PAROLE: IS IT A RIGHT OR A PRIVILEGE?

I INTRODUCTION

The nature of parole and its theoretical premise have received little or no attention in South African courts thus far. In those cases where the issue of parole was considered, courts simply assumed and/or accepted that parole amounted merely to a privilege.1 This may be attributed firstly to the fact that sentenced prisoners under the Correctional Services Act 8 of 1959 as amended (‘the old Act’) did not have a guaranteed constitutional right to legal representation, nor to such representation at State expense (legal aid) where any decisions and/or actions of a prison authority were challenged. This might have prevented prisoners from approaching the High Court for the necessary relief where their rights and/or status were affected, unless they could do so at their own expense.

Secondly, our courts have until recently, as in America,2 had little to do with the administration of the parole system. The court would sentence prisoners to a term of incarceration and would make recommendations as part of its sentencing judgment to the prison or parole authorities, who would in turn deal with the convicted prisoner. It is the Commissioner, however, through his or her delegated official (advised by the Parole Board) who had the sole authority to determine whether and, if so, when part of the prisoner’s term of imprisonment would be served outside prison, under parole.3

The new Correctional Services Act 111 of 1998 (‘the new Act’) contemplates, in stark contrast to its predecessor, much more direct and indirect judicial intervention, supervision and control at various levels of the prison administration, be it in the imposition of a non-parole period for a convicted prisoner (who must, after expiry of that non-parole period, be brought back to court for consideration of release on parole4) or by being part of the Correctional Supervision and Parole Board,5 the Correctional Supervision and Parole Review Board6 and/or the National Council for Correctional Services.7

The current situation might therefore change radically after the promulgation and coming into effect of the relevant provisions of the new Act, in terms whereof prisoners’ rights and obligations, as well as

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1 See Winckler v Minister of Correctional Services 2001 (2) SA 747 (C); Combrink v Minister of Correctional Services 2001 (3) SA 338 (D).
3 See s 65 read with s 22A of the old Act read with the SA Department of Correctional Services Manual for Prison Officials.
4 See s 276B of the Criminal Procedure Act 51 of 1977, read with s 78 of the new Act.
5 It is not inconceivable that a member of the judiciary and/or magistracy will indeed form part of such an important public body. In terms of s 74 of the new Act the Minister may appoint the members of the Board.
6 Section 76(1) of the new Act.
7 Section 85 read with s 86 of the new Act.
those of the Department of Correctional Services and its officials, are set out in an unprecedented manner. Presently, prison administration in South Africa is being conducted within the framework of two distinct sets of legislation, namely the old Act with its rules, regulations and policies, and the new Act with its rules, regulations and policies. The new Act is being gradually put into operation with the simultaneous abolition and repeal of the corresponding parts of the old Act. Parole, which directly affects the freedom of a prisoner, and which may be described as the ultimate objective of every prisoner, will increasingly be the subject of litigation at the instance of affected prisoners. It is submitted that our courts and/or other tribunals of competent and legal jurisdiction, will increasingly be confronted with the very notion of parole and its conceptual and theoretical bases in South African penal law. This note represents an attempt to tender certain submissions in this regard.

Parole (from the French ‘parole d’honneur’ which means ‘to honour’ or ‘word of honour’ – to be distinguished from probation, from the Latin ‘probare’ – to prove), is today universally recognised as an important – and, in most instances, necessary – part of the sound administration of penal institutions and in particular of the rehabilitation of offenders. Its practice and existence in modern penal administrations may be justified primarily by reason of the fact that rehabilitation may be fostered through gradually facilitating the move from confinement in an artificially created environment to social reintegration and resocialisation. Parole may also be justified on the basis that it creates the necessary restraint to keep the parolee from committing further offences, and serves the function of deterrence by the mere fact that the parolee knows that breach of a condition may result in his or her re-incarceration. 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 co-operate with prison authorities. It is recognised that parole is not only a way to reduce the prison population but, by doing so, also saves the community the added cost of housing another inmate, who is in any event capable of leading a productive, self-sufficient life outside prison (subject to the necessary parole conditions).

8 In terms of R20 of 1999 (GG 19778 of 19 February 1999); R79 of 1999 (GG 20259 of 1 July 1999); R117 of 1999 (GG 20619 of 18 November 1999) and Proclamation 4 of 2000 (GG 20892 of 18 February 2000), only the following sections of the new Act have come into operation: 1; 3; 5; 83-95; 97; 103-30; 134-36; 138. Only the following sections of the old Act have been repealed: 5; 5B; 20; 20A; 20C-K; 25; 25A-J; 61; 64.

