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The Doctrine of Substantive Legitimate Expectation: A Missing Piece of the Puzzle in Modern South African Administrative Law

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Abstract

The doctrine of legitimate expectation is well-established in South African administrative law. The doctrine has two pillars: a procedural legitimate expectation focuses on the procedure that a public authority follows before deciding, and a substantive legitimate expectation focuses on the actual decision that a public authority makes. There is a paralysis within the judiciary when it comes to reflecting seriously upon whether substantive legitimate expectations should form part of South African law, perhaps influenced to some degree by judicial restraint. Against the backdrop of Administrator Transvaal v Traub 1989 *(4) SA 731 (A),* Meyer v Iscor Pension Fund *2003 (2) SA 715 (SCA) and obiter comments in* Bel Porto School Governing Body v Premier, Western Cape *2002 (3) SA 265 (CC), the article takes transformative constitutionalism as its point of departure in advocating for the incorporation of substantive legitimate expectation into the evolving corpus of administrative law. This development is long overdue. The article discusses values such as constitutional supremacy, the rule of law, fairness, the separation of powers and administrative justice, and the institutions that support these values.*

Keywords

transformative constitutionalism, values, paradigm, legitimate expectations, substantive, separation of powers

1. Introduction

The Constitution of the Republic of South Africa, 1996 and the Promotion of Administrative Justice Act[1] do not include the substantive legitimate expectation doctrine as a new ground for judicial review in South African administrative law, while the courts avoid using it in their judgments. Unlike the Interim Constitution,[2] the Constitution omitted the doctrine of legitimate expectation and does not define the term 'administrative action'. The definition provided by the Promotion of Administrative Justice Act is narrow, confusing, and difficult to understand.[3] Furthermore, the Promotion of Administrative Justice Act

1 Act 3 of 2000 (as amended).
2 Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution).
3 Hoexter, C *Administrative Law in South Africa* (2012) 194-196.

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lacks the vision needed to transform South African administrative law, which provides the basis for the meaningful transformation of administrative justice.[4]

The courts have issued conflicting judgments. Some judgments find that applying the doctrine of legitimate expectation would mean fettering the discretion of administrative organs or the executive and over-riding the separation of powers doctrine. Other judgments find that the South African constitutional order hinges on the rule of law.[5] No decision grounded on the Constitution or law may be disregarded without recourse to a court of law.[6] For example, section 3(1) of the Promotion of Administrative Justice Act states, 'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.'

This section is unclear and does not say whether legitimate expectations are procedural or substantive. The section gives effect to section 33(1) and (3) of the Constitution. In *Economic Freedom Fighters*, and *Democratic Alliance v Speaker of the National Assembly*,[7] the court granted the applicants a substantive expectation based on the supremacy of the Constitution. The applications before the Constitutional Court were 'based on the supremacy of the South African Constitution, the rule of law and considerations of accountability'.[8] The President was ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence.

2. The approach to substantive legitimate expectations: Developments in major Commonwealth jurisdictions

The doctrine of substantive legitimate expectation has been the subject of intense debate in major Commonwealth jurisdictions following its introduction in the seminal Court of Appeal case of *R v North and East Devon Health Authority ex p Coughlan*.[9] The appeal Court arrived at the decision that affirmed substantive legitimate expectation as a principle of judicial review in administrative law. This laid the jurisprudential basis for the doctrine of substantive legitimate expectation in England.

The Court of Appeal went on to refine the contours of the doctrine in the subsequent decade and a half.[10] In his summation of the *Nadarajah* case, Tomlinson[11] states that

4 *Ibid* 203-205.
5 *Corruption Watch v President of the RSA* 2018 (10) BCLR 1179 (CC) (*Corruption Watch*).
6 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance* [2016] ZACC 11 (*EFF*) para 74.
7 *Ibid* para 4. See also *Justice Alliance of South Africa v President of the RSA* [2011] ZACC 23; *President of the RSA v The Office of the Public Protector* (unreported case number 79808/16). *Corruption Watch* (n 5 above) is also known as the Nxasana judgment. It set aside the appointment of the National Director of Public Prosecutions and nullified the settlement agreement between Jacob Zuma and Nxasana. These cases dealt with substantive legitimate expectations, even though the phrase is not explicitly mentioned.
8 *Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance* 2016 3 SA 389 580 (CC).
9 [2001] QB 213 (EWCA).
10 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 (*Nadarajah*).
11 Tomlinson, J 'The Narrow Approach to Substantive Legitimate Expectations and the Trend of Modern Authority' (2017) 17(1) *Oxford University Commonwealth Law Journal 75,* 82-83 and Tomlinson, J 'Do We Need a Theory of Legitimate Expectations?' (2020) 40(2) *Legal Studies* 286, 288.

