAJA of what is meant by 'exceptional cases'. It is settled law that the existence or otherwise of 'exceptional circumstances' is not a matter of judicial discretion, but a

²⁸⁹ See also the discussion and exposition of the concept of fairness above.

²⁹⁰ Section 8(1)(c)(i) of PAJA 3 of 2000.

²⁹¹ Section 8(1)(c)(i) of PAJA 3 of 2000.

²⁹² Section 8(1)(c)(ii)(aa) of PAJA 3 of 2000. The corresponding s 27(1)(b) of the Correctional Services Act 111 of 1998 – the empowering legislation, does not require 'exceptional circumstances' to be present.

matter of fact to be determined objectively.²⁹³ Thus, exceptional circumstances are either present or not, which must be determined as a matter of fact and not as a matter of judicial discretion. The judicial discretion, and the exercise thereof, only comes into play once a factual finding as to the existence or otherwise of exceptional circumstances has been made.²⁹⁴

This substantive dimension of the concept of legitimate expectation is not the same as substantive legitimate expectation, although it will form part thereof as discussed above.²⁹⁵

5.10 Substantive legitimate expectation

The term 'substantive legitimate expectation' denotes a right of a person to harbour an expectation to receive a substantive benefit, which was created and/or induced by a public authority through a promise or policies or guidelines.²⁹⁶

In *Traub*²⁹⁷, when the concept of legitimate expectation was analysed

²⁹³ *MV Ais Mamas Seatrans Maritime v Owners: MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 156 EF–157CD.

²⁹⁴ *MV Ais Mamas Seatrans Maritime v Owners: MV Ais Mamas and another supra* (n 293) 156–157.

²⁹⁵ See the discussion and exposition on fairness above.

²⁹⁶ *Administrator, Transvaal and others v Traub and others* (n 19) 758 D–E; *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) paras 26–27; *SA Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) 48–49; *Riggs op cit* (n 19) 404; *Hoexter op cit* (n 19) 382–385.

²⁹⁷ *Administrator, Transvaal & Others v Traub & Others supra* (n 19, 296) 758 D–E.

and introduced into South African law by Corbett JA²⁹⁸, he referred with approval to the article by Professor RE Riggs²⁹⁹ and acknowledged the existence of the substantive legitimate expectation, despite the fact that he did not acknowledge it as part of South African law, by explaining that both procedural and substantive legitimate expectation:

“... may be interrelated and even tend to merge. Thus the person concerned may have a legitimate expectation that a decision by the public authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing. ... As has been pointed out this is simply another, and preferable, way of saying that a decision maker must observe the principles of natural justice....”³⁰⁰

The existence of a substantive legitimate expectation in South African jurisprudence was also acknowledged by our Constitutional Court in 1999, in *Premier Mpumalanga v Executive Committee, Association of State-Aided School, Eastern Transvaal*³⁰¹ where the court similarly referred to the ‘entwined procedural and substantial aspects of a legitimate expectation in South Africa’.³⁰² However, the effect of the ultimate judgment of the Constitutional Court in this case was not only to recognise the existence of a substantive legitimate expectation, it was also the **enforcement** of a substantive benefit.³⁰³ This was in the form of the continued payment of school bursaries to needy and qualified pupils by the relative state department and administrator, until the expiry of the original term as promised by the latter, which was the end of 1995, but

²⁹⁸ Who later became the Chief Justice of South Africa.

²⁹⁹ Riggs *op cit* (n 19) 395 F, 404–406, 425 et seq.

³⁰⁰ Traub (n 19) 758 F–G.

³⁰¹ 1999 (2) SA 91 (CC) paras 38–42, 47, 52.

³⁰² 1999 (2) SA 91 (CC) para 38.

³⁰³ Hoexter *op cit* (n 19) 377.

which had unilaterally been terminated in August 1995 with effect from July 1995.³⁰⁴

The existence and **protection** of a substantive legitimate expectation in South African jurisprudence was also similarly recognised in the 2002 Constitutional Court case of *Bel Porto School Governing Body v Premier, Western Cape*³⁰⁵. According to Madala J, who concurred in the dissenting judgment of Mokgoro and Sachs JJ '... the doctrine of legitimate expectation is construed broadly and encompasses both substantive and procedural expectations', which '... can only be prevented from being given substance to ... if, and only if, the promise was made in violation of a statute or if a pressing public interest clearly indicates otherwise'³⁰⁶.

According to Chaskalson P, speaking for the majority of the court, the enforcement of a substantive legitimate expectation in South Africa jurisprudence is still a very contentious issue '... on which there is no clear authority in our law'.³⁰⁷

The existence of the substantive legitimate expectation in South

³⁰⁴ *Premier Mpumalanga v Executive Committee, Association of State-Aided School, Eastern Transvaal* (n 301) paras 38-51.

³⁰⁵ 2002 (3) SA 265 CC paras 212-213 per Madala J.

³⁰⁶ *Bel Porto School Governing Body v Premier Western Cape supra* (n 305) paras 212-213.

³⁰⁷ *Bel Porto School Governing Body v Premier Western Cape supra* (n 305) para 96. This coincides with his cautionary approach towards the setting of substantive fairness as a standard in South Africa law which, as such '... would drag Courts into matters which according to the separation of powers, should be dealt with at a political or administrative level and not at a judicial level' (*ibid* para 88). See also *De Leeuw v MEC for Local Government and Housing, Free State* unreported judgment in the Supreme Court of Appeal, Case No 420/2006, para 8; *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) para 36.

African law was also acknowledged and referred to in the more recent cases of *Meyer v Iscor Pension Fund*³⁰⁸ and *SA Veterinary Council and Another v Szymanski*³⁰⁹ although, in both cases, the Supreme Court of Appeal refrained from deciding the issue of its application in South African law.

In *Meyer v Iscor Pension Fund*, the Supreme Court of Appeal displayed a clear reluctance to introduce the 'difficult and complex' concept of the substantive legitimate expectation doctrine into South African law and suggested that it should be confined to English law.³¹⁰

In *Szymanski*³¹¹ the Supreme Court of Appeal held, however, that 'it is by no means clear that a legitimate expectation can found an extra procedural entitlement such as the substantive benefit claimed here', but also notes that '... this case does not require us to resolve this issue.'³¹²

The highest courts of South Africa have thus not definitively pronounced on the applicability and enforcement of substantive legitimate expectations in South African jurisprudence but, as Hoexter suggests '... the way would seem to have been left open by the highest courts',³¹³ for its application and enforceability. There are cogent arguments in South

³⁰⁸ 2003 (2) SA 715 (SCA) para 27.

³⁰⁹ 2003 (4) SA 42 (SCA) 48-49.

³¹⁰ See n 308 para 27 per Brand JA.

³¹¹ See n 309.

³¹² *Szymanski* case (n 309) para 50 per Cameron JA.

³¹³ Hoexter *op cit* (n 19) 389.

African jurisprudence in favour of the applicability and enforceability of a substantive legitimate expectation, albeit in a carefully managed way, and modified and adapted according to South African circumstances.³¹⁴

5.11 The scheme of the Correctional Services Act, 111 of 1998³¹⁵ creates a substantive benefit: to be released on parole

In South Africa, particularly in the context of parole, the release of prisoners on parole is statutorily acknowledged and regulated³¹⁶. Sections 38 and 42 of the Correctional Services Act, 111 of 1998 provides in peremptory terms that every prisoner must be assessed by the Case Management Committee with the ultimate and expressly stated objective, particularly in relation to those prisoners sentenced to more than 12

³¹⁴ Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *SALJ* 292 at 311, 320–321; see also the bold arguments of Southwood 'Legitimate Expectation: A Case of Paradigm Lost' (1998) 13 *SA Public Law* 197 at 210 et seq, who argues that essentially there is no such thing as a procedural expectation, because in cases where an expectation is apparently procedural, the benefit to be derived from that procedure is **actually substantive**. With reference to the English case of *Council of Civil Service Unions v Minister of Civil Service* 1984 (3) All ER 935 (HL) per Lord Diplock, at 943–944, the author argues that the expected benefit herein was really the continued freedom to be a member of a trade union, rather than the benefit of being consulted. See also Hoexter *op cit* (n 19) 382, 389–391; see also Van Zyl Smit *South African Prison Law and Practice* (1992) 368 where the author, with reference to the duty to act fairly, the substantive aspect of a legitimate expectation in the parole system in South Africa referring to it as 'a real interest' which prisoners have 'in ensuring that [the parole system] be operated in such a way that the possibility that they might be granted parole is properly considered'. This recognition is however qualified by the author's subsequent statement that it does not mean that 'a prisoner has a right to parole. It can be viewed simply as a procedural question', *ibid* 368.

³¹⁵ See ss 38 (assessment of prisoners), 41 (dealing with the treatment, development and support services for prisoners), 42 (which deals with the duties of the Case Management Committee (CMC), Chapter VI, in particular ss 50, 51 and 52 which deal with community corrections, its objectives, the persons subject thereto and the conditions thereof, and Chapter VII which makes provision for the 'release from prison and placement under correctional supervision and on day parole and parole', in particular ss 73(4), 73(5) and 73(6) thereof, and ss 75 and 76, which deal with the powers, functions and duties of the Correctional Supervision and Parole Board and the Correctional Supervision and Parole Review Board respectively.