9 See arts 10(1) and (3) of the ICCPR, which is concretised in rules 60-1 of the UN Standard Minimum Rules for Treatment of Prisoners (30 August 1965). See also the European Prison Rules as set out in Council of Europe, Committee of Ministers Recommendation No R(87) 3 (12 February 1987).

Though not always appreciated as such, parole can fulfil the role of an equaliser and/or fine-tuner of two or more different sentences, where there is a large disparity, in order to reduce such sentencing disparity.\textsuperscript{11} Since the Parole Board, after a period of imprisonment, may have more information at its disposal than the sentencing court and can decide about parole in a less emotionally charged atmosphere, it could be in a better position than a court, theoretically at least, to determine an appropriate period of incarceration. Parole also provides the necessary degree of community protection, given adequate conditions and the effective monitoring and supervision thereof.\textsuperscript{12}

The above still does not assist in the determination as to whether parole amounts to a \textit{right} which can be enforced by the prisoner against the prison administration, or whether it is merely a \textit{privilege} awarded to the prisoner at the discretion of the prison authority.

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.\textsuperscript{13}

Subsequently however, the United States Supreme Court, in an unprecedented judgment also described as the ‘Morrisey revolution’,\textsuperscript{14} 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:

\textit{[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.}\textsuperscript{15}

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11 Cohen (note 2 above) 1.15-1.2.
12 See generally \textit{Prison Information Bulletin} (note 10 above); Cohen (note 2 above) 1.23-1.29.
13 \textit{Hyser v Reed} 318 F. 2d 225, 235; 237-38 (DC Cir 1963).
14 Cohen (note 2 above) 476.
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In similar vein, it was held by the same court in a 1985 case (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:

- the requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action;
- 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.16

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 the custody and supervision of the Department of Corrections or some similar agency.17

In England, in the similar context of the exercise of disciplinary powers by the Prison Board of Visiter (Disciplinary Body) in 1979, it was held:

Thus despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. Now the rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision. The courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights and liberties may be as the result of some punitive or other process . . . If therefore, it is recognised . . . that a board of visiter is required to act judicially in the discharge of its disciplinary function, it must follow that the supervisory jurisdiction of the High Court is at once alerted. The proceedings of a board in this context, involving, as they do, a charge, a hearing and an adjudication, and affecting as they may the rights or liberties or status of a prisoner, are the very subject matter of the controlling or corrective jurisdiction of the High Court.18

Lord Justice Shaw further found that the rules of natural justice apply to such hearings.19 As to the argument that prisoners have no legally enforceable rights, it was found that:

This argument is based on the submission that there is no right to remission on the ground of good behaviour, because (the relevant rule) simply says that a prisoner ‘may . . . be granted remission’. But it was common ground between the parties that a prisoner

17 Cohen (note 2 above) 1.22-1.23.
18 R v Hull Prison Board of Visitors [1979] 1 All ER 702 (CA) 716h-j; 717e-f (own emphasis).
19 Ibid 723g-h.
is credited with his full remission when he arrives in prison, after sentence and he is told then his earliest date of release. Whether it is a right or a privilege a prisoner can expect to be released on that date unless he is ordered to forfeit some remission. Lord Reid quoted deprivation of rights or privileges as being of equal importance, and I respectfully agree with him. Whether remission is a right or a privilege is in my opinion immaterial. It is only necessary to consider the case of Saxton, who was ordered to forfeit 720 days. As a result he would have to serve nearly two years beyond his earliest date of release. It was a very substantial privilege which he had lost.\(^{20}\)

In 1984, it was further held that a prisoner has acquired a legitimate expectation to be considered and assessed fairly, and is entitled to judicial review of a decision by a public authority if it is shown that the said decision affected him by depriving him of some benefit or advantage which in the past he had been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had been given the opportunity of making representations against the withdrawal. The appellant’s legitimate expectation arising from the existence of a past practice of consultation which the appellants could reasonably expect to continue gave rise to an implied limitation on the Minister’s exercise of the power (conferred upon him by the applicable laws) namely an obligation to act fairly . . . .\(^{21}\)