Laws LJ pronounced that he was not satisfied with the current conceptual understanding of the doctrine of legitimate expectation as a tool of 'fairness', which existed to guard against the 'abuse of power'.

The Privy Council comprising Supreme Court Justices dealt directly with substantive legitimate expectation in *The United Policyholders Group v Attorney General of Trinidad and Tobago*.[12] In the absence of any clear statement from the Supreme Court on substantive legitimate expectations, the judgment in this case, particularly that provided by Lord Carnwath, provided a detailed, useful, and interesting review of the current state of the substantive legitimate expectation doctrine.[13]

Forsyth[14] is of the opinion that because there is so much uncertainty, there is a real danger that the concept of legitimate expectation will collapse into an inchoate justification for judicial intervention:

> [I]t seems to me that the time has come to return to fundamentals. So, we should ask fundamental questions about the justification and the task of the concept of legitimate expectations. That consideration of these fundamental issues leads me to conclude that legitimate expectations will end up with a narrower but still vital role.[15]

According to Tomlinson, the suggestion for developing 'a value pluralist account of the doctrine may be a preferable approach', and the 'alternative path is to continue to expand a theoretically refined body of scholarship with a baked-in ignorance'.[16]

3. The debate about substantive legitimate expectations and the separation of powers in administrative law

In *Fose v Minister of Safety and Security*,[17] the Constitutional Court said the following about a remedy which gives rise to substantive legitimate expectation:

> An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying, and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.[18]

Based on the literature discussed above, a view has emerged that if substantive legitimate expectation is not recognised in South Africa, citizens will not be able to enforce their constitutional right to fair administrative action.

12 [2016] UKPC 17.
13 Tomlinson 'The Narrow Approach' 76.
14 Forsyth, C 'Legitimate Expectations Revisited' (2011) 16(4) *Judicial Review* 429.
15 *Ibid* 430.
16 Tomlinson 'Do We Need a Theory' 288.
17 1997 (3) SA 786 (CC) (*Fose*) 826.
18 *Ibid*.

In *Administrator, Transvaal v Traub*,[19] Corbett CJ mentioned the two forms of legitimate expectation:

> Legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.[20]

On the other hand, in *Bel Porto School Governing Body v Premier, Western Cape*,[21] Chaskalson P cautioned the applicants as follows:

> The doctrine of substantive legitimate expectations was an ongoing issue, where there is no authority in the South African law, and in Meyer v Iscor Pension Fund,[22] the Supreme Court warned against incorporating the substantive legitimate expectations doctrine into South African law.[23]

Denying substantive relief for legitimate expectations is justified by South African courts on the following grounds:

> (a) The granting of substantive relief for legitimate expectations would amount to fettering the administrative organ's discretion, and allowing substantive legitimate expectations would entail that the courts would be allowed to intrude upon the separation of powers.
>
> (b) Substantive relief would overstep the boundaries of legality.[24]

The arguments raised in opposition to the recognition of substantive legitimate expectations mostly remain committed to an overtly conservative approach to administrative decision-making and lack a sincere commitment to constitutional transformation. Thus, for example, the argument in (a) fails to note that substantive relief merely relates to the issue of when the new policy choice is to take effect, not whether policies may be changed.[25] Furthermore, the denial of substantive relief for legitimate expectations does not take into account the principle of legal certainty.[26] According to this principle, government action should be predictable, and the government should act in a trustworthy manner, in the sense that the

19 *Administrator Transvaal v Traub* 1989 (4) SA 731 (A) (*Traub*).
20 *Ibid* 758.
21 2002 (3) SA 265 (CC) (*Bel Porto*) para 96.
22 2003 (2) SA 715 (SCA).
23 *Bel Porto* (n 21 above) para 96.
24 *R v Secretary of State for Transport, ex parte Richmond upon Thames London BC* 1994 (1) All ER 577; *Durban Add-Ventures Ltd v Premier of the Province of KwaZulu-Natal* 2001 (1) SA 389 (N) 510G-H. See also De Ville, J *Judicial Review of Administrative Action in South Africa* (2005) 123. The denial of relief for substantive legitimate expectations is usually justified with reference to the principle of legality and the prohibition on the fettering of discretion.
25 *R v Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 (QB) (*Ex parte Hamble*) 724B-C.
26 Compare *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 47.

public can rely upon representations made by public authorities. In addition, the argument that substantive legitimate expectations would allow the courts to intrude upon the merits of a decision is unconvincing.