³¹⁶ See the sections referred to in n 315.

months' imprisonment, of determining and planning the manner in which the sentence should be served. In other words to determine how long and for which portion of the sentence such a prisoner must stay in prison before he or she can be released on parole³¹⁷.

Section 73(4) of the Correctional Services Act, 111 of 1998 is really the foundation of the whole parole scheme under the Act in that it establishes the principle of discretionary release on parole³¹⁸.

This principle will only be applied³¹⁹ once those prisoners serving a determinate sentence have served the stipulated non-parole period, or after having served '25 years of a sentence or cumulative sentences'³²⁰.

Section 73(5) of the Correctional Services Act, 111 of 1998 implements the principle of discretionary release on parole by stipulating in peremptory terms the release of prisoners on parole or day parole or under correctional supervision on a date set by, and subject to the conditions imposed by, the Correctional Supervision and Parole Board or

³¹⁷ See the sections referred to in n 315, including ss 38 and 42 of the Correctional Services Act 111 of 1998.

³¹⁸ It reads as follows: '73(4) In accordance with the provisions of this Chapter a prisoner may be placed under correctional supervision or on day parole on parole before the expiration of his or her term of imprisonment'.

³¹⁹ In terms of s 73(6) of the Correctional Services Act 111 of 1998.

³²⁰ In terms of s 73(6) of the Correctional Services Act 111 of 1998. This latter provision would be applicable to those prisoners sentenced to life imprisonment or having received cumulative sentences exceeding 25 years, or those who have been imprisoned pursuant to being declared dangerous criminals in terms of s 52(2) of the Criminal Law Amendment Act No 105 of 1997. See also s 73(6)(b) of the Correctional Services Act 111 of 1998.

the court³²¹. A prisoner will, however, only be released from prison and placed under correctional supervision, on day parole or parole after having accepted the conditions for such placement in the sense that he or she has agreed thereto and has undertaken to co-operate in meeting them³²².

A substantive benefit – in the form of release on parole – is thus statutorily created and promised to a prisoner³²³ and, in the case of a life sentenced prisoner, it is in fact constitutionally necessitated³²⁴, albeit subject to certain conditions to which such a prisoner must agree and comply with³²⁵.

The statutory scheme³²⁶ creates a statutory obligation on the Department of Correctional Services (DCS), the Correctional Supervision and Parole Board (CSPB) and the court to consider prisoners for parole, including those sentenced to life imprisonment or sentenced to indefinite imprisonment pursuant to being declared dangerous criminals, after a statutorily determined period of imprisonment³²⁷. The statutory scheme and our constitutional framework³²⁸ therefore create, in the context of parole in South Africa, both a substantive legitimate expectation (as set

³²¹ The court makes this determination in the case of life sentenced prisoners in terms of s 75(5)(ii) of the Correctional Services Act 111 of 1998.

³²² Section 73(5)(b) and s 51(2) of the Correctional Services Act 111 of 1998.

³²³ Section 73(5)(b) and s 51(2) of the Correctional Services Act 111 of 1998.

³²⁴ Section 73(5)(b) and s 51(2) of the Correctional Services Act 111 of 1998. See *S v Bull*; *S v Chavulla and Others* (n 6); *S v Tsoeib* (n 12). See also the other cases referred to in n 12 above.

³²⁵ Section 51(2) and s 73(5)(b) of the Correctional Services Act 111 of 1998.

³²⁶ Section 51(2) and s 73(5)(b) of the Correctional Services Act 111 of 1998.

³²⁷ See Chapter VI of the Correctional Services Act 111 of 1998, in particular ss 50, 51 and 73.

³²⁸ Particularly Chapter VI of the Correctional Services Act 111 of 1998 (n 324), read with s 33 of the Constitution Act 108 of 1996 and the Promotion of Administrative Justice Act 3 of 2000.

out in the *Coughlan* case *supra*) – as well as a procedural legitimate expectation – to be assessed and considered for release on parole fairly, reasonably and lawfully³²⁹ and to a decision regarding placement on parole that is similarly fair, reasonable and lawful³³⁰.

In the event of that substantive legitimate expectation being frustrated by the public body (the Commissioner, the Correctional Supervision and Parole Board (CSPB) or the Court³³¹, in the sense that they decided not to release the prisoner on parole, the review court or tribunal is entitled:

- (1) to require reasons for the particular decision³³²; and/or
- (2) to enquire into the merits and substance of that decision, to determine *inter alia* whether it (the decision to refuse parole in the particular circumstances of the case) was 'fair, reasonable and lawful'.³³³

Should the review court or tribunal find that the refusal of parole by the CSPB was unfair, unreasonable and/or unlawful³³⁴ (In South Africa it is not necessary that it must amount to an abuse of power as in the *Coughlan*

³²⁹ See s 33 of the Constitution, Act 108 of 1996; s 6 of PAJA 3 of 2000, as discussed above.

³³⁰ As discussed above.

³³¹ See s 73 of the Correctional Services Act 111 of 1998.

³³² Section 8(1)(a) of PAJA 3 of 2000.

³³³ See s 33 of the Constitution Act 108 of 1996; ss 6 and 8 of PAJA 3 of 2000. See also *Hoexter op cit* (n 19), *Bato Star* (n 175), *New Clicks* (n 175), *Zondi* (n229, 233); *Roman v Williams NO* (n 40); *Stansfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C) paras 130-132.

³³⁴ See s 33 of the Constitution Act 108 of 1996 and s 6 of PAJA 3 of 2000.

case, although this abuse of power would be a ground for the court to interfere with that decision), the court is entitled to interfere with that decision³³⁵.

The review court or tribunal, which in the case of parole is the Correctional Supervision and Parole Review Board (the CSPRB³³⁶) or the High Court of South Africa³³⁷ is entitled to interfere with that decision in any one of the following manner³³⁸ (1) it can set it aside³³⁹; (2) it can, after having set it aside, remit the matter to the CSPB for reconsideration (taking into account the available information)³⁴⁰; or (3) the CSPRB or the High Court, as the case may be, can substitute its own decision for that of the Correctional Supervision and Parole Board (CSPB), i.e. it can *inter alia* order the CSPB to give effect to the substantive legitimate expectation of the prisoner, to be released on parole³⁴¹.

Whereas the existence of exceptional circumstances is the threshold requirement for this remedy to be applicable in terms of the PAJA³⁴², its counterpart in the Correctional Services Act, 111 of 1998 does not

³³⁵ *Pharmaceutical Manufacturers case* (n 87); *Hoexter op cit* (n 19); *Bato Star* (n 175); *New Clicks* (n 175); *Zondi* (n 229); *Roman v Williams NO supra* (n 40); *Stansfield v Minister of Correctional Services and Others* (n 333); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works and Others* 2005 (6) SA 213 (SCA) paras 20–36.

³³⁶ Section 77 of the Correctional Services Act 111 of 1998.

³³⁷ As discussed in Chapter 4.

³³⁸ See s 8 of PAJA. See also *Stansfield v Minister of Correctional Services and Others supra* (n 333) *Dualal v State of U.P. (HC-LB)* 1999 (38) ACC 899 paras 13 and 14.

³³⁹ Section 8(1)(c) of PAJA 3 of 2000.

³⁴⁰ Section 8(1)(c)(i) of PAJA 3 of 2000.

³⁴¹ Section 77(1)(b) of the Correctional Services Act 111 of 1998.

³⁴² Section 8(1)(c)(ii)(aa) of PAJA 3 of 2000.

stipulate such a requirement of exceptional circumstances³⁴³.

5.12 A summary of the legal principles applicable to parole

In South Africa, in the context of parole, the release of prisoners on parole or subject to correctional supervision, before the expiry of his/her term of imprisonment³⁴⁴, is statutorily and constitutionally acknowledged and regulated.

A sentenced prisoner has a right to be assessed and considered for release on parole or subject to correctional supervision before the expiry of his/her term of imprisonment³⁴⁵.

A prisoner furthermore has the right and legitimate expectation to be assessed and considered for release on parole or subject to correctional supervision, fairly, ie without any procedural impropriety, lawfully, in accordance with the principle of legality which would include non-arbitrariness, and reasonably, which would include rationality and proportionality, also referred to as justifiable in relation to the reasons given therefore³⁴⁶.

³⁴³ Section 77(1)(b) of the Correctional Services Act 111 of 1998.

³⁴⁴ Sections 39, 73, 75 and 78 of the Correctional Services Act No 111 of 1998. See also *Winckler v Minister of Correctional Services and others supra* 2001 (2) SA 747 (C).

³⁴⁵ Sections 42, 55, 73, 75 and 78 of the Correctional Services Act No 111 of 1998.

³⁴⁶ Sections 33(1) and (2) of the Constitution Act 108 of 1998; ss 3, 6 and 8 of PAJA 3 of 2000. See also the discussion under 5.3–5.6 above.

The assessment and consideration of prisoners to determine whether they can be released on parole, as well as the decision whether or not to release them on parole, constitute the exercise of public power and administrative action which must comply with the Constitution, the principle of legality and the requirements of reasonableness and administrative justice³⁴⁷.