In *Doody v Secretary of State for the Home Department*, it was held (in the context of parole, remission and the concept of fairness) that, whereas the old reasoning was that a person sentenced to imprisonment could not ‘expect’ to be released before the expiry of his sentence and may merely ‘hope’ for serving part of his sentence outside prison,

\[\text{[t]his reasoning is however much weakened now that the indeterminate sentence is at a very early stage, formally broken down into penal and risk elements. The prisoner no longer has to hope for mercy, but instead knows that once he has served the ‘tariff’ the penal consequences of his crime have been exhausted.}\] \(^{22}\)

The Court then proceeded to set out the reasons for the above, with specific reference to the dictates of fairness in the circumstances:

1. 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 circumstances.
2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
3. The principles of fairness are not to be applied identically in every situation. What fairness demands is dependant on the context of the decision and this is to be taken into account in all its aspects.

\(^{20}\) Ibid 723-24b.
\(^{21}\) *Council of Civil Service Unions v Minister of Civil Service* [1984] 3 All ER 935 (HL) 949e-951j (per Lord Diplock).
\(^{22}\) *Doody v Secretary of State for the Home Department* [1993] 3 All ER 94 (HL) 103d (per Lord Mustill) (own emphasis).
4. An essential feature of the context is the statute which creates the discretion, as regard both its language and the shape of the legal and administrative system within which the decision is taken.

5. 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 procuring its modification, or both.

6. 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.\(^{23}\)

The *Doody* case was referred to with approval, and its principles applied in the 1996 case of *R v Secretary of State for the Home Department ex parte Piersen*, where it was reiterated that representations made by or on behalf of a prisoner, for consideration to be placed on parole, must be ‘... considered fairly, objectively and without a preconceived intention to reject them’.\(^ {24}\)

In summary, a sentenced prisoner under the current English penal system does not merely have a hope to be released on parole. Once he or she has served his or her penal term or non-parole period (in the case of undetermined sentences) or once he or she becomes eligible for parole (in the case of determinate sentenced prisoners), he or she has an enforceable right to be considered for release on parole. Such a consideration must take place in accordance with the empowering legislation (including the rules of natural justice) and in the context of the principles of fairness. Where such a person is so considered, he or she has, on the basis of similar past practices, a legitimate expectation to be released on parole, unless there are clear, objective and well-conceived reasons for refusing parole.

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’.\(^ {25}\)

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\(^{23}\) Ibid 106d-h (own emphasis).
\(^{24}\) *R v Secretary of State for the Home Department ex parte Piersen* [1996] 1 All ER 837 (CL) 851.
\(^{25}\) *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 (QLD 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 the crime and therefore did not need the 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.
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.26

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 this 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’27 applied.

In India the question of parole would also be determined in accordance with the notion of legitimate expectation. The concept of legitimate expectation, it was said, has developed both in the context of reasonableness and of natural justice. Further, the mere existence of a legitimate expectation does not necessarily imply that it has, per se, become an enforceable right:

[The 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. 28

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 Rights29 referred with approval to R v Hull

27 Ibid (own emphasis). See also R v Ferris 93 CCC (3d) 497 (1995) 499c-e, with reference to R v Gamble (1988) 45 CCC (3d) 204. Although this case dealt 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.
Therefore, 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’. This affords such a prisoner the right or remedy to invoke the guarantees of art 6 of the European Convention on Human Rights, 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 also affirmed that, once a prisoner had been granted parole, that amounts to a state of liberty (in similar vein to the American *Morrisey* decision) 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.  

In summary, therefore, a person sentenced to life under English law, European Community law and American law never regains his right to liberty, except in the event of a free pardon or by Royal prerogative, even when released on licence (parole). Under European Community Law and the Convention however, such a person does not loose his 'right to liberty and security of the person' as guaranteed in art 5 of the Convention. Even if there are conditions attached to the release of such a prisoner, it only makes his freedom more circumscribed in law and more precarious than the freedom enjoyed by ordinary citizens, but those restrictions do not prevent the freedom of the prisoner from qualifying as 'a state of liberty' for the purposes of art 5. Thus, an order recalling such a prisoner to prison amounts to a removal from an actual state of liberty (albeit one enjoyed as a privilege and not as of right) to a state of custody.