Our courts have not addressed these two conflicting judgments because of the inherent conservatism[27] of the South African judiciary, which is a barrier to recognising substantive legitimate expectations in South African administrative law. A comprehensive vision of constitutional transformation focused on fairness in public administration, as a dynamic concept for legal reform, has been largely absent from the theoretical underpinnings of the judiciary's task to develop South African common law in accordance with the aims and spirit of the Constitution.

The requirements of rationality and reasonableness in the Promotion of Administrative Justice Act belong to the same category of considerations that could possibly intrude upon the merits of a decision. Providing relief for substantive legitimate expectations does not do this to any significant extent. Substantive legitimate expectations merely require that if a legitimate expectation is created unless it is under exceptional circumstances, the public body should then fulfil such expectations, or the expectation should be taken into consideration when deciding.

Until now, most arguments in favour of substantive relief for legitimate expectations have been based on *ad hoc* considerations, lacking a comprehensive vision of the theoretical basis of constitutional development in South Africa.[28] However, rather than creating a principle of substantive legitimate expectation, some court decisions seem to have granted substantive benefits under the 'guise' of procedural legitimate expectations.[29] In *Premier, Mpumalanga*[30] the effect of the order by the court was substantive in nature, namely that the bursaries had to be paid until the end of the year. In *Minister of Local Government and Land Tenure v Inkosinathi Property Developers (Pty) Ltd*,[31] the legitimate expectation was based on the following:

(a) regular practice
(b) the *audi alteram partem* rule was not complied with, and
(c) the decision was found to be invalid.[32]

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

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27 Peach, V *Conservatism of the South African Judiciary: A Barrier of Recognising Substantive Legitimate Expectations in South African Administrative Law Under the 1996 Constitution* Mbali conference proceedings (2018).
28 *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) (*Premier, Mpumalanga*).
29 *Ibid*.
30 *Ibid*.
31 1992 (2) SA 234 (TkA) (*Inkosinathi Property Developers*).
32 *Ibid* 234-235.

4. Understanding the doctrine of separation of powers

The concept of separation of powers is understood by Motala as the best way to control an errant government's power by dividing its powers into different branches: the judiciary, the executive, and the legislature. Motala refers to authors who connect the doctrine to the notion of checks and balances, while others view it 'as an institutional arrangement of limiting government powers'.[33] The new South African legal order was established in line with this definition. The President is the head[34] of the executive, the Speaker chairs Parliament,[35] and the judiciary is headed[36] by the Chief Justice.[37]

5. The nature and functioning of the doctrine of separation of powers

The separation of powers doctrine remains part and parcel of the theory and philosophy of constitutional law and constitutionalism.[38] The objective of this doctrine is to prevent abuse of power by any one arm of government. In South Africa, this principle is constitutionalised. A system in which powers are separated is commonly known as a system of checks and balances. In other words, the different branches of government should control each other to ensure the effective and proper fulfilment of their various powers and functions.[39] Courts must know their constitutional position, particularly the doctrine of separation of powers. Courts have recently been unwilling to permit any subordinate authority to obtain uncontrollable power, which would exempt public authorities or other bodies from the jurisdiction of the courts, as this would theoretically be tantamount to opening the door to potential dictatorial power.[40] The courts in Malawi are also aware of the doctrine of separation of powers. In the Malawian case of *Nangwale v Speaker of the National Assembly*,[41] the court observed as follows:

> While [the] emphasis is on separation of powers, [the] dominant 'institution' to which all the three organs are subservient is the Constitution. The Executive must promote the principles of the Constitution, the legislature must further the values of the Constitution and the judiciary must protect and enforce the Constitution.[42]

33 Motala, Z 'Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the new South African Order' (1995) 112 *South African Law Journal* 503, 506. The author refers to the definition of Gwyn, WG *The Meaning of the Separation of Powers: An Analysis of the Doctrine From its Origin to the Adoption of the United States Constitution* (1965) fn 15.

34 Section 83 of the Constitution. In terms of this section: (a) the President is the Head of the State and head of the national executive; and (b) must uphold, defend, and respect the Constitution as the supreme law of the Republic.

35 Section 52 of the Constitution.

36 In terms of s 165(6) of the Constitution, the Chief Justice is the head of the judiciary.

37 Section 165 of the Constitution. In terms of this section, judicial authority is vested in the courts. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

38 Bekink, B *Principles of South African Constitutional Law* (2016) 47.

39 *Ibid* 48.