If such assessment, consideration and/or decision is taken on review by the prisoner, the review court/tribunal role is no longer confined to determine whether or not there was compliance with the requirements of procedural justice. It can now also enquire into the merits and substance of that assessment, consideration and/or decision of the relevant body³⁴⁸, to determine whether or not it was substantively fair and/or reasonable.

In South African administrative law and penal law, the CMC, CSPB or court, in the assessment, consideration and/or decision regarding a parole of a particular prisoner, is under a duty to act fairly³⁴⁹.

Fairness has to be determined in relation to its procedural dimension

³⁴⁷ As codified in s 33 of the Constitution read with PAJA 3 of 2000. See also the discussion and arguments under 5.3–5.6 above.

³⁴⁸ As discussed and argued under 5.3–5.9 above.

³⁴⁹ See *Traub* (n 12). See also *Pharmaceutical Manufacturer Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras 51, 85–90; *Nortje* case (n 8, n 9); *Minister of Correctional Services v Kwakwa* *supra* (n 9, n 10) and *Bato Star (Pty) Ltd* case (n 175). See also the discussion and arguments in 5.7–5.9 above.

(procedural fairness)³⁵⁰ and its substantive dimension (substantive fairness)³⁵¹.

The concept of legitimate expectation is a facet of that duty to act fairly and, as such, also has a procedural dimension and a substantive dimension. In terms of the latter, a prisoner is entitled to legitimately expect that the particular administrative action in respect of him/her is substantively fair³⁵².

In South Africa, in the context of parole, a substantive legitimate expectation in the sense referred to in the English case of *Coughlan*³⁵³ is indeed created by, and exists in terms of, the statutory framework of the Correctional Services Act, 111 of 1998³⁵⁴ and the applicable constitutional and administrative provisions³⁵⁵.

The CSPRB in the parole context³⁵⁶ can now in terms of its extended

³⁵⁰ As developed in our common law and now guaranteed and protected as a constitutional right in s 33 of the Constitution, Act 108 of 1996 read with ss 1, 3, and 6 of PAJA 3 of 2000. See also *Traub supra* (n 12) 758–759; *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd supra* (n 28) 152; *Nortje case supra* (n 8, n 9); *Kwakwa case supra* (n 9, n 10). See also the discussion under 5.3–5.9 above.

³⁵¹ *Roman v Williams NO supra* (n 40). See also the discussion above under the heading 'Substantive Fairness, Lawfulness and Reasonableness'. See, however, the approach of Chaskalson CJ in *Bel Porto School Governing Body v Premier, Western Cape* 2002 (2) SA 265 (CC) para 88 as opposed to that of Madala J in his minority judgment, paras 212–213 (n 305). See also Hoexter *op cit* (n 19) 325.

³⁵² See the discussion above under the heading 'Substantive Fairness, Lawfulness and Reasonableness' and the references therein.

³⁵³ *R v North and East Devon HA ex parte Coughlan* [2001] QB 213.

³⁵⁴ Chapter VI, ss 50, 51 and 73 of the Correctional Services Act 111 of 1998.

³⁵⁵ See s 33 of the Constitution, Act 108 of 1996 read with ss 1, 3, 6 and 8 of PAJA 3 of 2000; *S v Bull and Another*; *S v Chavulla and Others* (n 6); *S v Tsoeib supra* (n 12).

³⁵⁶ See s 77(1)(b) of the Correctional Services Act, 111 of 1998.

role³⁵⁷, enquire into the merits and substance of a decision of the public body (CMC, CSPB or the court) to refuse parole or its decision to refuse to acknowledge and/or enforce a legitimate expectation of a prisoner to be released on parole.

The CSPRB may, in the exercise of its powers of review, set aside the decision complained of, remit it to the relevant authority or (in exceptional circumstances) substitute its own decision for that of the relevant authority (CMC, CSPB or the court of first instance), if it has found that decision to be unfair, unlawful and/or unreasonable³⁵⁸, or a 'otherwise unconstitutional or unlawful'³⁵⁹.

The above exposition of the principles that have emerged is but a variation of the model which has been suggested for the application of the concept of legitimate expectations – both procedural and substantive – in South Africa, by Campbell³⁶⁰. In terms of Campbell's model the Correctional Supervision and Parole Board, within the context of parole in South Africa, would start with the acknowledgment and enforcement of the prisoner's procedural legitimate expectation which he refers to aptly as

³⁵⁷ See s 8 of PAJA 3 of 2000; *Roman v Williams NO supra* (n 40); *Stansfield v Minister of Correctional Services supra* (n 333).

³⁵⁸ See s 33 of the Constitution, Act 108 of 1996 read with s 77(1)(b) of the Correctional Services Act 111 of 1998, ss 8, 1, 3 and 6 of PAJA 3 of 2000. The presence or existence of exceptional circumstances is not required in terms of the Correctional Services Act, 111 of 1998.

³⁵⁹ Section 6(2) of PAJA 3 of 2000.

³⁶⁰ Campbell 'Legitimate Expectations: The Potential and Limits of Substantive Protection in South Africa' (2003) 120 *SALJ* 292 at 311–321. See also Hoexter *op cit* (n 19) 390.

'procedural enforcement'³⁶¹. This means that the CSPB would first hear the affected person fairly, with the usual consequences if it failed to do so, and would be apprised of the legitimate expectation³⁶².

Thereafter, the Correctional Supervision and Parole Board would then reach its decision by taking into account all the relevant considerations, including the legitimate expectation, and giving it (the expectation) sufficient weight³⁶³.

A decision that denied the expectation would be reviewable on the basis of whether it meets the requirements of fairness, lawfulness (legality) and/or reasonableness (conditions of rationality and proportionality), but with the added requirement of an 'imperative public interest' to justify the denial³⁶⁴.

If a review court or tribunal, which would be the Correctional Supervision and Parole Review Board of the High Court within the context of parole in South Africa, found the decision to be unfair, unlawful and/or unreasonable, it could then in terms of the ordinary applicable principles as developed in our jurisprudence substitute its decision for that of the Correctional Supervision and Parole Board (the public body or

³⁶¹ Campbell *op cit* (n 360); Hoexter *op cit* (n 19).

³⁶² Campbell *op cit* (n 360); Hoexter *op cit* (n 19).

³⁶³ Campbell *op cit* (n 360); Hoexter *op cit* (n 19).

³⁶⁴ Campbell *op cit* (n 360); Hoexter *op cit* (n 19). See also *Coughlin* (n 26) above in the English context, and *Bel Porto School Governing Body v Premier Western Cape* *supra* (n 305), the dissenting judgment of Madala J, paras 212–213 (n 305) in the South African context.

administrator responsible for taking the decision, including the Commissioner or CMC where applicable)³⁶⁵. This procedure is not only precedented in our law, but is also statutorily and constitutionally acknowledged as reflected in the applicable provisions of the Correctional Services Act, 111 of 1998³⁶⁶, the PAJA³⁶⁷ and the applicable cases³⁶⁸.

5.13 The practical implications of these principles for parole in South Africa

In practice, it would mean simply that if a prisoner has served his/her penal term of imprisonment (non-parole period) and has substantially complied with all the prescribed and statutorily imposed conditions, and there is a positive recommendation by the CMC to the CSPB he/she can legitimately expect to be released on parole. In such cases, the practice was that such prisoners would invariably be released on parole³⁶⁹. Even where there is no positive recommendation by the CMC – it does not follow that the prisoner may not legitimately expect to be released on parole. This recommendation may be taken on review and the court is entitled to enquire into both whether there was procedural fairness and

³⁶⁵ See Campbell *op cit* (n 360); Hoexter *op cit* (n 19).

³⁶⁶ Section 77(1)(b) of Act 111 of 1998.

³⁶⁷ Section 8(1) and (2) of PAJA 3 of 2000.

³⁶⁸ See the cases referred to by Hoexter *op cit* (n 19) 387-392. See also the discussion and arguments in 5.3–5.9 above.

³⁶⁹ The writer learnt this from Department of Correctional Officials, including Parole Board members, during consultations in preparation for High Court litigation including *inter alia* in the Winckler case *supra* (n 79, n 344) and the Stansfield case *supra* (n 333).

into the merits and substance of the recommendation itself³⁷⁰

Where there is a positive recommendation by the CMC and the CSPB refuses parole, that decision can be taken on review. The review court or CSPB is entitled not only to enquire into whether there was procedural fairness, but also into the merits and substance of the decision to refuse parole³⁷¹. After such enquiry, and in the event that the review court or CSPB found there was a violation of the prisoner's legitimate expectation (substantive and/or procedural), the court may set aside that decision and remit the matter to the CSPB for reconsideration with appropriate directions (that it should take the relevant circumstances into account) or it could simply substitute its own decision for that of the CSPB – i.e. order the release of the prisoner on parole (in other words, enforcing the substantive legitimate expectation of the prisoner)³⁷². The same would apply in the event of a negative recommendation by the CMC, but in this instance, the review court or CSPB is entitled to enquire into both the substance and merits of that recommendation and its impact on the ultimate decision taken by the CSPB³⁷³. If the review court or CSPB finds that there was a violation of any established right of the prisoner, including his/her substantive and/or procedural legitimate expectation, the court can similarly set it aside, remit it to the CMC and the CSPB, with appropriate directions, or simply substitute its own decision for that of the

³⁷⁰ See *Pharmaceutical Manufacturers case supra* (n 88, 349), *Roman v Williams NO supra* (n 40).

