

The Bill of Rights in public administration



by

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DECLARATION

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I declare that the thesis titled *The Bill of Rights in public administration* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references in a list of sources included in the thesis.



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28/11/2001

Date

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MAXIM

*"We here hold that man,
born but once,
has the right to live his life fully,
in liberty and security of person.*

*We believe in the essential dignity and worth of the human being,
be he African or White, Indian, Coloured or Malay;
man or woman;
graduate or illiterate."*

Extract from the first draft of the Freedom Charter 1955 (Document EG.4.1.1.14)

ABSTRACT

Contemporary South Africa prides itself on having a Bill of Rights. For 84 years (1910 to 1994) public administration regulated the general welfare and lives of inhabitants in the finest detail, while being subject to almost only the whims and political objectives of the governing authority.

On 27 April 1994 the 1993 Constitution introduced a constitutional obligation and radical change to the manner in which public administration must be exercised. Today, still an infant in experience relating to a bill of rights, public administration must be exercised with the Bill of Rights as an integral part of this inhabitant / governing authority interaction.

The primary aim of this study is to attempt to describe the manner in which public administration was exercised, firstly, during constitutional dispensations prior to 1994 and, secondly, since public administration became subject to constitutionally entrenched fundamental rights. The empirical investigation is aimed at exploring and analysing the extent to which public administration has realised the constitutional obligation in practice.

The results of the empirical investigation highlighted, primarily, that the majority of the officials that participated in the survey do not know of the Bill of Rights, and that half of those who do know of the Bill have little knowledge of its provisions. More than half of the respondents lack awareness of section 195 of the 1996 Constitution, which states that public administration must be governed by democratic principles enshrined in the Constitution. Barely one tenth of respondents were informed of the significance of the Bill and its role regarding public administration. The majority of respondents have not of their own accord studied the Bill and the Bill does not have the desired effect on the manner in which public administration is exercised. Two thirds of respondents have mixed perceptions as to whether to serve the interests of inhabitants above the political objectives of the governing authority and less than a quarter of respondents give recognition to the Bill when rendering public services.

It seems as if South African public administration has a long way to go in adhering to its constitutional obligation in practice.

KEY TERMS

Public administration, Public sector, Public officials, Public administrative functions
Bill of Rights, Fundamental rights, Entrenched fundamental rights,
Constitution of the Republic of South Africa 108 of 1996

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Chapter 1

Orientation to the field of study

1.1 Introduction

The purpose of chapter 1 is to describe the framework within which the study is done. In chapter 2 (see *infra* 2.1) I explain that the study involves the public administration and legal environments. It is essential that I inform the reader at this stage that the study tends to lean over more to the legal environment as the prescriptions to both fundamental rights and public administration are contained in legal sources. I also mention this fact when I explain the method of data collection (see *infra* 1.6.6).

Firstly, the theme of the study, that contains the background to and motivation for the study, is described. Secondly, the purpose and thirdly, the significance of the study are discussed and this is, fourthly, followed by a statement of the problem that leads to the formulation of particular research questions. The methodology of the study is given fifthly. Sixthly, the scope and limits of the study is described in terms of a geo-, hierarchy- and time dimension, respectively. Seventhly, a description is given of the methods in which data are collected for the thesis. The reference technique used in the thesis is described eighthly. Ninthly, an analysis is made of particular terminology used in the thesis and this is followed, tenthly, by a brief overview of the structure of the thesis, chapter by chapter.

1.2 Theme of study

Once the reader has read the background to the theme of the study, I will explain the motivation for this study. I also deem it necessary to draw the reader's attention to the phrase: "the manner in which public administration is exercised", which is exhaustively used throughout the thesis, as it is material to discussions throughout the study.

1.2.1 Background

A common characteristic of constitutional systems is the division of a state's (see *infra* 1.9 "state") authority between legislative, executive and judicial institutions. Almost all constitutions formally distinguish between the three divisions of authority (see *infra* 1.9 "authority") and make provision for institutions in each regard (Rautenbach & Malherbe 1994:60-61). The present **Constitution of the Republic of South Africa** 108 of 1996 (hereinafter referred to as the "1996 Constitution") provides for such a division of authority in sections 43, 85 and 165, respectively. The previous **Constitution of the Republic of South Africa** 200 of 1993 (hereinafter referred to as the "1993 Constitution") also contained such a division of authority in sections 37, 75 and 96, respectively. Prior to 1994, a similar characteristic regarding the division of the state's authority also existed in the different constitutional systems of South Africa since 1910.

The functions of the executive authority of South Africa appear to be an ever-increasing responsibility. This authority is burdened with more than, *inter alia*, protecting the life and property of the inhabitants of South Africa. Executive institutions have in fact become a mechanism through which the general welfare of inhabitants is promoted and the lives of inhabitants are regulated in the finest detail (Henning 1968:1; Brynard 1993:19). In South Africa executive institutions' authority to regulate the lives of inhabitants is at present granted by section 85 of the 1996 Constitution. Public officials are part of the executive division and accordingly, instrumental in exercising executive functions in the form of public administration (see *infra* 1.9 "public administration").

A balance is expected to be maintained between the authority that is granted to the executive authority and the manner in which such authority is exercised. This is deemed necessary, as the possibility exists that such administrative executive institutions and public officials could exceed prescribed authority when exercising public administration. This possibility exists especially in the absence of distinct directives as to the manner in which public administration must be exercised. The absence of such distinct directives can subsequently result in public officials exercising public administration in an arbitrary manner (Ross 1957:2). Fortunately, the constitution of a democratic state usually not only grants authority to particular institutions, but also places limitations on the manner in which such authority is exercised (Rautenbach & Malherbe 1994:18).

Prior to 1994 though, South Africa's constitutional dispensation was characterised, in the words of the late Etienne Mureinik, by a culture of authority (Mureinik 1994:31). Parliament was sovereign and commanded law, which meant that it could adopt any law, no matter how unfair or discriminatory. All law, the constitutions of the time included, were subordinate to the supreme Parliament. Draconian laws, that denied people their freedom, equality and human dignity, systematically trampled upon the fundamental rights and freedoms of the majority of the inhabitants of the country. The executive authority, administrative executive institutions and public officials implemented government policies and exercised public administration, often in an arbitrary and bureaucratic (see *infra* 1.9 "bureaucratic") manner. The lives of inhabitants were regulated and dictated in the finest detail, often in an unfair and discriminatory manner. There was little scope for anyone to challenge the bureaucratic actions. The pre-1994 constitutions granted no recourse to inhabitants because these constitutions did not contain limitations that regulated the manner in which executive authority, and subsequently public administration, was to be exercised. A so-called balance between authority granted to the executive and the manner in which such authority is exercised, was apparently not maintained.

On 27 April 1994 a major event took place in South Africa - the 1993 Constitution, containing a chapter 3 on entrenched fundamental rights (see *infra* 1.9 "constitutionally entrenched") came into operation. For the first time in its constitutional history, South Africa had a supreme Constitution (see *infra* 1.9 "Constitution"). In the words of Mureinik, the 1993 Constitution replaced the old culture of authority with a new culture of justification—

"...a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command"
(Mureinik 1994:32).

The 1993 Constitution was an ambitious legislative instrument because when it came into operation, it made provision for a constitutional system that differed radically and fundamentally from the South African constitutional system of that time. The constitutional system that was based on the principle of parliamentary sovereignty was replaced by a constitutional system based on a supreme Constitution. The 1993 Constitution thus fashioned and installed a new constitutional order. In terms of this new order all the inhabitants of South Africa were, from 27 April 1994, entitled to share in a social and legal environment in which their fundamental rights and freedoms could be enjoyed, exercised and protected more comprehensively in terms of the 1993 constitutional directives than

they were prior to 1994. And - as from 27 April 1994, public administration was also directly affected by the new constitutional order!