II THE RELATIONSHIP BETWEEN THE CONCEPT OF LEGITIMATE EXPECTATION AND THE CONCEPT OF PAROLE IN SOUTH AFRICA

(a) General

As in the aforementioned jurisdictions, parole is a much needed and...
integral part of the penal administration, process and practice in South Africa.\textsuperscript{37} The practice thereof by the Department of Correctional Services and/or the relevant authorised body or institution, as reflected in the processes of selecting, assessing, evaluating and considering inmates, must be in accordance with the law,\textsuperscript{38} as well as with comparative international penal practice and international standards.\textsuperscript{39}

It is submitted that parole in South Africa will necessarily involve a process whereby sentenced prisoners are assessed and considered by the relevant, legally authorised institutional bodies for the possibility of earlier release from prison into the community, before the expiration of the full term of imprisonment imposed by a court of law, subject to the acceptance of appropriate conditions.

Inasmuch as the release of prisoners on parole is not enforceable as a right, it cannot be said to only amount to a privilege either. Parole derives its concept, existence and practice from a statutory discretionary power vested in either the Commissioner,\textsuperscript{40} the Correctional Supervision and Parole Board\textsuperscript{41} and/or the Court.\textsuperscript{42} That discretionary power must be exercised judicially, in accordance with the law,\textsuperscript{43} with due regard to the principles of fairness. The discretion must further not be exercised arbitrarily, illegally, irrationally, or suffer from procedural impropriety\textsuperscript{44} and must comply with all elements of lawfulness.\textsuperscript{45} Parole is a legitimate, necessary and rational practice in correctional and penal administration with its primary aim the rehabilitation (including reformation, social reintegration, re-evaluation and resocialisation) of the sentenced prisoner. This is equally applicable to South African penal practice and administration.\textsuperscript{46}

(b) Position under common law

At common law, a legitimate expectation may arise either from an

\textsuperscript{37} See s 65 of the old Act; Chapter VII of the new Act.
\textsuperscript{38} This would include the relevant provisions of both the old and new Correctional Service Acts; the relevant provisions of the Criminal Procedure Act 51 of 1977; the common law; the Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution); the Promotion of Access to Information Act 2 of 2000; the Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
\textsuperscript{39} As reflected in international law instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter for Human and Peoples Rights, the European Convention of Human Rights and Freedoms, the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules.
\textsuperscript{40} See s 65 of the old Act; s 73(7) of the new Act.
\textsuperscript{41} See s 65 of the old Act; s 73(1) of the new Act.
\textsuperscript{42} Section 73 read with s 78 of the New Act, ss 276; 276B and 287 of the Criminal Procedure Act; s 68 of the old Act.
\textsuperscript{43} See the authorities cited in notes 16; 22; 24 and 27 above.
\textsuperscript{44} See Council of Service Unions v Minister of Civil Service (note 21 above) 949f-j.
\textsuperscript{45} See notes 22-24 above and accompanying text.
\textsuperscript{46} See Submissions by SA Government to UN Summit on Safety & Security (April 2000) 35.
express promise given on behalf of a public authority, or from the existence of a regular practice which a person can reasonably expect to continue, and/or when considerations of fairness justify the existence thereof. The invocation of the doctrine of legitimate expectation in relation to the right to be heard has as its basis, it has been said, the concept of natural justice. As such, any deviation from and/or limitation of the doctrine of legitimate expectation must be justifiable in terms of the concept of natural justice. Thus, it has been said that the test to be applied in determining whether or not the doctrine of legitimate expectation applies is ‘... when do the rules of natural justice not require the application of the legitimate expectation doctrine and not when it is justified to depart from the rules of natural justice’.  

The application of the doctrine of legitimate expectation has at common law been confined to the question of procedural fairness:

Thus, 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 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. ... 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 decisions were taken and the extent of the duty to act fairly will vary greatly from case to case. 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. ...  

At common law, in relation to the audi alteram partem principle, a person has a legitimate expectation to be heard before a decision is taken which may adversely affect him or her. In Nortje v Minister van Korrektiewe Dienste, Brand AJA referred to and applied the definition of the fundamental principle of the audi rule by Corbett CJ in another seminal case:

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.