³⁷¹ See 5.7 above, and the discussion relevant thereto.

³⁷² See 5.5 above, and the discussion relevant thereto.

³⁷³ See *Hoexter op cit* (n 19) 392–397. See also the discussion in 5.3–5.7 above.

CMC or CSPB³⁷⁴.

Such release would be subject to the applicable parole and/or correctional services conditions (community corrections)³⁷⁵ which a prisoner must not only understand but must also sign as his undertaking to co-operate with its terms and conditions³⁷⁶. Where such an agreement has not been signed, and the prisoner has therefore not accepted his or her parole conditions, the prisoner will not be released on parole³⁷⁷.

There is a duty on the part of the relevant authorities, including the CMC, the Commissioner, the CSPB, the CSPRB or the court, to act fairly, lawfully and reasonably, in accordance with the requirements of the Constitution as reflected in PAJA³⁷⁸, in their **assessment** and **consideration** of the particular prisoner for parole, and in its **decision** whether or not to release such prisoner on parole or subject to correctional supervision respectively. In the event of a positive assessment and a positive recommendation pursuant thereto, by the CMC to the CSPB or the court, and when the prisoner has served his or her non-parole period

³⁷⁴ This in effect was the approach adopted by the court in *Stansfield v Minister of Correctional Services and others supra* (n 333). Section 77(1) of the Correctional Services Act 111 of 1998 does not require 'exceptional circumstances' to be present to invoke this remedy, as in s 8(1)(c)(ii) of PAJA 3 of 2000. See also *Du Plooy v Minister of Correctional Services and Others* 2004 (3) All SA 613 (T), 621–622 and *Masibuko v Minister of Correctional Services* 2007 (2) SACR 303 (T) at 308. In both cases the *Stansfield* judgment was referred to with approval and in fact followed.

³⁷⁵ See Chapter VI and VII, ss 50–72 of the Correctional Services Act 111 of 1998.

³⁷⁶ See Chapter VI and VII, ss 50–72 of the Correctional Services Act 111 of 1998.

³⁷⁷ Section 51(2) read with s 55(3) and s 75 of the Correctional Services Act 111 of 1998.

³⁷⁸ See the discussion and arguments in 5.3– 5.9 above.

or the minimum term of imprisonment (the 'penal term')³⁷⁹ and 'by that time no disciplinary award or forfeiture or remission has been against him'³⁸⁰, an enforceable right in the form of a legitimate expectation to be released on parole or subject to correctional supervision before the expiry of such prisoner's sentence of imprisonment, has arisen. In such circumstances, the prisoner is entitled to be released on parole, failing which such refusal can be taken on review and the review court / tribunal may enforce that legitimate expectation³⁸¹

5.14 Cancellation of parole

Flowing from what has been set out above, it is trite that the decision to cancel parole or correctional supervision constitutes administrative action within the purview of the Constitution and PAJA³⁸².

That decision must firstly comply with the objective jurisdictional requirement for cancellation of parole or day parole or correctional supervision, namely: (1) there must be a written request by the Commissioner to the Correctional Supervision and Parole Board for such cancellation; (2) such written request by the Commissioner must be on the

³⁷⁹ See *Doody* case *supra* (n 1).

³⁸⁰ *Traub* case *supra* (n 12).

³⁸¹ *Roman v Williams NO* *supra* (n 40); *Stansfield v Minister of Correctional Services* *supra* (n 333); *Coughlan* *supra* (n 26); *Dualat v State of UP* *supra* (n 68). See also s 8(1) and (2) of PAJA 3 of 2000. See, generally, the discussion under 5.7–5.9 above, including the reference to the model proposed by Campbell (n 360).

³⁸² Section 33 of the Constitution Act 108 of 1996 read with ss 1, 3, 6 and 8 of PAJA 3 of 2000; *Roman v Williams* *supra* (n 40) 281 B–C, 284 F–G. See also the discussion above under 5.4 above.

advice of a Supervision Committee; and (3) the CSPB **must** consider the matter, including the written request of the Commissioner which would obtain the advice of the Supervision Committee³⁸³;

Only after such consideration may the Board then cancel the parole, day parole or correctional supervision, or it may amend the conditions thereof³⁸⁴. However, if the parolee or probationer refuses to accept the amended conditions 'the correctional supervision or day parole or parole must be cancelled'³⁸⁵.

In the case of a person sentenced to life imprisonment, the same objective jurisdictional requirements as set out above apply, except that in this case the Commissioner requests the CSPB to advise him or her on the cancellation of parole or day parole, or the amendment of the applicable conditions, which request the Commissioner must similarly consider within 14 days and thereafter make recommendation on cancellation or amendment to the court. In other words, the court decides on the question of cancellation of parole or the amendment of conditions of parole in the case of life sentenced prisoners, and not the CSPB³⁸⁶.

Before the court acts upon the recommendation of the CSPB, in the case of life sentenced prisoners, such court must firstly consider that

³⁸³ Section 75(2)(a) of the Correctional Services Act 111 of 1998.

³⁸⁴ Section 75(2)(b) of the Correctional Services Act 111 of 1998.

³⁸⁵ Section 75(2)(b) of the Correctional Services Act 111 of 1998.

³⁸⁶ Section 75(2)(c) of the Correctional Services Act 111 of 1998.

recommendation and, secondly, make a decision upon the recommendation³⁸⁷. Where the CSPB has cancelled parole or day parole or correctional supervision, that decision would be final but would be subject to review by the Correctional Supervision and Parole Review Board³⁸⁸. That would only happen, however, if the Minister or Commissioner of Correctional Services, in his or her discretion, refers the matter including the decision to cancel to the Correctional Supervision and Parole Review Board for reconsideration³⁸⁹.

No provision is made for the review of a decision of a court, acting in terms of s 78 of the Correctional Services Act, 111 of 1998, to cancel the parole of the life sentenced prisoner within the framework of the Correctional Services Act, 111 of 1998. The only remedy afforded to such a life sentenced prisoner whose parole has been cancelled is that the court must reconsider the matter within two years³⁹⁰.

That decision to cancel, by either the CSPB, the CSPRB or the court³⁹¹ must however also comply with constitutional requirements of procedural fairness, lawfulness in relation to the legal requirements and procedures preceding the re-imprisonment of such parolee/probationer, all in compliance with the principle of legality, and reasonableness.³⁹²

³⁸⁷ Section 78(3) of the Correctional Services Act 111 of 1998.

³⁸⁸ Section 75(8) and 77(1) of the Correctional Services Act 111 of 1998.

³⁸⁹ Section 75(8) of the Correctional Services Act 111 of 1998.

³⁹⁰ Section 78(4) of the Correctional Services Act 111 of 1998.

³⁹¹ The court acting in terms of s 78 of the Correctional Services Act 111 of 1998.

³⁹² *Roman v Williams NO supra* (n 40) 284–285.

It is submitted that the approach formulated by Van Deventer J in *Roman v Williams NO*³⁹³ is instructive with regards to the re-imprisonment of parolees and/or probationers:

"In reviewing a decision of the Commissioner to re-imprison a probationer in terms of s 84B(1) of the CSA the Court will not lose sight of the main objects and the administrative demands of the discipline of correctional supervision and will bear in mind that the relevant statutes do not prescribe the factors to be taken into account or to be excluded from consideration by the Commissioner and that he is burdened with the duty to decide which factors are relevant and what weight ought to be attached thereto and to test and assess a probationer's character and correctional potential.

Should it appear from the reasons given for a decision that a character assessment had contributed to the Commissioner's judgment, the Court will take into account that such an assessment would inevitably have been based to some extent (as in this case) on the supervising officers' personal communication and experiences with the probationer and their individual impressions of his temperament, character and value standards and that the Court could never be as well positioned and qualified as the Commissioner to make the correct assessment."

In the result, the Court should not interfere with the Commissioner's character assessment of a prisoner unless it appears to be in conflict with the known facts.

This approach indicates an acknowledgment that once a prisoner has been conditionally released, either on parole or subject to correctional supervision, such person is in an actual state of freedom which is constitutionally protected³⁹⁴, and which freedom cannot be taken away in breach of any such a person's constitutionally guaranteed rights.

³⁹³ *Roman v Williams NO* *supra* (n 40) 285.

³⁹⁴ Sections 12 and 35 of the Constitution Act 108 of 1996 read with ss 1, 3, 5, 6 and 8 of PAJA 3 of 2000.

In this regard, South African law is similar to the approach adopted and followed in America³⁹⁵, and Europe³⁹⁶ and Canada³⁹⁷.

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³⁹⁵ *Morrissey v Brewer* 408 US 471 1972.

³⁹⁶ *Weeks v United Kingdom* 1987 (10) EHRR 293 Series A No 114, which also affirmed the principle that once a prisoner has been granted parole, that merits to a state of liberty which affords such a parolee, as of right, the guarantees of Article 5 of the European Convention (the right to be free from arbitrary detention).

³⁹⁷ *Mooring v Canada (National Parole Board)* 93 CCC (3d) (1995) 415, 437 *et seq.*

5.15 Conclusion

Once a prisoner has served his or her non-parole period or the statutorily determined minimum period of imprisonment, he or she no longer has to merely hope to be released on parole.