The supreme 1993 Constitution and its chapter 3 on entrenched fundamental rights contained an abundance of democratic values and principles. The supremacy of this Constitution meant that it was the supreme law of South Africa and that all other law and all conduct that was inconsistent with it, was invalid. The mentioned chapter 3 of the 1993 Constitution applied to all law and bound the legislature, the executive, the judiciary and all public institutions (see *infra* 1.9 "public institution") in their functions and activities (1993 Constitution: sections 4 and 7(1)). Public administration was thus influenced by and had to, as from 27 April 1994, be exercised in consistency with the provisions of the 1993 Constitution and the principles of the constitutionally entrenched fundamental rights in the mentioned chapter 3 (see *infra* 1.9 "constitutionally entrenched").

The 1993 Constitution was replaced by the 1996 Constitution that came into operation on 4 February 1997, which contains a bill of rights (see *infra* 1.9 "Constitution"). The 1996 Constitution also contains provisions similar to those of the 1993 Constitution, mentioned above, relating to constitutional supremacy, supreme law and entrenched fundamental rights (1996 Constitution: sections 2 and 8(1)). In addition, the 1996 Constitution contains instructions as to the manner in which public administration must be exercised. These instructions include, *inter alia*, that public administration must be governed by transparency, accountability and the democratic values and principles enshrined in the Constitution (1996 Constitution: section 195(1)). The instructions in section 195(1) are thus also directives as to the manner in which public administration must be exercised. I must inform the reader that although the mentioned section 195(1) contains particular directives as mentioned and is an important part of the study, the fundamental rights as contained in the Bill of Rights play the primary role to realise the purpose of the study (see *infra* 2.1).

By implication, the post 27 April 1994 constitutional dispensation in South Africa impels public officials to exercise public administration, subject to the principles of the constitutionally entrenched fundamental rights, which currently are contained in the Bill of Rights. This constitutional rule is obligatory and any conduct that falls short of the set parameters is unconstitutional and accordingly invalid. Such a strict constitutional directive for public officials to adhere to did not exist before 27 April 1994.

1.2.2 Motivation for study

Against the background outlined above, it is my contention that an exploratory and scientific study needs to be undertaken into the influence that the constitutional entrenchment of fundamental rights has on the manner in which public administration is exercised as from 27 April 1994. The expected change in the manner in which public administration is exercised is of current interest and importance. The mere existence of the Bill of Rights in the 1996 Constitution, together with the constitutional obligation that public administration must be exercised in consistency with the principles of the constitutionally entrenched fundamental rights, does not necessarily mean that public administration is actually exercised in that manner in practice.

Several articles and commentaries have been published on the contents of the Bill of Rights since 27 April 1994 (Cachalia *et al* 1994:7; Du Plessis 1994:22; Mureinik 1994:29; Rautenbach 1995:14; Devenish 1998:4). Most studies that have been completed to date, with a bill of rights as a central theme, do not, however, include the actual application of the principles in the Bill of Rights in public administration. The influence that the existence of such rights has on public administration has thus not been subjected to much scientific analysis. This particular field of study is therefore ready for exploitation and a need for a study regarding constitutionally entrenched fundamental rights in a bill of rights within the framework of public administration, is considered necessary. In conjunction with the study of the effects that constitutionally entrenched fundamental rights possibly have on public administration, comparative references are made to other countries that have a bill of rights. Countries that are referred to for comparative purposes are, among others, Britain, the United States of America and Namibia.

At present, the practical application of the principles in the South African Bill of Rights is still to a large extent in a state of trial, growth and maturing. The necessity therefore exists for constructive analysis, criticism and contributions to support and promote the development and application of those principles in public administration. Constructive commentaries are desirable in order to facilitate the implementation of such rights to the full extent in public administration. The Human Sciences Research Council confirmed that no similar research as undertaken in this study has been embarked on or completed to date. This fact contributes to the stimulation for me to undertake the study.

1.3 Purpose of study

The primary purpose of the study is to attempt to establish whether constitutionally entrenched fundamental rights have an influence on public administration in South Africa. More specifically, the study will examine whether the existence of such rights has an influence on the manner in which public officials exercise public administration. Ultimately, the study is an attempt to establish whether the manner in which public administration must be exercised that was prescribed in terms of the provisions of the 1993 Constitution, and subsequently the 1996 Constitution, has in fact been realised in practice. The application of such rights will accordingly be appraised in relation to relevant duties performed by public officials since 27 April 1994.

One goal of the study is to explore, analyse and describe the South African constitutional dispensations prior to 1994 in order to attempt to determine, firstly, the extent to which fundamental rights were protected constitutionally and, secondly, the influence such rights, if any, had on public administration. This exploration, analysis and description extends to the period just prior to Union in 1910 in order to also, for the same purpose, examine the constitutional dispensation of each of the four South African colonies (the Cape of Good Hope, Orange Free State, Transvaal and Natal) as they existed just prior to Union, as well as the constitutional dispensations of the then British protectorates, Lesotho, Swaziland and Botswana. This exploration, analysis and description is done so as to expose factors that can be compared to similar factors extracted from the analysis of the South African constitutional dispensation installed after 1994. Such a comparison has the potential to provide an indication of the extent of the change that occurred in the manner in which public administration was constitutionally prescribed to be exercised prior to and after 1994.

Another objective of the study is to examine the features of the entrenched fundamental rights contained in the 1993 Constitution and also of such rights contained in the 1996 Bill of Rights. The study has the potential to establish whether the constitutionally entrenched fundamental rights have made any contribution to the enhancement of the manner in which public administration is exercised since April 1994. This implies that the appraisal of the application of the principles of such constitutionally entrenched fundamental rights in public administration will be done within the reference framework of public administration as a field of activity and from the viewpoint of the Public Administration as a subject.

A further purpose of the study is to attempt to establish whether public officials are conversant with the contents of the Bill of Rights and with constitutional instructions (section 195:1996 Constitution) regarding the manner in which public administration must be exercised.

Another goal of the study is to discuss the necessity that the principles in the Bill of Rights be adhered to and be considered by the governing authority whenever policies are formulated regarding the governing of the country. This requirement appears feasible on account of the fact that all the inhabitants of South Africa have access to the Bill of Rights by which their fundamental rights can be enforced and protected.

A further objective of the study is to endeavour to emphasise the importance of the principles and ideals of such constitutionally entrenched fundamental rights to public officials in particular. The objective is also to contribute to the belief that the Bill of Rights could fulfil a useful purpose for the inhabitants of South Africa in that justice will be ensured when public administration is exercised subject to the constitutionally entrenched fundamental rights.

1.4 Significance of study

I believe that the findings of the study have the potential to provide an objective basis for redirecting the application of constitutionally entrenched fundamental rights with regard to public administration. It has the potential to serve as a basis for developing conceptual frameworks for planning and implementing programmes designed to apply the principles of the constitutionally entrenched fundamental rights in the Bill of Rights in public administration and thereby assist public officials in their daily work. Whereas constitutional directives at present indicate that public administration is subject to constitutionally entrenched fundamental rights and that public administration must be exercised in a particular manner, no actual study has been done so as to determine whether the directives have become manifest in public administration practice.