40 *Matambo v Speaker of the National Assembly* (MAHGB 13) BWHC 2 (28 January 2015) (*Matambo*) para 124.

41 [2005] MWHC 80 (*Nangwale*), available at https://malawilii.org/mw/judgment/high-court-general-division/2005/80 accessed 18 June 2022.

42 *Ibid*.

In *Callely v Moylan*[43] the court held that the basic test for allowing judicial review of political matters is whether the action or inaction of the political organs of the state touches upon citizens' constitutional rights. The inquiry was reviewable notwithstanding the separation of powers because it concerned the senator's constitutional right to the protection of his good name. The court held that the basic test for allowing judicial review of 'political' matters is whether the action or inaction of the political organs of the state concerns citizens' rights.

6. Separation of powers under the Interim Constitution

One constitutional principle that had a bearing on the structure of government in South Africa, as suggested by the Technical Committee on Constitutional Issues, was the separation of powers between the executive, the judiciary, and the legislature.[44] The certification process of the Constitution brought with it reference to the separation of powers. This doctrine was initially not included in the Interim Constitution. Even though this was not contained in the Interim Constitution, the constitutional principle which was an annexure to the Interim Constitution called for the separation of powers. In *In re Certification of the Constitution of the RSA*, *1996*,[45] the Constitutional Court did not hesitate to point out the mandate of the Interim Constitution in terms of the constitutional principles. Constitutional Principle VI mandated that there be a separation of powers between the legislature, the executive, and the judiciary.[46] The court went on to say that the language of Constitutional Principle VI was wide enough to cover the type of separation required by the New Text (NT). For this article, it is important to bear in mind which interpretation approach must be applied to the interpretation of the constitutional principles. Two observations can be made:

1. In terms of the constitutional principles the separation of powers must not be interpreted with technical rigidity; and
2. All 34 constitutional principles must not be read in isolation from the other constitutional principles which give meaning and context.

7. South Africa's constitutional state

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

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43 [2011] IEHC 2 (*Callely*).

44 Van der Vyver, JD 'The Separation of Powers' (1993) 8(2) *South African Public Law* 177.

45 1996 (4) SA 744 (CC) para 113.

46 Constitutional Principle VI. The constitutional principles were described by the Constitutional Court in para 36 of this judgment as a broad constitutional stroke on the canvas of constitution-making in the future.

The provisions of both the Interim Constitution and the Constitution emphasise the Constitution's commitment to transformation. They require a radical move from the past and compel the transformation of the legislature, the executive and South African legal culture.[47] The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with reference to recognising substantive legitimate expectations. Klare describes transformative constitutionalism as a long-term project of constitutional enactment, interpretation and enforcement in order to transform a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.[48] In addition, Langa argues that a truly transformative South Africa requires a new approach to legal education, in that it should place 'the constitutional dream at the very heart of legal education'.[49] He confronts the inherent conservatism of the South African legal culture, which is based on formal, rather than substantive, reasoning. Considering this definition, my view is that to reform South African administrative law and recognise substantive legitimate expectations, there is a need to achieve transformation by implementing the values and aspirations enacted in the Constitution,[50] and to change the South African legal culture, to meet the standards for reforming administrative law. Although transformation is not the sole responsibility of the court, since it is the task of all three arms of government,[51] the greatest responsibility lies with the judiciary. Furthermore, the Constitution commits all the branches of government to the promotion of democratic values, human rights, and equality.

8. Transformative constitutionalism, the separation of powers and substantive legitimate expectations

Transformative constitutionalism is the underlying paradigm for reforming administrative law in South Africa, because of the transformative nature of the Preambles to both the Interim Constitution and the Constitution. Constitutionalism is viewed as a fundamental concept upon which the new South Africa as a country has been founded.[52]

The Preamble to the Constitution commits all South Africans to a democratic and open society in which government is based on the will of the people, and every citizen is equally protected by the law.

This Constitution, following in the footsteps of the Interim Constitution, aims to establish a society that is based on democratic values. These values enable the courts to engage in transforming the legal culture. In so doing, the courts will recognise substantive

47 Pieterse, M 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20(1) *South African Public Law* 155, 166.

48 Langa, P 'Transformative Constitutionalism' (2006) 17(3) *Stellenbosch Law Review* 351, 356; Klare, K 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 151.