Parole in South Africa is a substantive benefit, in the form of early conditional release, that is promised and legally provided for:

- (a) In terms of the statutory and legal framework in South Africa, including the structure and provisions of the Correctional Services Act 1998³⁹⁸, including its prescribed rules as contained in the Correctional Service Order B (CSOB) and the Regulations governing parole;
- (b) In terms of legal precedent, especially in relation to life sentenced prisoners³⁹⁹ and medical parole matters⁴⁰⁰, parole has been elevated to a constitutional prerogative, without which the sentence of life imprisonment would have been unconstitutional, in contravention of s 12 of the Constitution⁴⁰¹, which declares cruel

³⁹⁸ Act No 111 of 1998.

³⁹⁹ *S v Bull and Another*; *S v Chavulla and Others supra* (n 6); *S v Makwanyane and Another* (n 12).

⁴⁰⁰ For example, *Stansfield v Minister of Correctional Services & Others supra* (n 333).

⁴⁰¹ Act 108 of 1996.

and unusual punishment to be unconstitutional;⁴⁰² and

- (c) Past practices of the Department of Correctional Services, in particular those institutions dealing with the implementation and application of the policies and applicable service orders, as contained in the CSOB, and which have now been given statutory force and effect⁴⁰³, insofar as it pertains to the determination of whether or not a prisoner should be released on parole.

Thus, the legal framework regarding parole in South Africa, and the practices on the part of the Department of Correctional Services concerning parole, create an expectation on the part of a prisoner that once he or she has served the non-parole period, or statutorily determined term of imprisonment, to be released on parole. That expectation becomes legitimate if, in addition, such a prisoner has complied substantially with the prescribed and required internal rules and programmes: in short, if that prisoner has been positively assessed by the relevant body⁴⁰⁴. That right will not be triggered, however, until and unless the prisoner concerned has agreed to and accepted the conditions of parole imposed upon him or her by the appropriate body. The period within which that right in the form of a legitimate expectation can be triggered is between the statutorily determined minimum period of

⁴⁰² See also *S v Tsoeib* *supra* (n 12); *S v Makwanyane and Another* (n 12).

⁴⁰³ In terms of s 136 of the Correctional Services Act, 111 of 1998 as amended.

⁴⁰⁴ The Case Management Committee and/or the Correctional Supervision and Parole Board.

imprisonment (the risk period) has been served and/or after having served the non-parole period of imprisonment, on the one hand, and the maximum term (the last date) of imprisonment as determined and pronounced by the court when it imposed the prison sentence.

That legitimate expectation will not be denied if that decision to deny (the denial) will be illegal (unlawful), unreasonable (disproportionate and/or irrational) and/or unfair (procedurally and/or substantively). The substance of the decision to deny will be subject to scrutiny by the court, which will include scrutiny of the reasons which were furnished in relation to the decision (to deny) which was taken.

Once that right, i.e. release on parole, albeit conditionally, is given effect to, such person released on parole is no longer a prisoner, even though his or her sentence is yet to expire.⁴⁰⁵ Such a person is in a state of freedom and subject to all the applicable constitutional protections, rights and limitations. Thus the cancellation of parole must also be in accordance with the constitutional requirements of legality (lawfulness), reasonableness (rationality and proportionality) and fairness (procedurally⁴⁰⁶ and substantively⁴⁰⁷).

⁴⁰⁵ *Price v Minister of Correctional Services* 2007 SCA 156 (RSA) para 16. Also reported at 2008 (1) All SA 455 SCA para 16.

⁴⁰⁶ *Minister of Correctional Services v Kwakwa supra* (n 9, n 10).

⁴⁰⁷ See the discussion and cases referred to under the heading 'Parole as Administrative Action Must Also Be Fair: Procedural Fairness, Substantive Fairness and Legitimate Expectations' *infra*.

CHAPTER 6

CONCLUSION

Parole is a process which is legally¹ and constitutionally² recognised and permitted in South African law. It consists of various stages which starts with the imprisonment of a person who has been duly convicted and sentenced to a term of imprisonment by a court of law, with the ultimate objective of releasing such prisoner before the expiry of his or her actual term of imprisonment. It involves different stages during which the prisoner comes in contact, and interacts, with other inmates, the correctional officials, the applicable disciplinary codes, rules and procedures, and other social, religious and/or educational activities or programmes operative in such prison. It also refers to and includes his or her physical environment where he or she would serve the applicable term of imprisonment and his or her behaviour whilst still imprisoned, his or her assessment by the Case Management Committee, his or her prognosis based on such an assessment as well as his or her evaluation for purposes of determining whether he or she is eligible to be released on parole³. This has also been referred to as 'the internal dimension of prison law'⁴.

¹ In terms of the Correctional Services Act 111 of 1998.

² See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); (1995) (2) SACR 1, 1995 (6) BCLR 665 (CC); *S v Tsoeib* 1996 (1) SACR 390 (NmS) 399-402; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) 521-523; *S v Bull*; *S v Chavulla and Others* 2002 (1) SA 535 (SCA) 552-554.

³ Sections 38 and 42 of the Correctional Services Act 111 of 1998.

⁴ Van Zyl Smit *South African Prison Law and Practice* (1992) 58.

Parole also has an external dimension⁵ which refers to and includes such a prisoner living and functioning as a parolee, outside prison and subject to the imposed parole (or correctional supervision) conditions, as well as his or her interactions with officials of the Department of Correctional Services attached to the Office of Community Corrections⁶. It also refers to, and includes, such a parolee's interaction with the broader members of the community outside of prison.

This whole process is a continuous inter-dependant process involving the prisoner who, from the first stage – his/her reception at prison – until his/her release from prison, and who interacts in a continuous and dynamic manner with the officials of the Department of Correctional Services, members of the CSPB and the Judicial Inspectorate of Prisons, other inmates, as well as with all the other aspects of the correctional service system. This process involves different identifiable stages, which start with the reception of the prisoner at the prison. Thereafter it is followed by his or her assessment; and thereafter the consideration of the prisoner. This is followed by the decision of the responsible authority whether or not to release the prisoner on parole (or subject to correctional supervision). The following stage, in the event of a positive decision, is the release and placement of the prisoner on parole (or subject to

⁵ Van Zyl Smit *op cit* (n 4) 58.

⁶ In terms of ss 55, 57 and 58 of the 1998 Correctional Services Act and would comprise *inter alia* members of the Supervision Committee in terms of s 58.

correctional supervision). This is followed by the parole period, ie that period between the date of such a prisoner's release on parole and the actual termination of his or her term of imprisonment, which would include the conditions imposed on the parolee as well as his or her conduct. The parolee will be monitored and/or is subject to monitoring during this period, by the responsible officials of the Department of Correctional Services) until the expiry of such a parolee's actual term of imprisonment, less amnesties granted to him or her. The next stage is the cancellation of such parole by the CSPB or the court, as the case may be⁷, should it be found that the parolee has acted in violation of his or her parole conditions and his or her arrest. The next stage is re-imprisonment, with the parolee serving the unexpired portion of his or her sentence in prison, if a breach has been found to have been committed by such parolee, or if not, being released on parole for the duration of the unexpired portion of his or her sentence.

Each stage involves decision making by the various responsible public officials, including the Commissioner of Correctional Services, the Case Management Committee and/or the Correctional Supervision and Parole Board, regarding the prisoner, which involves value judgments which often compete with each other and which '... all interact as a complex system to

⁷ See s 75(3) of the 1998 Correctional Services Act read with s 70 of the 1998 Correctional Services Act.

determine the time finally served in prison by inmates⁸. Every decision made in respect of the prisoner in this multi-staged decision making process⁹ is inter-dependant on each other¹⁰. The one decision therefore taken at one stage lays the foundation for, and informs and shapes the decision at the next stage, all of which then interact and contribute to the ultimate decision being taken at the end of the process¹¹.

The rationale for parole is most vividly reflected in cases of life sentences imposed upon prisoners which would have been unconstitutional, in both Namibia¹² and South Africa¹³, had it not been 'for the fact that the relevant legislation permits release on parole in appropriate circumstances'¹⁴. It fosters rehabilitation by gradually facilitating the move from confinement in prison to social reintegration and resocialisation in the community¹⁵. It serves the function of deterrence and creates the necessary restraint to keep the parolee away from committing further offences and, importantly, serves as an incentive for

⁸ Gottfredson and Gottfredson 'Decision Making in Criminal Justice: Towards the Rational Exercise of Discretion' (1988) 3 2nd Ed in *Law Society and Policy* Feinberg, Hirschi, Sales and Wexler (eds) 234.

⁹ Hoexter *Administrative Law in South Africa* (2007) 392–397.

¹⁰ See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 137 per Chaskalson CJ; para 441 per Ngcobo J 'contemplates a single process, consisting of several stages', and para 672 per Moseneke J 'one continuous process'.

¹¹ *Minister of Health v New Clicks SA (Pty) Ltd supra* (n 10).

¹² *S v Tsoeib* 1996 (1) SACR 390 (NmS) 399–402 pr Mohamed CJ, who later became the first black Chief Justice under the first democratic and constitutional dispensation in South Africa.