The findings of the study could possibly also provide a sound basis for designing and re-designing training programmes for public officials on the manner in which public administration must be exercised. Such programmes could include information sessions as to the contents, purpose and directives of the 1996 Constitution and the Bill of Rights. Public officials can only appropriately apply the principles contained in the mentioned

Constitution and the Bill of Rights if they adequately comprehend those principles. Public officials can then possibly be instrumental in the quest for optimal application of such principles in public administration.

1.5 Statement of problem

The current constitutional directives regarding the manner in which public administration must be exercised (see *supra* 1.2.1), attempt to ensure that public administration is exercised subject to constitutionally entrenched fundamental rights. To some, the current constitutional directives may be little more than sonorous words if such directives are not adhered to. If implemented correctly and uniformly by all public officials, constitutionally entrenched fundamental rights can become manifest in public administration in a more visible fashion than merely being written into the Bill of Rights.

Under the heading "Background" (see *supra* 1.2.1), I wrote that public officials are part of the executive authority and instrumental in exercising executive functions in the form of public administration. A balance should be maintained between the authority granted to the executive in terms of the 1996 Constitution and the manner in which such authority is exercised. The 1993 Constitution, and subsequently the current 1996 Constitution, contains directives as to the manner in which public administration must be exercised.

Under the heading "Purpose of study" (see *supra* 1.3) I wrote that a further objective of the study is to endeavour to emphasise the importance of the principles and ideals of the constitutionally entrenched fundamental rights, to public officials in particular. This I deem essential, as it is my opinion that all public officials do not have sufficient legal or other knowledge to be able to, without difficulty, interpret and apply the 1996 constitutional prescriptions and other relevant legislation when exercising public administration. In chapters 2 to 5 of the thesis I attempt to explain and emphasise the importance of various matters by making normative statements. I also do interpretations of different passages of legislation referred to in the discussions. My opinion is that such explanations, statements and interpretations have the potential to serve as guidelines to public officials when they exercise public administration.

I believe that public officials should adequately comprehend constitutional prescriptions and other legislation relating to public administration and the manner in which it must be exercised in order to apply such prescriptions correctly in an effort to render effective and

efficient public administrative services. Accordingly, for the purposes of the first part of the study (chapters 2 to 5), the following research questions are formulated:

(i) Is the meaning of "law" clear?

In chapter 2 of the thesis it is my intention to attempt to describe the meaning of "law" and draw a distinction between the different components of law from which rights emanate. I believe that it is necessary to explain to officials that the law of the legal system of South Africa recognises and protects rights. This discussion also necessitates that officials be informed of the distinction that exists between the law and ethical rules so that they do not regard ethical rules as law. The distinction is done by means of a comparison between law and ethical rules.

(ii) Is the meaning of "rights" clear?

In chapter 2 of the thesis I attempt to explain that the use of the term "rights" could lead to an ambiguity arising as to whether a right is intended or not. This explanation is done by means of an analysis of the term "rights" and an explanation of the meaning of "moral expectations", "privileges" and "contingent rights". A comparative analysis is made between "rights", "moral expectations" and "privileges".

The explanation of the term "rights" necessitates that a description be given of an "obligation" as the opposite of right. I also include a description and discussion of "legal rights", "fundamental rights" and "entrenched fundamental rights". This is followed by a categorisation of rights that contains a description, explanation and comparison of the different generations of rights.

I believe that public officials must understand the nature and meaning of rights in order to apply the Bill of Rights appropriately when rendering public services.

(iii) Is it clear that a change in the manner in which public administration must be exercised, took place on 27 April 1994?

My contention is that the 1993 Constitution came into operation on 27 April 1994 and prescribed a *de iure* change in the manner in which public administration was being exercised. During constitutional dispensations prior to 1994, public administration was apparently exercised without being subject to a comprehensive set of non-racial

constitutionally entrenched fundamental rights. When the 1993 Constitution came into operation, public administration became subject to such mentioned rights.

In chapter 3 of the thesis, and in order to illustrate the implied change in the manner in which public administration must be exercised, the South African and colonial constitutional dispensations, that existed before 1994, are described and analysed. A historical survey is done of each of the dispensations and a description is given of each public administrative environment. An analysis is done of the extent to which fundamental rights were protected or disregarded. Reference is also made to the manner in which public administrative functions were legislatively prescribed to be exercised. A comparative analysis is ultimately done between the different dispensations.

The inception of the constitutionally entrenched fundamental rights on 27 April 1994 is described so as to illustrate that a new post-apartheid democratic constitutional dispensation was installed. This description includes an explanation of the statutory and theoretical "change" that was made to the constitutional environment.

- (iv) Is the effect that the 1993 Constitution had on the then constitutional environment, the different branches of government and the public administration environment, understood?

In chapter 4 of the thesis a general description is given of the 1993 Constitution and its status. A similar description is given of the 1996 Constitution and several provisions of the two Constitutions are compared. An analysis is made of the different branches of government and an explanation is given of the provisions of both mentioned Constitutions which have a direct bearing on public administration functions.

- (v) Is the concept "democracy" understood?

In chapter 4 of the thesis an analysis is made of the concept "democracy". References are made to several writers that wrote articles on this topic. I made several evaluations and comparisons between the opinions of the writers and also drew my own conclusions as to the meaning of "democracy". This discussion included an explanation of where democracy fits into and how it affects the activities of public officials.

- (vi) Is it clear what fundamental rights entail, who the bearers of such rights are, and how such rights must be applied when public administration is exercised?

In chapter 4 of the thesis an explanation and definition is given of who the bearers of fundamental rights are. I also distinguish between natural and juristic persons. Officials need to be made aware of which persons are entitled to the different types of rights. An explanation, interpretation and description are also given of what fundamental rights entail and how they must be applied when rendering public services. A more comprehensive explanation and discussion are given of the statutory limitations placed on fundamental rights. This I regard as extremely important as officials need to know that the non-compliance with statutory limitations on a fundamental right could be tantamount to an infringement on another right.

- (vii) Is the constitutional obligation on public administration known?

In chapter 4 of the thesis an analysis is done of the 1993 and 1996 constitutional prescriptions that have a direct impact on public administration. An explanation is also given of why public officials are compelled to adhere to the constitutional obligation when exercising public administration.

- (viii) Is the implementation process of constitutional principles and the impact that constitutional entrenched fundamental rights have on the manner in which public administration is exercised, known?

In chapter 5 of the thesis an exposition is given of the implementation of constitutional principles in practice and an analysis is made of the expected effect entrenched fundamental rights will have on the manner in which public officials exercise public administration. The opinions of several writers are discussed and compared. I draw several conclusions from these comparisons.

Under the heading "Motivation for study" (see *supra* 1.2.2) I wrote that the mere existence of the Bill of Rights does not necessarily mean that public officials actually exercise public administration in the constitutionally prescribed manner in practice. As a purpose of the study (see *supra* 1.3) I wrote that the study would attempt to establish whether public officials, as from 27 April 1994, apply the constitutionally entrenched fundamental rights in practice and exercise public administration in terms of current constitutional directives. I added that another objective of the study would be to attempt to establish whether public

officials are conversant with the provisions of the Bill of Rights and other constitutional directives relating to the manner in which public administration must be exercised. My opinion is that the two aspects mentioned are to be tested in practice by means of a questionnaire. This does not mean that I intend drawing a line of severance between the importances of the different matters discussed in the purpose of the study (see *supra* 1.3). I merely intend selecting particular matters to test in practice.

Accordingly, for the purposes of this study and with the purpose of the study in mind, the following empirical research questions are formulated:

- (i) Do public officials in the Department of Home Affairs know of the Bill of Rights in chapter 2 of the 1996 Constitution?