47 See generally UTASA v Minister of Education and Culture; Isaacs v Minister of Education and Culture 1993 (2) SA 828 (C) 844-47; especially 847A-B; Administrator, Transvaal v Traub 1989 (4) SA 731 (A) 756G-761G; Minister of Justice, Transkei v Gemi 1994 (3) SA 28 (Tk) 31-3; Gencor SA Ltd v Transitional Council for Rustenburg 1998 (2) SA 1052 (T) 1056-57; Ragani v Superintendent General, Department of Health & Welfare 1999 (4) SA 383 (T) 392F-394H; Governing Body, Tafelberg School v Head, Western Cape Education Department 2000 (1) SA 1029 (C) 1217; Du Preez v Truth & Reconciliation Commission 1997 (3) SA 204 (A) 231; Nortje v Minister van Korrektiewe Dienste 2001 (3) SA 472 (SCA) 479-80.  

48 Minister of Justice, Transkei v Gemi (note 47 above) 311-J; 33C-D.  

49 Administrator, Transvaal v Traub (note 47 above) 758-59 (own emphasis). See also 756G-757E.  

50 Note 47 above.  

51 Du Preez v Truth & Reconciliation Commission (note 47 above) 231G-H.
Therefore, the question to be asked in every case in which the audi alteram partem rule is applicable, is whether the person who is adversely affected by a decision had a just and fair opportunity to state his or her case.52

Applying these principles to the concept and practice of parole under South Africa law, it is submitted that:

- A sentenced prisoner does not have a right to be released on parole prior to the expiration of his or her term of imprisonment.
- Such a prisoner, however, has the right to be assessed and considered for release on parole before the expiry of his or her term of imprisonment, in terms of the Correctional Services Act.
- Such a prisoner furthermore has the right and legitimate expectation to be assessed and considered for release on parole in a manner that is lawful, fair, non-arbitrary and without any procedural impropriety or irrationality (ie in accordance with the principles of natural justice).
- Where such a prisoner has displayed conduct which is indicative of his or her rehabilitation, does not present an unacceptable risk to the broader community, and has substantially complied with the rules and regulations of the correctional facility during the term of incarceration, and where it can be demonstrated that such a person would in the normal cause of events qualify to be placed on parole, a legitimate expectation is created as an enforceable legal right, on the part of such a prisoner, to be released on parole (subject, obviously, to the applicable parole conditions).53

In this way, a duty is created on the part of the correctional facility or parole authority to act fairly and in accordance with the requirements of natural justice in their assessment and consideration of the parole application.54 Such a sentenced prisoner has acquired not only a right to be assessed and considered for parole in terms of ss 62 and 63 of the Old Act and s 38 of the New Act, but also a legitimate expectation to be assessed and considered for parole fairly and in terms of the principles of natural justice and to be released on parole ‘if by that time no disciplinary award of forfeiture or remission has been made against him...’55

(c) Relevant constitutional and legislative provisions

In terms of s 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (‘interim Constitution’) every person had the right to:

52 Nortje v Minister van Korrektiewe Dienste (note 47 above) 480B-D.
53 See authorities cited in note 47 above; specifically Administrator, Transvaal v Traub (note 47 above) 756G-757E.
54 See Nortje v Minister van Korrektiewe Dienste (note 47 above) 480B-C; referring to Du Preez v Truth & Reconciliation Commission (note 47 above) 231G-H.
55 Administrator, Transvaal v Traub (note 47 above) 756G-761G.
In terms of s 33 of the 1996 Constitution, every person has the right to administrative action that is lawful, reasonable and procedurally fair. In terms of item 23(2)(d) of schedule 6 of the 1996 Constitution, ss 33(1) and (2) thereof had to be regarded to read as s 24 of the interim Constitution, until national legislation envisaged in s 33(3) of the Constitution had been enacted. Such legislation has indeed been enacted, in the form of the Promotion of Administrative Justice Act 3 of 2000. Section 6 of the Act reads as follows:

(1) Any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if

(a) the administrator who took it
   (i) was not authorised to do so by the empowering provision;
   (ii) acted under a delegation of power which was not authorised by the empowering provision; or
   (iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken
   (i) for a reason not authorised by the empowering provision;
   (ii) for an ulterior purpose or motive;
   (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
   (iv) because of the unauthorised or unwarranted dictates of another person or body;
   (v) in bad faith; or
   (vi) arbitrarily or capriciously;
(f) the action itself
   (i) contravened a law or is not authorised by the empowering provision; or
   (ii) is not rationally connected to
      (aa) the purpose for which it was taken;
      (bb) the purpose of the empowering provision;
      (cc) the information before the administrator; or
      (dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful.
It is submitted that the assessment and consideration of a prisoner for parole in terms of s 62 read with ss 63 and 65 of the Old Act constitutes an administrative action in terms of the relevant provisions of the 1996 Constitution, read with these provisions of Act 3 of 2000. As such, assessment and consideration of a prisoner for parole must adhere not only to common law principles and provisions, but also to constitutional requirements.