¹³ *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 520: *S v Bull and Another*; *S v Chavulla and Another* 2002 (1) SA 535 (SCA) at 552–554.

¹⁴ *S v Tsoeib supra* (n 12) 402 D–E. See also Van Zyl Smit *South African Prison Law and Practice* (1992) 379–380; Van Zyl Smit *Is Life Imprisonment Constitutional? – The German Experience*, in *Public Law* (1992) 263, 270–271.

¹⁵ *S v Tsoeib supra* (n 12) 399–402. See also Van Zyl Smit *South African Prison Law and Practice* (1992) 379–380; Van Zyl Smit *Is Life Imprisonment Constitutional? – The German Experience*, in *Public Law* (1992) 263, 270–271.

prisoners to obey the rules and imposed parole and correctional service conditions, and to give their co-operation¹⁶. Parole is therefore an important part of the sound administration of penal institutions and creates the necessary incentive for rehabilitation of offenders¹⁷. It can also fulfil the necessary role of 'an equaliser by reducing unwarranted sentencing disparity'¹⁸.

Parole is manifested in the early release of a prisoner before the expiry of the maximum term of imprisonment which is the actual sentence as imposed by the court¹⁹. There are also other forms of early release mechanisms created and regulated by statute which include a presidential pardon or reprieve²⁰; special remission of sentence²¹; correctional supervision²²; day parole, which is defined as "a form of community corrections contemplated in section 54"²³; correctional supervision or parole on medical grounds²⁴; and, release on payment of a fine, which was coupled with imprisonment upon non-payment thereof²⁵.

¹⁶ *S v Tcoeb* supra (n 12) 402 D-E. See also Van Zyl Smit *South African Prison Law and Practice* (1992) 379–380; Van Zyl Smit *Is Life Imprisonment Constitutional? – The German Experience*, in *Public Law* (1992) 263, 270–271.

¹⁷ See *S v Tcoeb* supra (n 12) 399 F–G. See, generally, Chapter 1 under the heading 'Rationale'; see also Moses 'Parole: Is it a Right or a Privilege' 2003 *SAJHR* 263 and 264–265.

¹⁸ See n 17. See also Gottfredson and Gottfredson *op cit* (n 8) 243.

¹⁹ See, generally, Chapter 2 herein.

²⁰ Section 84(2)(j) of the Constitution Act 108 of 1996; s 82 of the Correctional Services Act 111 of 1998.

²¹ Section 80 of the Correctional Services Act 111 of 1998.

²² Section 276(1)(i) read with s 276A(2) and (3) of the Criminal Procedure Act 51 of 1977, read with s 73(5)(a)(i) and s 75 of the Correctional Services Act 111 of 1998.

²³ Section 1 of the Correctional Services Act 111 of 1998 read with s 73(5)(a)(ii) read with s 75(1) of the Correctional Services Act 111 of 1998.

²⁴ Section 79 of the Correctional Services Act 111 of 1998.

²⁵ Section 287 read with s 289 of the Criminal Procedure Act 51 of 1977. These different forms of early release are all discussed in Chapter 2 above.

A prisoner is entitled to be assessed from the date of his or her reception at prison until his or her release therefrom²⁶. That assessment must comply, firstly, with the applicable statutory requirements, the extent of which is limited to procedural fairness²⁷. These assessments constitute a crucial determinant for a prisoner's eligibility for parole as it must not only comply with the prescribed statutory requirements²⁸, but must also comply with constitutional requirements of lawfulness in accordance with the principle of legality²⁹, it must be reasonable³⁰ and fair, including both procedural and substantive fairness³¹.

This assessment will therefore be subject to constitutional review in accordance with the principle of legality or to administrative review in accordance with the requirements of administrative justice under the

²⁶ Section 38 read with s 42 of the Correctional Services Act 111 of 1998.

²⁷ Sections 6, 21, 24, 25, 31(5), 38, 42, 45, 55(3) read with the relevant provisions of Chapter IX dealing with the Judicial Inspectorate and Chapter X dealing with Independent Prison Visitors of the Correctional Services Act 111 of 1998. See also, generally, the discussion in Chapter 3 above.

²⁸ As referred to above (n 25).

²⁹ *Hoexter op cit* (n 9) 116–117; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 59; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148; *Pharmaceutical Manufacturers Association of SA; In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 50–51; *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 97.

³⁰ As *Hoexter op cit* (n 9) 294–295 points out, with reference to *Union Government v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 237, gross unreasonableness is not required for purposes of judicial review of an administrative action. See also *Roman v Williams NO* 1998 (1) SA 270 (C); 1997 (9) BCLR 1267 (C) 1278 F–I. See, generally, the discussion under reasonableness in Chapter 5 above.

³¹ See, generally, the discussion under fairness in Chapter 5 above. See also *Hoffman v South African Airways* 2001 (1) SA 1 (CC) 21 F–G, paras 42 and 45 per Ngcobo J; see also Corder *Administrative Justice in Rights and Constitutionalism, The New South African Legal Order* (1994) Van Wyk, Dugard, De Villiers and Davis (eds) 645–646 wherein he refers to fairness as including procedural and substantive reasonableness.

Promotion of Administrative Justice Act 3 of 2000, as the assessment itself constitutes an administrative action³².

The assessment forms an essential link with the consideration of the prisoner to be done by the Correctional Supervision and Parole Board, and is an indispensable ingredient of the eventual and ultimate decision whether or not to release a prisoner on parole, to be made in this multi-staged decision-making process, by the relevant authorities in respect of the particular prisoner. As such, it constitutes administrative action³³.

The consideration of a prisoner for parole is similarly subject to the requirements of lawfulness, reasonableness and fairness³⁴. It will similarly therefore be subject to either constitutional review or administrative justice review, in the event of a violation of any of these abovementioned principles³⁵. That consideration is entrusted to certain authorities in respect of the different categories of prisoners³⁶ which will only become pertinent and enforceable after the particular prisoner has served his or her non-parole (punitive) period of imprisonment. Those prisoners serving determinate sentences in prison must, as a general rule, be considered for parole by

³² Hoexter *op cit* (n 9) 223, 224–225 and 115, 163. See also the discussion under 'Parole Constitutes Administrative Action', Chapter 5, para 5.4 above.

³³ See Hoexter *op cit* (n 30). See also the discussion in Chapter 5, para 5.4.

³⁴ Hoexter *op cit* (n 30).

³⁵ Hoexter *op cit* (n 30).

³⁶ The Commissioner can consider those prisoners sentenced to 12 months or less for possible release on parole, the Correctional Supervision and Parole Board all the other prisoners sentenced to more than 12 months imprisonment, except those sentenced to life imprisonment and/or being declared and imprisoned as dangerous criminals, both of which categories will be considered by the court in terms of s 42(3), s 73, both read with ss 75(1), 73(6) and s 78(1) of the 1998 Correctional Services Act. See, generally, the discussion under 'Consideration' in Chapter 4 above.

the CSPB after having served a stipulated non-parole period imposed by a court, or whenever a prisoner has served 25 years of a life sentence or cumulative sentences³⁷. The duty to consider, and the corresponding right on the part of the prisoner to be considered, only arises however once they become eligible therefore, i.e. when they have served the stipulated non-parole period or 25 years of a life sentence or cumulative sentences³⁸.

Having gone through the various stages of the parole system, and after having served his or her non-parole period, the 'nagging question' arises '... whether the statutory mechanisms ... constitute a sufficiently 'concrete and fundamentally realisable expectation'³⁹ of release (on parole) adequate to protect the prisoner's right to dignity, which must include belief in, and hope for, an acceptable future for himself⁴⁰. This question is therefore answered in the affirmative within the context of the parole system in South Africa. The prisoner is entitled to harbour an expectation which is legitimate and enforceable in law:

³⁷ Section 73(6) of the 1998 Correctional Services Act. See also Chapter 4 *ibid*.

³⁸ *Ibid*. See, generally, s 73(6) of the 1998 Correctional Services Act.

³⁹ Van Zyl Smit *Is Life Imprisonment Constitutional? – The German Experience*, in Public Law (1992) 263 at 271. See, however, the English case of *Doody v Secretary of State for the Home Department* 1993 (3) All ER 94 (HL) 103 D where Lord Mustill in fact echoes the sentiments of Mohamed CJ in *Tcoeib supra* (n 12) wherein he warns against a 'faint hope' which could be created by the capricious exercise of discretion by prison authorities (*ibid*), where Lord Mustill says the following:

This reasoning is however much weakened now that the indeterminate sentence is at a very early stage, formally broken down into penal and risk elements. **The prisoner no longer has to hope for mercy, but instead knows that once he has served the 'tariff' the penal consequences of his crime has been exhausted** (emphasis added).

See also Van Zyl Smit *South African Prison Law and Practice* (1992) 380 where the author acknowledges the creation and the existence of a legitimate expectation by the practice of the Department of Correctional Services, but confines that legitimate expectation to one of 'procedural formalities which limit executive discretion'.

⁴⁰ Per Mohamed CJ in *S v Tcoeib supra* (n 12) 399 H (my insertion).