The existence of the Bill of Rights does not necessarily mean that public officials in the Department of Home Affairs in fact know that the Bill is contained in chapter 2 of the 1996 Constitution. Should the mentioned public officials indeed know of the Bill of Rights, it does not, in turn, necessarily mean that they are conversant with its contents and principles. This question has the potential to test whether the mentioned public officials are conversant with the contents of the Bill of Rights and exercise public administration with adherence to the principles of the Bill of Rights.

- (ii) Do public officials in the Department of Home Affairs know of section 195 of the 1996 Constitution, which states that public administration must be governed by the democratic values and principles, enshrined in the Constitution?

This question has the potential to test whether the mentioned public officials know of the constitutional obligation relating to the manner in which public administration must be exercised. Should the mentioned public officials be conversant with the provisions of the mentioned section 195, the question can then be posed as to whether they perform their functions with adherence to these prescriptions. Replies given could indicate whether there is participation in, or resistance to, implementing those prescriptions.

- (iii) Has the inception of the entrenched fundamental rights on 27 April 1994 (since 4 February 1997 known as the Bill of Rights), had an influence on the manner in which public officials in the Department of Home Affairs performed their functions since that date?

This question has the potential to indicate whether the manner in which the mentioned public officials exercise public administration, has in reality undergone any change in practice since 27 April 1994. During the pre-1994 constitutional dispensations, public administration wasn't subject to constitutionally entrenched fundamental rights contained in a bill of rights. Public administration (see *supra* 1.2.1) was accordingly exercised in accordance with the legislation of that time. After the inception of the entrenched fundamental rights, the manner in which public administration must be exercised was prescribed constitutionally. Respondents' replies to this question could indicate whether the mentioned public officials have in fact implemented these written constitutional prescriptions or not.

- (iv) Have public officials in the Department of Home Affairs been officially informed of the significance of the Bill of Rights and its role in connection with the manner in which public administration must be exercised?

Public officials are instrumental in exercising the functions of the executive authority (see *supra* 1.2.1) and must be officially informed of all aspects that are related to their activities. It is thus essential that public officials in the Department of Home Affairs are clearly and adequately informed about the manner in which they are to exercise their functions in terms of current constitutional directives and obligations. The principles in the Bill of Rights cannot be realised in practice if the mentioned public officials are not officially informed. My opinion is that a comprehensive public administration, where all aspects regarding working methods are largely uniform and can be co-ordinated, is preferential. Specific emphasis should be placed on the constitutional directives aimed at sophisticating public administration. Priorities can be set, long and short-term projections done, and co-operation promoted in order to achieve goals set. In this way the governing authority's functions could be transparent and non-suspicious.

- (v) Do public officials in the Department of Home Affairs recognise and apply the principles in the Bill of Rights when public services are rendered?

The acceptance of a system can be influenced by, *inter alia*, understanding and transparency. Rejection of a system often stems from a lack of understanding. Public officials have to understand the contents of the Bill of Rights in order to have knowledge of what is expected of them (Wells 1982: 776-782).

The converse is that if public officials do not all participate uniformly in implementing the principles of the constitutionally entrenched fundamental rights in the Bill of Rights in public administration, negative results can be experienced.

Public officials in the Department of Home Affairs may possibly be opposed to applying the principles in the Bill of Rights. Officials who may, in the light of the constitutional obligation in section 195 of the 1996 Constitution, have to change the manner in which they exercise public administration, could offer resistance based on the following reasons:

- **Indolence:** an inborn desire to retain the status quo even when present procedures are inadequate. Indolence includes the inclination to want to do something in the traditional way.
 - **Uncertainty or fear of the unknown:** notwithstanding how inadequate the present system may be, it is at least known how the system works (Stanislao & Stanislao 1983:75).
- (vi) Do public officials in the Department of Home Affairs, when rendering public services, serve the interests of the inhabitants of the country above the political objectives of the governing authority, or *vice versa*?

The intention of the 1996 Constitution (section 7), as to enshrine the rights of all the inhabitants of South Africa against arbitrary government action, should be emphasised to public officials in the Department of Home Affairs. It is essential that these mentioned public officials are clearly and adequately informed of the present constitutional directives and obligations as to which interests are to be served above others. During the pre-1994 constitutional dispensations public administration wasn't subject to constitutionally entrenched fundamental rights in a bill of rights and the political objectives of the governing authority could have been served above the interests of the inhabitants of the country. This was possible as no distinct constitutional directives existed that obliged public officials to avoid exercising public administration arbitrarily and guide officials as to which interests are to be served above others. My opinion is that a governing authority would not object to or place limitations on officials exercising public administration and serving the political objectives of the governing authority above the interests of the inhabitants of the country. The question dealt with here could thus be an indication of which interests the mentioned public officials serve above others when exercising public administration and if such a priority differs from the pre-1994 public administration environment.

The hypotheses in chapter 6 are derived from the above-mentioned questions and are tested in the empirical survey.

1.6 Methodology of study

I will now introduce the features of the methodology employed in the study, as described under the headings: stages of the study, scientific research, research design, purpose of research and research methodology.

1.6.1 Stages of the study

The study consists of two parts. The first part consists of a literature study and the second part consists of an empirical survey. The two parts or stages of the study can be distinguished as conceptualisation and operationalisation. In chapters 1 to 5 of the thesis, the conceptualisation of the theoretical framework is reflected where the idea of the study is set. Document research and literature research is employed to investigate this issue. In the second stage, as from chapter 6, operationalisation, in the form of empirical research, takes place.

1.6.2 Scientific research

The study is done by means of scientific research. Scientific research implies the development of methods of systematic inquiry for the purposes of ascertaining the truth about something. Scientific research can also be regarded as finding the truth and making it known. Scientific practice, *inter alia*, strives to describe and explain something (Babbie 1992:89).

The study is done with the intention of finding out primarily what the 1996 Constitution, and its bill of rights, prescribes as to the manner in which public administration must be exercised. This is done by describing, analysing and explaining the theoretical constitutional requirements. My intention is also to attempt to ascertain the extent to which public officials have realised the contemporary constitutional prescriptions into practise. This is done by means of an empirical study whereby data are gathered, analysed, interpreted and explained. For the purposes of comparison, I also intend to ascertain the extent to which fundamental rights were protected constitutionally or by other law, during constitutional dispensations prior to 1994. This is done by describing, analysing, comparing

and explaining events during such dispensations. I furthermore intend making evaluations and drawing conclusions from the data so gathered. In this way, I believe this study to be scientific. It is the task of a science to, *inter alia*, describe and analyse (Smit 1985:1 ; Rudner 1966:8).

1.6.3 Purpose of research

Mouton & Marais (1996:42-45) write that the purpose of research can be exploratory, descriptive or explanatory. My opinion is that a particular study can, however, endeavour to achieve more than one of these purposes.

Babbie (1992:72) remarks, and I agree, that exploration is done mostly in order to satisfy the researcher's own curiosity and be in pursuit of a better understanding of the subject matter; to determine the feasibility of an in-depth study and to develop the methods used in such a study. Exploratory studies are valuable and necessary when a researcher enters a new territory of research and can almost always deliver new insight on a subject for research. Babbie (1992:73) adds that the main shortcoming of an exploratory study is that it seldom delivers answers to all research questions.