49 Langa *ibid* 356.

50 Klare (n 48 above) 151.

51 Langa (n 48 above) 351, 358.

52 Sibanda, S 'Not Purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22(3) *Stellenbosch Law Review* 482-500.

legitimate expectations in South Africa. According to Klare, '[t]he Constitution is an engagement with a future that it will partly shape; and has been welcomed as a document with a transformative vision looking at the advancing social justice and substantive equality'.[53]

The constitutionalisation further informs this of administrative law in terms of section 24 of the Interim Constitution and section 33 of the Constitution. This optimistic outlook is a result of the transfer of power from the apartheid regime to all South Africans as a whole and the complete eradication of the system of apartheid.[54] The basic principles of this new order are democracy, equality, human dignity, the supremacy of the Constitution, the rule of law (constitutionally entrenched in the Constitution), the separation of powers, and the Bill of Rights.

The pertinent question is what role constitutionalism can play in encouraging the courts to advance the values that underlie the Constitution by accepting substantive legitimate expectations as part of administrative law. The recognition of substantive legitimate expectations is based on the concept of transformative constitutionalism. In *S v Makwanyane*,[55] the court stated that the Constitution wants to achieve, with differing degrees of intensity, the shared aspirations of a nation and the values that bind its people.

In view of what the court stated, I argue that transformative constitutionalism is a vehicle for reforming administrative law through substantive legitimate expectations. *S v Makwanyane*[56] was one of the first constitutional cases that gave the Constitution its place in the South African legal system, and showed how the courts should interpret the values that underlie the new constitutional order. Constitutional supremacy dictates that the rules and principles of the Constitution are binding on all branches of the state and have priority over any other rules made by the government, the legislature, or the courts.[57] Transformative constitutionalism contains the values of the Constitution that must be considered by the courts in interpreting the Constitution, and in the adjudication of cases that come before the courts.

The new order fostered change, which is both inevitable and intrinsically important in providing a vehicle for creative renewal, something which is of profound benefit to mankind. Therefore, constitutional change and constitutional law are not synonymous. Constitutional change comes before formal legal changes, while legal changes invite constitutional changes. This article advocates both constitutional and legislative changes for the recognition of substantive legitimate expectations, to ensure that the legitimate expectation doctrine is a new ground for judicial review in South African administrative law.

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53 Klare (n 48 above) 150.

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

55 1995 (3) SA 391 (CC) (*Makwanyane*).

56 S v *Makwanyane and Another* 1995 3 SA 391 (CC) para 15.

57 Currie, I and De Waal, J *The Bill of Rights Handbook* (2015) 9. See also *Executive Council of the Western Cape Legislature v President of the RSA* 1995 (4) SA 877 (CC) (*Executive Council of the WC Legislature*) para 62.

The question is, therefore, whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with reference to recognising the role of substantive legitimate expectations in reforming administrative law. The courts must reject the notion of fettering another arm of government, in this case the executive, in favour of transformative constitutionalism based on the values of the Constitution. Transformation occurs when a court fully overturns an established doctrine but does not announce it has done so.

9. Substantive legitimate expectation doctrine

An argument that the incorporation of the doctrine of substantive legitimate expectation will violate the principle of separation of powers cannot be accepted without challenge. The reason is that the doctrine of separation of powers must be read and understood within the context of the rights contained in the Bill of Rights.

> All exercise of public power must have a rational basis, this is one of the foundations of legality, or lawfulness by section 33(a) of the Constitution. Justifiability which will be discussed below is required by section 33(d), demand something more substantial and persuasive than mere rational connection.[58]

In *Executive Council of the WC Legislature*,[59] the court held that any law or conduct that is not in accordance with the Constitution, whether for procedural or substantive reasons, will therefore not have the force of law. On the other hand, in *Minister of Health v Treatment Action Campaign*,[60] the court gave substantive relief to the respondents. This was an appeal against a High Court order issued against the government, because of the latter's failure to respond to HIV/AIDS challenges. The court *a quo* found that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting HIV to their babies at birth. The government had acted unreasonably in refusing to make the antiretroviral drug Nevirapine available in the public sector where the attending doctor considered it medically indicated, and in not setting out a timeframe for a national programme to prevent mother-to-child transmission of HIV.[61] The government appealed against this order.

The government's defence was based on the separation of powers. This argument had two aspects:

1. The respect that courts should show to decisions taken by the executive concerning the formulation of its policies.
2. The competent order to be issued by the court in the event it found in favour of the respondents.[62]

58 *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the RSA* 2000 (3) BCLR 241 (CC) paras 85 and 90.
59 *Executive Council of the WC Legislature* (n 57 above) para 62. See also Currie and De Waal (n 57 above) 9.
60 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 721 (CC) (*TAC*) paras 96-114.
61 *Ibid* para 2.
62 *Ibid* para 22.