In this regard, the post-1996 constitutional position had been summarised (correctly, it is submitted) as follows:

A decision of the Commissioner of Prisons [to refuse releasing a sentenced prisoner on parole] is reviewable administrative action within the purview of section 31(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. 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 . . . . 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 decision was reached but extends to its substance and merits as well.

If remission and/or ‘credits’ are applicable to any sentenced prisoner, it may impact positively on a finding that a legitimate expectation to be released on parole existed, as an objective factor to be given ‘due consideration’. Such remission or ‘credits’ moreover creates a ‘liberty interest’ which attaches to the prisoner in the sense that it impacts on the duration of such a prisoner’s imprisonment. Once that ‘liberty interest’ is created and acknowledged, it becomes, in substance, an enforceable right attaching to the prisoner, in the sense that it becomes the subject of the protection of the provisions of the 1996 Constitution that correspond with arts 5 and 6 of the European Convention.

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56 Roman v Williams 1997 (9) BCLR 1267 (C) 1278F I (per Van Deventer J) (own emphasis).

57 See National Buildings Construction Co v Raghunathan (note 28 above) 2784-85; also pages 8-12 of the unreported judgment of Rose-Innes J in O’Kennedy v Commissioner of Correctional Services (CPD 5247/95) which dealt with a remission of sentence and the effect of credits on the sentence of a sentenced prisoner. The judge concluded as follows: ‘The intention of the remission, in my opinion, was not to alter the period of the sentences imposed upon prisoners by the courts, but not to require that a portion of such sentences be served, and that intention must relate to the portion of the sentences which has not yet been served on 27 April 1995 when the Presidential Act was issued’.

58 These provisions are the right to be protected from arbitrary arrest and detention and deprivation of liberty (art 5 which corresponds with s 12 of the 1996 Constitution) and the right to a fair and public hearing (art 6, which corresponds with s 33 read with s 33(3) of the 1996 Constitution).
III SUMMARY AND CONCLUSION

A sentenced prisoner whose term of imprisonment has not yet expired, has a right to be assessed and considered for parole in terms of the relevant provisions of the Correctional Services Act. Such a prisoner also has the right and legitimate expectation to be assessed and considered for parole in a fair manner. That assessment and consideration must not only be procedurally fair, but must also be fair and justifiable in terms of the decision whether or not to release such a prisoner on parole. In the circumstances, the sentenced prisoner also has the right and legitimate expectation that the decision, in terms of its substance and merits, be fair, lawful and constitutional, since the decision in itself constitutes an administrative action.59 If, after such assessment and consideration, the prisoner is found to be eligible for parole, in accordance with the ‘norm’ and ‘general practice’, he or she has an enforceable right in the form of a legitimate expectation to be released on parole.

Once a remission or ‘credit’, or parole is granted to a prisoner (whether as a right or a privilege), it becomes part of his or her enforceable rights and cannot be deprived arbitrarily or in a manner which breaches his or her constitutional rights. Moreover, those remissions or ‘credits’, in the form of a ‘liberty interest’, provides the foundation for the existence of a legitimate expectation to be released on parole before the expiration of the full term of imprisonment. That expectation will be legitimate and hence enforceable in the absence of any lawful and justifiable reasons to the contrary. Once a prisoner has been granted parole, he or she has been placed in a ‘state of liberty’ akin to that enjoyed by the ordinary citizen, albeit circumscribed by certain conditions, and is as of right entitled to the protection awarded by the applicable laws and the Constitution.60 That ‘state of liberty’ cannot be deprived arbitrarily and in violation of such a person’s rights under ss 12, 33 and 35 of the 1996 Constitution.

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59 See Roman v Williams (note 56 above) 1275 E-G; 1267B-C; 1278F-I.
60 See Campbell & Fell v UK (note 29 above) and Weeks v UK (note 33 above).
* The research for this note was undertaken as part of a PhD in Criminal Justice and was made possible partly with the kind and valued assistance of the Max Planck Institute for Comparative and International Criminal Law and Criminology, Freiburg, Germany and in particular with the kind assistance and guidance of Professor Dr Hans-Jorg Albrecht.