Exploratory studies can furthermore have the purpose of describing and/or explaining situations and events (Babbie 1992:73-74). Descriptive studies include a wide variety of types of research. On the one hand the emphasis can be placed on the in-depth description of a group, an individual, an institution or a social object such as an Act or a legal system. On the other hand, a description of the frequency by which a particular quality or variable appears in a test sample can be emphasised. The term "description" has developed into an umbrella term used for many different types of research. The single common element in all these types of research is the aim of the researcher to, in one or other way, describe that which exists as accurately as possible (Mouton & Marais 1996:44).

Explanatory studies are aimed at indicating the causality between variables or events. Explanatory research has a direct link with predictive and evaluative studies (Mouton & Marais 1996:45-46).

In order to realise the purpose of this study as described in chapter 1.3 of this thesis, the purpose of this study is intended to be exploratory, descriptive and normative.

1.6.4 Research design

A research design addresses the planning of a scientific investigation, in other words, the design of a strategy to investigate a phenomenon. The components of a research design, as identified by Babbie (1992:71-81), are the purpose of the study, the unit to be analysed (what/who or population of the study) and the time dimension. As the research design for this study, I include the –

- purpose of the study (dealt with in chapter 1.3)
- statement of problem to be investigated (dealt with in chapters 1.5 and 6)
- methodology of study (dealt with in chapter 1.6)
- exploration, description, analysis and comparisons of, and conclusions from, events (dealt with in chapters 2 to 5)
- unit/population to be analysed (dealt with in chapter 7)
- method of data collection during the survey research (dealt with in chapters 1.6 and 7)
- statistical analysis (dealt with in chapter 8)

Oppenheim (1992:7-8) distinguished the following steps in a survey research:

- (i) Identification of the objectives and hypotheses to be studied
- (ii) Review of the relevant literature
- (iii) Preliminary conceptualisation of the research
- (iv) Decisions on design and feasibility of the study within various constraints such as time and costs
- (v) Decision on specific hypotheses to be investigated and making them specific to the research topic
- (vi) Designing the necessary research instrument
- (vii) Completing the necessary pilot work to test the research instrument, and modify the research instrument if necessary
- (viii) Designing the sample
- (ix) Drawing the sample
- (x) Completion of the field work
- (xi) Processing the data, including coding the responses, preparing the data for analysis and entering into the computer
- (xii) Completing the statistical analysis
- (xiii) Collating the results and testing the hypotheses
- (xiv) Describing the results, drawing conclusions and making proposals

In this study I have used the same steps listed. The first four steps (i – iv) described above are covered in the research proposal assessing the feasibility of the project. However, in a thesis of this nature, the identification of the objectives is described in chapter 1 of the thesis. Chapters 2, 3, 4 and 5 of the thesis explore the relevant literature and also describe and analyse particular matters, make comparisons and draw conclusions from certain information and discussions. Chapter 6 of the thesis deals with step number v above. Chapter 7 of the thesis deals with steps vi to x above regarding the research instrument and the sample. Chapter 8 describes the processing of the data, the completion of the content analysis, the tabulation of the results of the survey and the testing of the hypotheses (steps xi to xiii). In chapter 9 the results obtained, conclusions drawn, and proposals for possible future research are suggested (step xiv).

1.6.5 Research methodology

The reader will notice that I refer to Leedy, Babbie, Yin and other writers who have written articles on research methodology. I must point out that this study has its own particular characteristics and research methods. The methods that I have selected are very similar to those discussed by the writers mentioned in the text. The final research methodology of this study, though, has its own character as I found it necessary to apply in order to realise the purpose of this study.

It is my intention that this study be reliable. Yin (1990:40) writes that for research to be reliable, another researcher must be able to replicate the results of an experiment or enquiry and come up with similar results. This study thus aims at another researcher being able to achieve similar results by pursuing the same line of enquiry.

According to Leedy (1993:122) it is the data that dictates the research methodology. In other words, it is the nature of the available data that determines the research approach. I agree with Leedy and therefore I consider the data of this study to dictate the research approach to follow in this study. Leedy (1993:122, 123, 243) distinguishes between the following methods of research:

- The historical method that is suitable for obtaining data from documents or literature
- The descriptive research method that is suitable for obtaining data by means of observation. The observation can take place in person or by means of instruments such as questionnaires or

interviews. The descriptive research method thus concerns itself with what can be seen, observed and what can be described in words

- The analytical (used in a restricted sense) research method that is suitable for obtaining data from sources represented in a numerical or statistical manner
- The experimental method where the data are obtained from an experimental situation

Each one of these research methods has particular characteristics. I had all this in mind when selecting appropriate methods for this study. The first part of this study, a literature study (see *supra* 1.6.1), I considered to be a historical study as it involves reflecting on past events. The mentioned first part also describes and analyses events and situations in order to make comparisons and evaluations, and draw conclusions. Statements are also made for the purposes of referring to procedures and prescriptions (especially legislative prescriptions) as guidelines when exercising contemporary public administration. The second part of the study, an empirical survey, I considered to be a descriptive empirical research in which a questionnaire is used as a tool to obtain information relating to the hypotheses formulated in chapter 6. The first and second parts of the study are also considered to be comparative research as certain phenomena are compared in order to reach comparable descriptions. I carefully considered the selection of these methods as being the most appropriate research methods for the purposes of this thesis.

The descriptive research method, the historical method and the comparative research method are regarded as being appropriate to this study and are examined more closely.

1.6.5.1 Descriptive research

For the purposes of this research study, the more significant characteristics of the descriptive research method are the following (Leedy 1993:187):

- It deals with a situation where data are collected primarily by observation done in person or by means of questionnaires or interviews
- The population targeted for the research is chosen carefully, clearly defined and specifically demarcated

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- Data obtained by means of the descriptive research method are susceptible to distortion by including bias in the research design. Special attention should be given in order to prevent the influence of bias
 - The descriptive research method is based on obtaining data by means of observation, but the collected data must be presented orderly and systematically in order that valid and accurate conclusions can be drawn from the data

Descriptive research involves collecting data in order to test hypotheses or answer questions concerning the current status of the subject of the study. A descriptive study determines and reports the way things are. Descriptive data are typically collected through a questionnaire survey, interviews or observation (Gay 1992:13). Such data thus need to be qualitative in nature and quantitative to allow for a variety of responses. The descriptive method should be an appropriate method for investigating a variety of perceptions regarding fundamental rights and public administration. Descriptive research is usually done to develop knowledge on which the problems and explanations and subsequent research will be based.

The descriptive survey method is most appropriate for the purposes of the survey study dealt with in chapters 6, 7 and 8 of this thesis. A clearly defined population exists (see *infra* 7.2 and 7.3) and the data are to be obtained by means of a questionnaire. As Christensen (1988:39) explains, the situation represents an attempt to provide an accurate description of a particular phenomenon.

Based on the descriptive research method, and as dealt with in chapter 7 of the thesis, public officials were requested to complete a questionnaire and comment on certain statements contained in the questionnaire. The survey research was conducted to establish the influence fundamental rights have on the manner in which public officials exercise their official duties. The availability of the responses and comments of the officials supply information that is factual in nature and which provides an opportunity to conduct various independent studies. Perceptions of the target group highlighted by this survey are expected to further enhance the understanding of, provide insights into, and provide justification for conclusions drawn in this study. Findings based on the data obtained from completed questionnaires conducted during this study are described in chapter 8 of the thesis.

The responses by public officials to the questions (those that provided for an open response) in the questionnaire were subjected to content analysis. According to Kerlinger (1986:477) content analysis is a method of studying and analysing communications in a systematic, objective and quantitative manner to measure variables. In the empirical study the variables measured are mentioned in each of the hypotheses that are tested by the empirical survey (see *infra* 6.2). This permits an impression of the range of an opinion on a particular topic to be obtained, as well as facilitating the development of hypotheses about differences in the data being analysed.