The court considered the early judgment of *Government of the RSA v Grootboom*,[63] where the court had found that the state's housing policy in the Cape metropolitan area failed to make reasonable provision, given the available resources, for people in the area who had no access to land and no accommodation, and were living in intolerable conditions.[64] In the *TAC* case, the applicant's case was that under the separation of powers doctrine the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy. The court found that this argument lacked merit because there are no bright lines that separate the roles of the legislature, the executive, and the courts from one another. Some matters lie pre-eminently within the domain of one or other arms of government, but not others. This does not mean that courts cannot or should not make orders that impact on policy.

This case clearly negates the counterargument that the recognition of substantive legitimate expectations will interfere with the executive's prerogative, because section 7(2) of the Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Constitution'. How will the rights in terms of the Constitution be fulfilled if substantive legitimate expectations are not recognised as part of South African administrative law? What happens to the individual rights of citizens? My submission is that section 33 of the Constitution mandates the courts to accept the doctrine of substantive legitimate expectation in South African administrative law.

Considering this judgment, the courts are given the latitude to fashion substantive legitimate expectations as a new ground of judicial review where a litigant is claiming substantial relief. Ackerman J went on to state:

> In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying, and the rights entrenched in the Constitution cannot properly be upheld or enhanced. ... [W]hen the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[65]

This innovation of recognising substantive legitimate expectations is not new in South Africa and it will not be the first time that South African courts break with the dichotomy of existing rights. At no stage does this offend the principle of separation of powers.

The court held in the *TAC* case that, when it is appropriate to do so, courts may – and must, if necessary – use their wide powers to make orders that affect policy as well as legislation.[66] Policies must be consistent with the Constitution and the law.[67]

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63 2001 (1) SA 46 (CC) (*Grootboom*).

64 Section 165(5) of the Constitution.

65 *Ibid* para 71. For a critical exposition, see Okpaluba, C 'Of "Forging New Tools" and "Shaping Innovative Remedies": Unconstitutionality of Legislation Infringing Fundamental Rights Arising from Legislative Omissions in the New South Africa' (2001) 12(3) *Stellenbosch Law Review* 462.

66 *TAC* (n 60 above) para 113.

67 *Ibid* para 114.

In the *EFF* matter,[68] the Constitutional Court dealt with the thorny issue of the separation of powers and exercised its full constitutional powers. The application was brought by the Economic Freedom Fighters (EFF), the third largest political party in Parliament, and concerned the upgrading and implementation of then President Zuma's private house in KwaZulu-Natal. The court had to decide whether the President as the head of the executive was bound by the remedial action of the Public Protector. To deal with this issue, the court had to encroach on the other two branches of government. The court reminded itself of its limitations:

> The judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution.[69]

The court did intrude in the process of the other two branches by holding that the President was bound by the remedial action of the Public Protector. Likewise, the court must intrude on the executive sphere if the argument is that, by recognising the doctrine of substantive legitimate expectation, the court will be overreaching, because the Constitution is the supreme law. It is binding on all branches of government and the same can be said about Parliament. The doctrine of substantive legitimate expectation was left to the courts to interpret and develop, as the courts did in the *Makwanyane* case about the death sentence. The drafters of the Constitution did not state whether the legitimate expectation doctrine is procedural or substantive. This sentiment was expressed in the court's decision in *Tlouamma v Mbethe, Speaker of the National Assembly of Parliament of the Republic of South Africa*,[70] where the High Court held that the Constitution did not expressly or impliedly require a secret ballot for the motion of no confidence in the President. Three political parties in Parliament – the Democratic Alliance (DA), the Economic Freedom Fighters (EFF) and the United Democratic Movement (UDM) – approached the Speaker of the National Assembly to schedule a motion of no confidence in President Zuma. The Speaker refused to allow a ballot and held that the National Assembly rules did not allow her to prescribe a secret ballot. The UDM sought direct access to the Constitutional Court (with the DA and the EFF intervening) to force the Speaker of Parliament of the Republic of South Africa to hold a secret ballot.[71] The court ruled in favour of the applicants and assisted the National Assembly with holding a secret ballot by providing guidelines. In the light of the two cases above, using the argument of separation of powers to deny litigants a substantive remedy cannot be supported.