- (a) Not only to be assessed and considered fairly, lawfully and reasonably, to be released on parole, which flows from the legal and constitutional obligations imposed upon the correctional administrative body responsible for performing that duty⁴¹;
- (b) But also to be released on parole subject to appropriate parole conditions, if, based on the factual matrix of the particular case and in accordance with the principles of fairness, including equity and justice, lawfulness and reasonableness⁴², such a prisoner's further incarceration is not warranted and his/her release on parole is justified.⁴³

The legitimate expectation is an essential component of the duty to act fairly⁴⁴. The legitimacy of the expectation also includes the element of reasonableness, which is considered to operate as 'a precondition to its

⁴¹ See the discussion and authorities referred to in Chapter 5. See also *S v Tsoeb* *supra* (n 12). See also *Hoffman v South African Airways* 2001 (2) SA 1 (CC) paras 42 and 45.

⁴² See n 37 and 39 above. See also the discussion under fairness, lawfulness and reasonableness in Chapter 5 above.

⁴³ See discussion and authorities referred to in Chapter 5 *infra*. See *S v Tsoeb* *supra* (n 12) where these constitutional requirements are referred to as 'lawfully and fairly' and 'fairly and reasonably' (e-f). See also n 45 *infra*.

⁴⁴ See the discussion under legitimate expectation and fairness in Chapter 5 *ibid*. See also the Indian Supreme Court case of *Dualat v State of UP* (Allahabad High Court) – Lucknow Bench 1999 (38) ACC 899 at 903–905, para 11, 12, 13 and 14 and, in particular, *National Building Construction Corporation v S Ragnathan* 1998 (85) AIR 2779 (SC) para 23–24 (referred to in 70–72 in Chapter 5).

legitimacy⁴⁵. In this sense, both fairness and reasonableness are constituent parts of the concept of legitimate expectation.⁴⁶

The legitimacy of the expectation will be determined according to the factual matrix of each case and the principles of fairness, including equity and justice, lawfulness (in accordance with the principle of legality) and reasonableness.⁴⁷

The concept of a legitimate expectation is no longer confined to a procedural legitimate expectation, but also includes a substantive legitimate expectation in the sense that a substantive benefit in the form of release on parole has been created in terms of the structure of the 1998 Correctional Services Act⁴⁸. That substantive legitimate expectation within the context of the parole system in South Africa is similarly enforceable by a prisoner within the particular factual matrix of the case⁴⁹.

A prisoner within the current parole system in South Africa can reasonably expect to be released on parole (but not yet legitimately), if he or she has served the non-parole period, has complied with all the internal

⁴⁵ *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 21.

⁴⁶ See the discussion under legitimate expectation in Chapter 5 above.

⁴⁷ *Mugwena and Another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at 155, para 12. See also *Lek v Estate Agent Board* 1978 (3) SA 160 (C) at 171B–H and 172H–173B per Friedman J (as he then was, later Judge President of the Cape Provincial Division of the High Court of South Africa). See also the discussion under legitimate expectation, fairness, lawfulness and reasonableness as well as the authorities referred to therein.

⁴⁸ See discussion under Chapter 5.

⁴⁹ See the discussion under legitimate expectation in Chapter 5 above. See also *SA Veterinary Council v Szymanski* *supra* (n 43); *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SAC) para 27. See also Hoexter *op cit* (n 9) 378.

rules, disciplinary codes and requirements of the prison authorities and has received a positive recommendation by the CMC based on the latter's own internal assessment and evaluation of such a prisoner. Such prisoner can, however, legitimately expect to be released on parole if, in addition to the above and within the particular factual matrix of the case, his or her release on parole is warranted by the dictates of fairness and justice determined according to the applicable legal and constitutional principles of lawfulness, reasonableness and fairness enunciated above⁵⁰.

The Correctional Services Act⁵¹ and the policy of the Department of Correctional Services⁵² explicitly makes provision for parole and, as such, it promises early conditional release of a prisoner as a substantive benefit if eligible therefore. If a prisoner has complied with the rules and disciplinary code of the Department of Correctional Services, and has been positively assessed in terms of the broad goals of rehabilitation, and has also been assessed and is considered as not presenting an unacceptably serious risk to the broader community or society such an expectation, i.e to be released before the expiry of the actual prison term, is a legitimate one which the prisoner may harbour. Such a legitimate expectation is legally enforceable by the prisoner as against the Department of Correctional Services and/or the Correctional Supervision and Parole Board. A legitimate expectation based on the promise of a

⁵⁰ As discussed above and, in particular, in Chapter 5.

⁵¹ No 111 of 1998.

⁵² See *White Paper on Corrections in South Africa*: February 2005: Department of Correctional Services. Republic of South Africa. p 88 para 5.5.

substantive benefit in the form of parole placement before the expiry of the actual term of imprisonment is created by the structure of the 1998 Correctional Services Act and policies⁵³. As such, it is an enforceable right which the prisoner has as against the Department of Correctional Services, including the Correctional Supervision and Parole Board. The content of that legitimate expectation as part of the duty to act fairly within the context of parole in South Africa is not only confined to procedural fairness but extends to and includes substantive fairness, lawfulness and reasonableness.⁵⁴

The practical application of the principle derived from this exposition above would be similar to the version proposed by Campbell⁵⁵ which has been referred to as a commendable proposal⁵⁶. According to this proposal, the administrator (read the Correctional Supervision and Parole Board) would first hear the affected person fairly (with the applicable remedies and the usual consequences if it failed to do so). The administrator would also then be apprised of the existence of a legitimate expectation⁵⁷.

A decision would then be reached by the Correctional Supervision and Parole Board by taking into account all the relevant considerations,

⁵³ As referred to in s 136 of the Correctional Services Act 111 of 1998.

⁵⁴ As discussed and argued in Chapter 5.

⁵⁵ Campbell 'Legitimate Expectations: The Potential and Limits of Substantial Protection in South Africa' (2003) 120 SALJ 292, 311–321. See also Hoexter *op cit* (n 9) 389–391.

⁵⁶ Hoexter *op cit* (n 9) 390.

⁵⁷ Hoexter *op cit* (n 9) 390.

including the legitimate expectation which must be given sufficient weight⁵⁸. If the CSPB denies that expectation, it would be reviewable *inter alia* on the basis of rationality, but with the added requirement of an 'imperative public interest to justify the denial'⁵⁹. Should the court or review tribunal find the decision of the Correctional Supervision and Parole Board to be irrational, it could then in terms of the ordinary principles of our law, substitute its decision for that of the CSPB⁶⁰.

The effect hereof is that of protecting the legitimate expectation **substantively**.⁶¹

Once released on parole, his or her status changes from being a prisoner to a parolee who, although not enjoying unqualified freedom, does enjoy the 'core values of liberty'⁶², which core values correspond with those set out and protected in the South African Constitution, and particularly the Bill of Rights⁶³.

⁵⁸ Hoexter *op cit* (n 9) 390.

⁵⁹ Hoexter *op cit* (n 9) 390. See also *Coughlan supra* (Chapter 5, n 26); see also the dissenting minority judgment of Madala J in *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) para 212. See, generally, the discussion in Chapter 5.

⁶⁰ Campbell 'Legitimate Expectations: The Potential and Limits of Substantial Protection in South Africa' (2003) 120 SALJ 292, 311–321. See also s 77(1)(b) of the 1998 Correctional Services Act which pertinently grants this authority to the Correctional Supervision and Parole Review Board without the requirement of 'exceptional circumstances' as required in terms of s 8(1)(c)(ii) of the PAJA 3 of 2000.

⁶¹ Campbell 'Legitimate Expectations: The Potential and Limits of Substantial Protection in South Africa' (2003) 120 SALJ 292, 311–321; Hoexter *op cit* (n 9). See, generally, the discussion under legitimate expectation in Chapter 5 above.

⁶² See the American Supreme Court case of *Morrissey v Brewer* 1972 (408) US 471. See also, in the South African context, *Price v Minister of Correctional Services* 2007 SCA 156 (RSA) para 16, also reported at 2008 (1) All SA 455 (SCA).

⁶³ See *inter alia* ss 9, 10, 12, 14, 33 and 35 of the Constitution, Act 108 of 1996.

Such a parolee remains obliged to adhere to the imposed parole conditions until the expiry thereof, both in terms of the applicable provisions of the 1998 Correctional Services Act⁶⁴, in particular the written agreement entered into between himself and the CSPB that he/she will adhere to, and work towards the implementation of, the imposed parole conditions. Should the parolee act in breach of any of the imposed parole conditions, the Commissioner of Correctional Services can reprimand him/her, or instruct him or her to appear before the court or CSPB or other body which imposed the community corrections⁶⁵, or such parole can be cancelled at the instance of the Commissioner of Correctional Services, on application to the CSPB or the court⁶⁶. The CSPB, CSPRB or court⁶⁷, as the case may be, is obliged both in terms of the provisions of the 1998 Correctional Services Act⁶⁸, and the Constitution⁶⁹, to consider such cancellation '... according to law'⁷⁰. In practice, it means that the

⁶⁴ Section 73(5) of Act 111 of 1998, read with s 75 and 52 thereof.

⁶⁵ Section 70(1) of Act 111 of 1998, read with s 75(2) and (3) thereof.

⁶⁶ Section 70 read with s 75(6) and (8) and ss 77 and 78(4) of Act 111 of 1998.