Abbott and Monsen (1979:504) have provided the following exposition of content analysis:

“Content analysis is a technique for gathering data that consists of codifying qualitative information in anecdotal and literature form into categories in order to derive quantitative scales of varying levels of complexity. The simplest of content analyses consists of nothing more than the attribution of the incidence of an event under question in the literary document that consists of the raw data. In this simple analysis, therefore, the dichotomy is the only level of measure that may be achieved for each category. However, if more than one category is subjected to a content analysis, a more complex level of measurement may be achieved through the summing of the result for each category. Thus if each is assigned a score of zero or one, indicating the absence or presence of the attribute under analysis, the resulting scale varies between zero and the number of attributes being investigated.”

Both Krippendorff (1980:21) and Kerlinger (1986:477) hold the view that content analysis allows for making replicable and valid inferences from data and their context while meeting the needs of the research to be objective and systematic. The criterion of objectivity is met when similar results are obtained from tests carried out by different researchers using the same data at different points in time (Krippendorff 1980:21).

1.6.5.2 Historical research

Historical research involves studying, understanding and explaining past events. The purpose of historical research is to arrive at conclusions concerning causes, effects, or trends of past occurrences that may help to explain and understand present events and anticipate future events. Historical research studies do not typically gather data by means of instruments, for example by requesting individuals to complete a questionnaire. Such studies must seek out data that are already available (Gay 1992:12).

Over and above the descriptive research conducted in this study, the available data enabled historical research to be used as well. Historical research, discussion of events and an analysis of particular situations are applied in chapters 2, 3, 4 and 5. Such research, explains Henderson, Pierson and Brown (1992:39), uses existing literature as its data source. According to Leedy (1993:122), data can be obtained from literature and documents.

1.6.5.3 Comparative research

As stated above (see *supra* 1.6.5.1), descriptive research involves collecting data in an attempt to provide an accurate description of a particular phenomenon as it is at the time the data are collected. Historical research (see *supra* 1.6.5.2) involves gathering data that explain past events. In certain studies, as in this study, there also exists an objective of comparing certain phenomena existing in the data collected by means of the mentioned descriptive and historical research methods. This involves the examination of variables from each of the two methods, in order to reach a comparable description (Babbie 1992:52).

As mentioned in the purpose of the study (see *supra* 1.3), an objective of this study is to examine and compare factors relating the manner in which public administration was exercised during constitutional dispensations prior to and after 1994. This means that a particular phenomenon, as it existed at certain intervals over a period of time, is to be compared.

Comparative research, as intended in this instance, can be done by means of a longitudinal survey in the form of a cohort (a particular group in a particular area) study. According to Babbie (1992:57) a longitudinal survey allows for data to be collected over a period of time for the purposes of comparison. In this study the data to be used for this purpose cover the current constitutional and also pre-1994 constitutional dispensations as far back as the late 1800's. The research in this regard thus involves a rather long period of which data are to be collected. The relevant data used are thus collected by means of an analysis of data collected earlier by several other researchers (Babbie 1992:57).

A cohort study focuses on the same specific population each time data are collected over a period of time. The sample studied may be different (made up of different people) when data are collected but each sample would represent the same population. Babbie

(1992:99-100) explains that a cohort is typically an age group such as people born in 1990, but can also be based on some other time grouping such as people attending college during the Vietnam War. In this study the population is public officials in the Department of Home Affairs during 1998 (see *infra* 7.3). The sample consists of public officials from different offices in the Department of Home Affairs (see *infra* 7.4). Babbie (1992:57) explains that although the sample would be different each time, the same specific population would be described. In this study the different groups of public officials from different offices thus represent the Department of Home Affairs.

1.6.6 Method of data collection

The literature study done during the first part of the study (chapters 2 to 6) is based on both primary and secondary research. The literature study tends to mostly involve the legal environment as the legal sources contain legislation, descriptions of fundamental rights and provisions relating to the manner in which public administration must be exercised. The first part of the study leads to the empirical survey that is conducted during the second part of the study. In chapter 7 details are given as to the method of how data are collected during the survey.

Primary research sources consulted are documents and reports by the Department of Justice, the SA Law Commission, the Public Service Commission, and the Human Sciences Research Council, as sources which may contain relevant information and have a bearing on the Bill of Rights and the research subject. At each institution permission was obtained orally to gain access to relevant documents and reports. The information required from these sources was usually clear and factual. However when such sources were consulted and clarity was needed on particular aspects, explanations and further documents were requested and received from officials without any difficulty.

Other primary research sources studied are the Bill of Rights and both the 1993 and 1996 Constitutions, relevant Parliamentary debates (Hansard debates) and judgments delivered by the High Court, the High Court of Appeal and the Constitutional Court. All these sources are available in the UNISA main library.

Secondary research sources consulted include published literature that is relevant to the subject and comprehensive and divergent in nature, appropriate articles in journals, published documents and reports by other researchers, and relevant newspaper articles.

The constitutions, bills of rights and case law of other countries were also consulted for relevant approaches and for reasons of comparison. These secondary sources were used in conjunction with primary sources so as to find meanings to cumbersome or difficult statements and provisions.

The wide range of sources consulted was not only consulted in order to obtain sufficient information, but also to confirm particular facts and information included in the thesis.

1.7 Scope and limits of study

In order to limit the study orderly, attention is given to the geo-, hierarchy- and time dimension in which the study is done. The focus of the study is primarily within the parameters of the three mentioned dimensions.

1.7.1 Geo-dimension

The existence of an administrative state is not limited to South Africa but is a global phenomenon (Brynard 1993:19). By implication this means that public administration is exercised in a particular prescribed manner within political executive institutions worldwide in order to institute the policies of governing authorities.

This study is, however, undertaken within the geo-dimensional framework of South Africa and will encompass only South Africa's public administration and Bill of Rights. The focus is therefore primarily on the manner in which public administration is exercised in South Africa in terms of the current constitutional dispensation as instituted by the 1996 Constitution, and the constitutional dispensation that existed in terms of the 1993 Constitution. For purposes of comparison though, a description is also given of the manner in which public administration was exercised during South African constitutional dispensations prior to 1994. As an essential part of such comparative descriptions, references are made to the constitutional environments of the four South African colonies (the Cape of Good Hope, Orange Free State, Transvaal and Natal) as they existed just prior to Union in 1910. Also for the purposes of comparison, references are likewise made to the constitutional environment of certain neighbouring states such as Lesotho, Botswana and Swaziland as they existed over the period starting at the end of the 19th century and up until the early part of the 20th century.

The study will perforce include references to and comparisons with the public administration and bills of rights of certain other countries such as, among others, Canada, the United States of America, Britain and Namibia. Such comparisons and references to foreign systems are done mainly in order to place the South African situation in perspective within the current global context. The methods followed in this regard are described in paragraph 1.6.5.3.

1.7.2 Hierarchy dimension

Executive authorities in the different spheres of government (national, provincial and local sphere of government) exercise public administration (see *infra* 1.9 "public administration"). By implication this means that constitutional prescriptions regarding public administration and the manner in which it must be exercised, apply to all such institutions. In fact, the 1996 Constitution (section 2 and 7(2)) makes it compulsory that the state authority fulfil all the obligations imposed by the mentioned Constitution.