10. Transformative goals

Klare states that the Constitution invites a new imagination and self-reflection about legal method, analysis, and reasoning, in line with its transformative goals. This can only be achieved with the correct judicial mindset.[72] Mlambo indicates that one of the mechanisms

68 See also Mhango, M and Dyani-Mhango, N 'The Powers of the South African Public Protector: A Note on *Economic Freedom Fighters v Speaker of the National Assembly*' 2020 13(1) *African Journal of Legal Studies* 1.
69 *EFF* (n 6 above) para 92.
70 2016 (1) SA 534 (WCC).
71 *United Democratic Movement v Speaker of the National Assembly* 2017 (8) BCLR 1061 (CC).
72 Klare (n 48 above) 150.

for transforming South African society is the entrenchment of socio-economic rights in the Constitution.[73] The democratic transition in South Africa was intended to be a bridge from authoritarianism to a new culture, in which every exercise of power must be justified.

The notion of incorporating transformative constitutionalism as a vision for developing South Africa's constitutional culture found support in the wording of the Preamble and other provisions of the Constitution. Section 1(a) proclaims fundamental values informing the South African vision of the Constitution. This section states what the new state should look like and further proclaims that human dignity, equality, and freedom are at the core of South Africa's vision of constitutionalism. According to Davis and Klare, in terms of transformative constitutionalism and common and customary law,[74] sections 8(3) and 39(2) of the Constitution can be viewed as development clauses. They state that South Africa cannot progress towards a society based on human dignity, equality and freedom with a legal system that rigs a transformative constitutional superstructure onto a common law- and customary law-based structure that has been inherited from the past and has been indelibly stained by apartheid.

Equality, freedom, and fairness are proclaimed as fundamental values that inform the South African vision of constitutionalism. Section 1 of the Constitution describes, with similar sensitivity, how constitutional values must be understood. Transformative constitutionalism is not a neutral concept but is intended to have a positive voice and to connote a social good. Furthermore, the South African people have chosen to move away from the supremacy of Parliament to constitutional supremacy, where judges are empowered to develop the law. Mureinik[75] indicates that being a conscientious judge in South Africa involves promoting and fulfilling, through one's professional work, the democratic values of human dignity, equality, and freedom, and working towards establishing a society based on democratic values, social justice, and fundamental human rights. To accomplish this, the state must respect, promote, and fulfil the rights contained in the Bill of Rights. The Constitution is full of broad phrases and is redolent with excellent hopes to overcome past injustices and move towards a democratic and caring society.[76]

At the heart of a transformative Constitution is a commitment to substantive reasoning to determine the underlying principles that inform laws themselves and the judicial reactions to those laws, and to upholding the transformative ideal of the Constitution, where judges transform the law to bring it in line with the rights and values contained in the Constitution.

In *Nyathi v MEC for Department of Health: Gauteng Province*,[77] the Constitutional Court declared the provisions of the State Liability Act,[78] which prevented the execution of orders

73 Mlambo, D 'The Pursuit of Meaningful Social Justice' Opening address delivered at the Law Society of the Northern Province's Annual General Meeting (AGM), Sun City, 9 November 2013.

74 Davis, DM and Klare, K 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26(3) *South African Journal on Human Rights* 403.

75 Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31, 31-32.

76 Klare (n 48 above) 148.

77 2008 (5) SA 94 (CC) (*Nyathi*).

78 20 of 1957.

against the property of the state, to be unconstitutional. Parliament was given 18 months to devise new legislation that would enable the effective enforcement of court orders.

Transformation requires a complete reconstruction of the state and society, including the redistribution of power and resources along egalitarian lines. Equity as a value and a right is central to the transformation task. Kriegler J observed that the Constitution is primarily and emphatically an egalitarian Constitution.[79] The supreme laws of comparable constitutional states may underscore other principles and rights. However, considering South Africa's own history and the South African vision for the future, a constitution was written with equality as its core value.[80] He added that '[e]quality is our Constitution's focus and its organising principle'.[81]

The doctrine of *audi alteram partem* in general, and in legitimate expectations in particular, has been closely associated with notions of fairness and natural justice. In *Attorney-General, Eastern Cape v Blom*,[82] the court alluded to the creative development of the *audi alteram partem* principle.[83] In *Traub*, the court, in a creative fashion, officially imported the doctrine of legitimate expectation, based on the duty to act fairly.[84]

11. Administrative law reform

Transformative constitutionalism, fairness and administrative law reform cannot be achieved in a vacuum. In South Africa, there are large disparities in terms of wealth. Millions of people are living in deplorable conditions and extreme poverty. There is high unemployment and inadequate social security, and many do not have access to clean water or adequate health services. These conditions existed when the Constitution was adopted, and a commitment to addressing them and transforming South African society into one where human dignity, freedom and equality lies at the heart of the new South African constitutional order. If these conditions continue to exist, these aspirations will have a hollow ring.[85] Transformative constitutionalism is an important vehicle for accomplishing transformation to address the issues mentioned above.