⁶⁷ Section 70 read with s 75(6) and (8) and ss 77 and 78(4) of Act 111 of 1998.

⁶⁸ Section 75 thereof.

⁶⁹ Sections 12, 14, 32, 35(3), and particularly s 33, of the Constitution Act, 108 of 1998. See also the discussion under Chapter 5 *infra*, footnotes 49 to 51. These provisions correspond with Article 9, and in particular Article 9(4), of the International Covenant on Civil and Political Rights (ICCPR) and Articles 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷⁰ See the Australian case of *Parole Board ex parte Palmer* 1993 (68) A Crim. R 324 at 330–331; see also *Webster v Correctional Services Commissions* 1998 QLD SC 103 A Crim R 63 at 65; see also *R v Hull Prison Board of Visitors* 1979 (1) All E.R. 702 (CA); *Campbell & Fell v UK* 1984 (7) EHRR (Serie A); See also D van Zyl Smit. *Humanising Imprisonment: A European Project?* (29/08/2005), a paper presented at the European Society of Criminology Conference, in Krakow, Poland at the time, wherein the author points out the progressive trend set by the European Court of Human Rights in becoming more directly involved in deciding on substantive prisoners' rights, and not merely compliance with procedural requirements (at p 6 of the paper). The author also demonstrates that the acceptable standard set by the European Parliament in respect of the treatment of prisoners by its member states, is that they are bound not only by negative obligations by banning them from subjecting prisoners to inhumane and degrading treatment, "... but also positive obligations, by requiring them to ensure that prison conditions are consistent with human dignity and that thorough, effective investigations are carried out if such rights are

Commissioner, before and when deciding to issue a warrant for 'arrest' of the parolee who allegedly has acted in breach of his/her parole conditions⁷¹, would do so only on the basis of information or evidence on oath – which usually is in the form of an affidavit placed before him or her – similar to a warrant being issued in terms of the relevant provisions of the Criminal Procedure Act⁷². The Commissioner is obliged to apply his/her mind carefully to the issues raised and the allegations under oath⁷³. He/she will also have to be satisfied that reasonable grounds exist before issuing such a warrant⁷⁴.

These requirements are important since the effect of the warrant will result in the arrest of the parolee and therefore a violation of his/her constitutionally guaranteed rights to freedom and security of his person, which includes the right not to be deprived of his/her freedom arbitrarily or without just cause⁷⁵. Such an arrest will also take place before all the evidence has been gathered and tested through cross-examination and

violated" (at p 7 thereof). See also the discussion and references in Chapter 5 under the subheading: Cancellation of Parole (para 5.14).

⁷¹ In terms of s 70(3) of the 1998 Correctional Services Act.

⁷² Act 51 of 1977, ss 20, 21 and 22. See also s 70(2) of the Correctional Services Act 111 of 1998.

⁷³ *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd supra* (Chapter 5, n 28); *Roman v Williams supra* (n 28); *Stansfield v Minister of Correctional Services and Others supra* (Chapter 5, n 193); *Minister of Correctional Services v Kwakwa supra* (Chapter 5, n 9, 10).

⁷⁴ See s 70 of the Correctional Services Act 111 of 1998; *Roman v Williams NO supra* (n 30); *Cine Films (Pty) Ltd v Commissioner of Police* 1971 (4) SA 574 (W); see also *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C); Du Toit et al *Commentary on the Criminal Procedure Act* Service 12 (1993) pp 5–10 (Service 17 (1996) pp 2–3 and the cases therein referred to: *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) at 465–466; and *Minister of Justice v Ndala* 1956 (2) SA 777 (T).

⁷⁵ Section 12 read with s 35(2) of the Constitution, 108 of 1998.

hence such parolee's constitutional rights to the presumption of innocence⁷⁶ are also applicable.

The CSPB or the tribunal⁷⁷ responsible for deciding the issue of whether or not to cancel the parole will have to ensure, and be satisfied that: (a) all the procedural and constitutional rights of the parolee have been respected and adhered to; and (b) that the evidence at the end of its enquiry or hearing is sufficiently cogent to warrant a finding that justifies the cancellation of the parole⁷⁸.

If it is not so satisfied, the parolee must be released forthwith to complete the remainder of the parole period until its expiry.⁷⁹

Parole, therefore, is a multi-staged process which starts with the imprisonment of a person and which culminates in the release of a prisoner before the end of his or her actual term of imprisonment imposed by a Court of law.⁸⁰ Decisions regarding the prisoner are intermittently taken at each stage of this process. The assessment and consideration of the prisoner's eligibility for parole as well as the decision whether or not to place such a

⁷⁶ Section 35(2) of the Constitution.

⁷⁷ It could be the Correctional Supervision and Parole Review Board in terms of s 75(8) read with s 77(1) of the Correctional Services Act 111 of 1998, or the Court acting in terms of s 78 of Act 111 of 1998.

⁷⁸ Section 75(3) read with s 77(1) and s 78, which prescribes the procedure to be followed as well as the information that must be considered by the CSPB, CSPRB or the Court, as the case may be. See also the discussion under Chapter 5, para 5.14.

⁷⁹ See s 75(3) read with s 70, further read with ss 77 and 78 of the Correctional Services Act 111 of 1998.

⁸⁰ See in this regard the discussion in Chapter 4 *infra*.

prisoner on parole are different yet inter-related stages during which prisoners acquire and have rights and obligations *vis-a-vis* the State, as represented by the Department of Correctional services, its various organs and officials, including the Correctional Supervision and Parole Board, the Correctional Supervision and Parole Review Board and the Court acting in terms of section 78 of the 1998 Correctional Services Act.⁸¹ These organs of state also have rights and obligations *vis-a-vis* the prisoner in this multi-staged process and, in particular are obliged to act strictly within the parameters allowed by the 1998 Correctional Services Act and the Constitution of the Republic of South Africa Act, 1996.⁸²

The assessment and consideration of the prisoners regarding their eligibility for parole, and the decision whether or not to place them on parole constitute the exercise of public power as well as administrative action and as such can be reviewed both in terms of the constitutional principle of legality and the constitutional requirement for administrative justice.⁸³ Since each prisoner has an enforceable right to be assessed and considered for parole, and an enforceable right to be assessed and considered fairly, lawfully and reasonably for parole, and to a fair, lawful and reasonable decision regarding parole eligibility, this can found in a given situation a legitimate expectation on the part of the prisoner to be released on parole before the expiry of the actual prison term imposed on such a prisoner.⁸⁴

⁸¹ See Chapter 4 *infra*.

⁸² See Chapter 4, in particular paragraph 4.3, the Legal Nature of the Parole Process, *infra*.

⁸³ See inter discussion in Chapter 5, more particularly paragraph 5.4 *et seq* 228 *infra*.

⁸⁴ As discussed in Chapter 5 *infra*.

The remission and/or credits awarded to a prisoner become part of his or her enforceable rights which both inform, and form part of, that legitimate expectation of the prisoner to be released on parole before the expiry of his or her actual term of imprisonment.⁸⁵

In South Africa, the legitimate expectation of the prisoner to be released on parole is based, firstly, on a longstanding practice of early (parole) release of prisoners within the correctional services system⁸⁶. This practice is also now constitutionally acknowledged and elevated to a constitutional requirement without which the sentence of life imprisonment in South Africa (and in Namibia) would have been unconstitutional.⁸⁷ This legitimate expectation is also created by the structure and provisions of the 1998 Correctional Services Act as well as the policies issued by the Department of Correctional Services, in terms whereof early release on parole, as a substantive benefit, is expressly authorised and promised to a prisoner who complies with the applicable eligibility requirements.⁸⁸

Thus where a prisoner has served his or her penal term of imprisonment (the statutorily imposed minimum, or the non-parole period) and he or she has substantially complied with all the statutorily imposed and prescribed conditions, he or she can legitimately expect to be released on parole before the expiry of the actual prison term imposed by a Court. As such it is

⁸⁵ As discussed in Chapters 3 and 4, *infra*.

⁸⁶ As discussed in Chapters 1, 2 and 3, in particular paragraph 3.2, *infra*.

⁸⁷ See the cases references in Note 2 above. See also the discussion in Chapter 5, in particular paragraph 5.3 *et seq.* *infra*.

⁸⁸ As discussed in Chapter 5, more particularly paragraphs 5.7, 5.8, 5.9, 5.10 and 5.11. *infra*.

an enforceable right (that the legitimate expectation be acknowledged and given effect to) which the prisoner has against the Department of Correctional Services.⁸⁹

A denial of such a legitimate expectation on the part of the relevant organ of state (*in casu* the correctional supervisor and parole board) will be carefully scrutinised by the Court if taken on review – with regards to both the procedure how that decision (to deny the legitimate expectation) was reached, as well as with regards to the substance of that denial. If such denial is found to be in violation of any of the constitutional rights of the prisoner, including the principle of legality, his or her rights to administrative justice – i.e. if the denial was unfair, illegal and/or unreasonable – it will be set aside, and such a review court can, *inter alia*, substitute its own order for that of the decision-making body, including ordering that effect must be given to the legitimate expectation of the particular prisoner, to be released on parole.⁹⁰

⁸⁹ As discussed in Chapters 5 and 6, *infra*.

⁹⁰ *Ibid*.

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