Owing to the existence of many executive administrative institutions in South Africa, it is necessary to narrow the study down in order for it to be manageable. For the purposes of the study the focus is placed on national government departments as listed in Annexure 1 of the Public Service Act 1994 (Proclamation 103 of 1994). In the thesis, when referring to the mentioned departments collectively, reference will be made to the "public service".

In hierarchical sense the study will thus be confined to public administration exercised by public officials in the public service and fundamental rights as contained in the Bill of Rights in the 1996 Constitution. For the purposes of the empirical survey undertaken, the study is limited to the Department of Home Affairs. A description in this regard is given in chapter 7.

1.7.3 Time dimension

The time dimension of the study is to indicate whether the research is to be done for a specific date or for a longer period of time. With regard to the time aspect, a distinction is drawn between synchronous or cross-sectional studies and diachronically or longitudinal studies. Cross-sectional studies take a particular manifestation at a given time as an object of research. Longitudinal studies can be subdivided into tendency studies, specific group studies and panel studies (Babbie 1992:81).

In the second part of the study, an empirical survey research, is aimed at investigating the influence of fundamental rights on public administration in practice. Opinions in this regard should be obtained at a specific period in time and therefore the use of a cross-sectional study appears to be more appropriate.

The empirical survey research also aims to examine the extent to which public officials have in fact implemented the constitutional directives regarding the manner in which public administration should be exercised. The time dimension of this part of the study thus commences on 27 April 1994 when the 1993 Constitution and its chapter 2 on entrenched fundamental rights came into operation and is concluded at the end of 2000.

The literature study includes an examination of the manner in which public administration was exercised prior to the start of the new constitutional dispensation on 27 April 1994. This part of the study, which covers the three constitutional dispensations since the formation of the Union, covers the period 31 May 1910 to 27 April 1994.

The descriptions of the pre-Union constitutional environments of the different South African colonies and selected neighbouring states cover the period starting near the end of the previous century up until 31 May 1910.

1.8 Reference technique

The Harvard method is used throughout the thesis (Burger 1992:23 - 76). The name of the author, the year of the source and the relevant page number appear in the text. The full particulars of the source are given in a list of sources at the end of the thesis. The list of sources is arranged alphabetically according to the surnames of the authors or by title. Statutes and court judgments are also arranged alphabetically according to the name of the statute or judgment. In certain cases it was necessary to adapt the reference technique slightly, for example, where reference is made to reports of committees and debates of Parliament. For practical reasons, the name of the chairman of a committee, or key words in the full title of the committee, are used to identify the report set up by that committee. To identify the debates of Parliament the word "Hansard" is used.

1.9 Definition of terminology

The use of unambiguous terminology in the thesis assists the reader in attaching the correct interpretation to the terms used. Terminological confusion is an issue which manifests in all social sciences, Public Administration included (Roux 1966:218), and therefore it is necessary, for the purposes of this thesis, to define terminology used. The aim is to define only particular terminology that appears prominently and repeatedly in the text if such terminology is not defined elsewhere as part of the text. Other terminology that needs to be defined, but is of less prominence, is defined when used in the text.

- *Apartheid*

For the purposes of the thesis, the formal policy of separate development is referred to as "apartheid". A political party, the National Party, applied this policy during constitutional dispensations between 1948 and 1994. The political party did not at first have a blueprint of what the mentioned policy implied. During its campaigning prior to the 1948 general election, the political party used the word "apartheid". When the party gained a majority vote and assumed political authority after the mentioned election, the political party applied and developed the mentioned policy piecemeal (Posel 1987:8).

- *Authority*

Authority is used in this thesis with dual connotations. This usage will be followed and the reader will be able to determine from the context which one of the following two meanings is intended.

A constitution of a state defines the authority of a state and allocates such authority to particular institutions (Rautenbach & Malherbe 1994: 18). In literature, the words power and powers refer to the right or competence that such institutions have to execute such authority allocated to them, for example authority regarding education, foreign affairs and nature conservation (Rautenbach & Malherbe 1994: 54,55). In this thesis the word "authority" is used in the place of, but with the same meaning as, the words "power" and "powers".

“Authority” also refers to the totality of persons and institutions that determine policy and make binding decisions within a state. Authority can thus refer to those persons and institutions that execute those policies and decisions (Roux 1966: 225; Fox & Meyer 1995: 55). When the word “authority” is used in the thesis, reference is also by implication made to public officials who initiate and implement policy. Authority does not only refer to the central authority of a state but also refers to lower authorities such as provincial and local authorities (Roux 1966: 225).

- **Bureaucratic and autocratic**

The public administration functions of public officials are prescribed and described in legislation and are delegated to the respective officials as their official duties. Training and guidelines are supplied to officials in order to ensure that duties are performed and procedures are followed correctly and uniformly. Each government department operates by means of the officials who routinely perform their duties in terms of directives. Completed matters are placed in files and there appears to be no end to the continuous administrative process. In time, various officials gain much experience and develop into professionals in the area in which they exercise their duties. In the public sector such a process is described as “bureaucracy” (Gerth *et al* 1982: 196, 214, 228 and 234). In the thesis the word bureaucrat also refers to a public official in the service of a public institution that does not use his position as a public confidant, which it actually is, but rather as a position of authority. A bureaucrat in a negative sense will make authoritative decisions without proper consideration of the interests and requirements of the inhabitants of the country or on account of personal or political preferences. Such a decision can possibly be regarded as arbitrary. The word arbitrary refers to inconsistent or unreasonable conduct or decision-making by an official (Baxter 1984: 88; Galligan 1990: 144). In the thesis the word “arbitrary” is used to refer to any decision or conduct by an official that unfairly infringes on the rights, freedoms and interests of an individual. Although bureaucratic may have a neutral meaning in this thesis (simply referring to the administrative authority and its activities), the words “bureaucrat” and “bureaucracy” are used with the word “arbitrary” in order to denote a negative sense. The word “autocratic” is used to describe a person or an institution with complete authority and where decisions are made without consulting other persons. The word “autocratic” is thus used with a negative meaning (Marais 1989:69).

- **Constitution**

The constitution of a state contains provisions as to the structures and parameters within which the authority of the state is exercised (Schmandt & Steinbicker 1954: 206). A constitution regulates public institutions within the state, defines the authority of the state, allocates such authority to particular institutions and regulates the manner in which such authority is exercised by those institutions (Rautenbach & Malherbe 1994: 18). A constitution also regulates the relationship between the state authority and the inhabitants of the state. In this regard the constitution contains guarantees for the upholding and protection of the rights and freedoms of the inhabitants and also limits the manner in which state authority is exercised (Basson & Viljoen 1991:20; Rautenbach & Malherbe 1994: 17, 18).

In the thesis reference is made to the 1996 Constitution and to the 1993 Constitution. The 1993 Constitution came into operation on 27 April 1994 and was an interim Constitution (see its preamble). The 1996 Constitution came into operation on 4 February 1997 and replaced the 1993 Constitution. When particular matters are dealt with in the thesis, and depending on the necessity thereof, references are made to both or either of the Constitutions.

- **Constitutionally entrenched**

The reader will note that firstly, a connotation, and secondly, a denotation, is being dealt with here.

As a connotation, the words "protected rights" and "Bill of Rights" are used in the thesis with the intention of referring to rights that are protected constitutionally or in another manner by law. For the purposes of the thesis the idea of protected rights therefore includes any unwritten protection of fundamental rights such as is found in Britain. The British concept of parliamentary supremacy resulted in Britain never having had a written constitution or a written set of constitutionally protected fundamental rights. The British courts protect such rights in terms of British law and the unwritten constitutional principles (Anderson 1994:657).