In the sphere of administrative justice in particular, transformative constitutionalism can be regarded as a constitutional philosophy that represents fairness in public administration. The notion that administrative justice is an expression of fairness is a novel idea in South African administrative law. South African courts have often reverted to the doctrine of fairness in English law. Fairness helps the English courts to realise substantive relief for legitimate expectations.

The Promotion of Administrative Justice Act plays a very important role in the transformation of South African administrative law. The purpose of the Act is to give effect to the right to administrative action, which is procedurally fair, as well as the right to written reasons for administrative action, as contemplated in section 33 of the Constitution.

79 *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) (*Hugo*) para 74.
80 *Ibid*.
81 *Hugo* (n 79 above).
82 1988 (4) SA 645 (A) (*Blom*) 648.
83 *Ibid* 660H.
84 *Traub* (n 19 above).
85 *Shabalala v Attorney-General of Transvaal* 1996 (1) SA 725 (CC) para 26.

This new order fosters change, which is both inevitable and intrinsically important in providing a vehicle for creative renewal, which is profoundly beneficial to mankind. Therefore, constitutional change and constitutional law are not synonymous. Constitutional change comes before formal legal changes, while legal changes invite constitutional changes. This article advocates both constitutional and legislative changes for the recognition of substantive legitimate expectations, to substantiate the position of the legitimate expectations doctrine as a new ground for judicial review in South African administrative law.

The question is therefore whether transformative constitutionalism is a viable paradigm for reforming South African administrative law, with reference to recognising the role of substantive legitimate expectations in reforming administrative law.

12. The separation of powers as a constitutional value for the recognition of substantive legitimate expectations

The executive as a collective and individual executing authority plays an important role in the affairs of the country and the livelihoods of its citizens. The Constitution permits the intrusion of the courts in cases where the executive does not fulfil its promises. The argument that substantive legitimate expectations will prevent the government from doing its work does not hold water in the sense that Constitutional Principle VI requires that:

> there shall be separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness.[86]

In terms of the separation of powers, it may be more important to protect citizens rather than the executive,[87] if accountability is to serve its purpose. Mogoeng CJ eloquently put the courts' assertiveness on the separation of powers to rest thus:

> Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved.[88]

Under constitutionalism, the judiciary is the main agency[89] for exercising control over civil and political rights. Therefore, it matters not that the executive will not be able to do its work, when the Constitution's values are undermined by those who control the levers of power. Those who are vested with a public mandate to control and run public offices are required by law to justify their actions and conducts through a forum that is pre-determined.[90] This will also be in the spirit of developing the common law in line with the Constitution. The Constitutional Court has the ultimate responsibility to enforce the Constitution and its values.

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86 Economic Freedom Fighters v Speaker of the National Assembly, Democratic Alliance 2016 (3) SA 850 (CC).

87 Reinstein, RJ and Silverglate, HA 'Legislative Privilege and the Separation of Powers' (1973) 86(7) *Harvard Law Review* 1113, 1167.

88 *EFF* (n 6 above) para 93.

89 Motala (n 33 above) 503.

90 Munzhedzi, PH 'Fostering Public Accountability in South Africa: A Reflection on Challenges and Successes' (2016) 12(1) *Journal for Transdisciplinary Research in Southern Africa* 1-7.

13. Conclusion

Recognition of substantive legitimate expectations will assist with curbing the scourge of corruption that affects the poor directly. It will ensure the accountability and effectiveness of government and reduce maladministration. The Interim Constitution was consistent about making the judiciary the custodian of the Constitution. The separation of powers doctrine shaped the levels of government that citizens wished to have in the new democratic order and in a constitutional state. Besides the Bill of Rights, checks on power are needed to avoid an unjust government. Substantive legitimate expectations will work against a system of government in which the only constraints on the majority will are those of the Bill of Rights as interpreted by the courts. Substantive legitimate expectations will enable the government to govern, but will prevent it from ignoring the opinions, rights, promises and opposing views of citizens. Recognising substantive legitimate expectations will facilitate the nurturing of a human rights culture, increase the level of fairness applications, and promote administrative justice under section 33 of the Constitution.[91] The scope of judicial review will be widened to make accessible to the broader community to invoke the doctrine of substantive legitimate expectation whenever fairness and equity demand this.

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