The denotation is the following. The legislative authority of the national sphere of government of the Republic of South Africa is vested in Parliament (1996 Constitution:

section 43(a)). Parliament has the authority to pass, amend and repeal legislation, and amend the 1996 Constitution. When exercising its legislative authority, Parliament must act in accordance with and within the limits of the provisions of the Constitution (1996 Constitution: section 44(1)(a) and (4)). Legislation is usually amended or repealed by means of a simple majority vote in Parliament (50% plus 1 of the members). Section 1 of the 1996 Constitution, though, may only be amended by means of a bill passed by Parliament with a supporting vote of at least 75% of its members (1996 Constitution: section 74(1)(a)). The mentioned section 1 is referred to as a constitutionally entrenched provision as its amendment entails a more difficult procedure than that of other legislation. Chapter 2 of the 1996 Constitution, which contains the Bill of Rights, may only be amended by a bill passed by Parliament with a supporting vote of at least two thirds of its members (1996 Constitution: section 74(2)(a)). Such a procedure is also more difficult than that of other legislation. The fundamental rights contained in chapter 2 are referred to as constitutionally entrenched fundamental rights.

▪ Courts

In terms of the provisions of the 1993 Constitution, the courts of the Republic consisted of the Constitutional Court (section 98), the Supreme Court (an Appellate Division and provincial and local divisions) (section 101), and any other courts (lower or magistrates' courts) established in terms of an Act of Parliament (section 103). In section 166 of the 1996 Constitution, the judicial system of the Republic is described as consisting of the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts and any other court established or recognised in terms of an Act of Parliament. The 1996 Constitution thus refers to the former Appellate Division and Supreme Court (provincial and local divisions) as the Supreme Court of Appeal and the High Courts, respectively. In the thesis the latter terms are used. The former terms are only used when referring to the period prior to the commencement of the 1996 Constitution.

In terms of the 1996 Constitution, the Constitutional Court and a High Court may decide on constitutional matters (sections 167(3) and 169(a)). The constitutional Court alone has to make the final decision on whether legislation is constitutional or unconstitutional, and confirm any order of constitutional invalidity of legislation or conduct made by the Supreme Court of Appeal or the High Court (section 167(5)). In the thesis a reference to a competent court means the constitutional Court, the Supreme Court of Appeal or the High Court that may decide on the validity of legislation.

- Fundamental rights

The words “fundamental rights” are used in the thesis with the intention of referring to rights that are listed in a bill of rights, specified in a constitution or guaranteed by a law or laws for the purposes of receiving more attention and protection than other rights (see the discussion on “fundamental rights” *infra* 2.8.1).

- Judiciary

The constitution of a state allocates the state authority to particular institutions (Rautenbach & Malherbe 1994: 18). In terms of section 165(1) of the 1996 Constitution, the judicial authority of the Republic of South Africa is vested in the courts. The judicial authority includes the constitutional Court, the Supreme Court of Appeal, the High Courts, and the lower courts such as Magistrates’ Courts. See definition of courts above.

The judiciary is the adjudicative or dispute-resolving branch of the state. In its normal understanding, judiciary has a narrow scope, referring only to higher courts, such as the constitutional Court, the Supreme Court of Appeal and the High Court, which are staffed by judges (Boulle *et al* 1989:18). In the thesis, the use of the term “judiciary” refers to the judges of the mentioned higher courts and to the courts themselves, and any similar High Court and Supreme Court that existed during former constitutional dispensations described in the thesis. When another meaning is intended, it will to be so reflected from the manner in which the phrase or term appears in the text.

- Justiciable

In the thesis, the phrase justiciable bill of rights is used. The term justiciable means that something, in this case a bill of rights, is capable of being dealt with by a court of law. The 1996 Constitution (section 8(3)) confirms that the higher courts shall apply the provisions of the Bill of Rights contained in chapter 2 of the 1996 Constitution, and enforce such rights that may have been infringed (section 38). In this manner, the courts’ interpretations and judgments are authoritative and binding.

- **Public administration**

The constitution of a state contains provisions as to the parameters within which the authority of the state is exercised (Schmandt & Steinbicker 1954: 206). The executive authority of the different spheres of government (national, provincial and local) is divided into political executive institutions and political incumbents, and into administrative executive institutions and public officials (Cloete 1994: 11). The administrative executive institutions and public officials are usually referred to as the **administration** (Rautenbach & Malherbe 1994: 142). An administrative executive institution is created and equipped with statutory authority to carry out public policies and legislation for the government (Cloete 1986: 85; Roux 1966: 226). The activities of public officials in the administrative executive institutions, executing statutory prescribed functions, for example the Commissioner of Inland Revenue, is the **public administration** of the state. When officials exercise public administration, the fundamental rights of individuals may be acutely affected to their benefit or their detriment (Wade *et al* 1993:603-4; Van der Waldt *et al* 1995:2).

For the purposes of the thesis the phrases public administration activities, functions and duties of a public official and a public institution have the same meaning as public administration and refer to the process of rendering a public service. Such a process includes both a prior decision concerning a particular activity and the action taken to execute that decision.

- **Public institution**

The constitution of a state arranges the structures and parameters within which the authority of the state is exercised (Schmandt & Steinbicker 1954: 206). A public institution is a person or a group of persons that exercises the authority of the state (Roux 1966:255). All public institutions in the different spheres of government (national, provincial and local) together make up the authority of the state (Rautenbach & Malherbe 1994: 53,54). A reference to a public institution in the thesis denotes a public institution that exercises the authority of the state (Brynard 1987:13).

- *Spelling of terms: official institutions and office bearers*

When reference is made to an official institution or an office bearer in a specific sense in the thesis, for example the Department of Justice and the Minister of Justice, respectively, the relevant words are written with a capital letter. When the words “the Department” or “the Minister” are used immediately thereafter with the intention of referring to the foregoing institution or office bearer, respectively, and it also appears that way from the construction of the text, the relevant words are also spelt with capital letters. When an institution or an office bearer is mentioned in a general sense, for example a department or a minister, the words are written with a small letter. The words “Parliament” and “President” refer to the only institution and office bearer, respectively, of its kind in South Africa and, because of the importance thereof, are written with a capital letter without any supplementary words attached. The words “cabinet” and “government” are written throughout with a small letter.

- *State*

A state consists of a community of people who find themselves within a demarcated area of land over which an authority, that is within and part of the state, governs. The demarcated area can exist in more than one part and can enclose an area that is not part of that state. Independence is a prerequisite to be classified as a state. This means that no institution from outside the demarcated area must have the competence to at will exercise authority within the area concerned (Rautenbach & Malherbe 1994: 1,2; Basson & Viljoen 1991:6). In the thesis the word “state” is used in the context as described. When another meaning is intended, it ought to be so reflected from the manner in which the word appears in the text.

1.10 Study sequence

The thesis is divided into different chapters. The chapters form a logical unit so as to present the scope of the thesis and how the different points of discussion develop.

CHAPTER ONE is an introductory chapter that contains the theme, purpose and significance of the study, a statement of the questions that form the basis of the study, a description of the method, scope and limits of the study, the method by which data are collected, the reference technique, definitions of specific terminology, and a summary of the chapters of the thesis.

Public administration and constitutionally entrenched fundamental rights are the two primary subjects of the study (see *supra* 1.3). The primary question formed and the aspect to be analysed, is the influence of constitutionally entrenched fundamental rights on public administration and the change in the manner in which public administration is exercised since 27 April 1994.

CHAPTER TWO contains a literature study but also a description of the law of South Africa, the meaning of the concept legal *persona*, and a distinction between rights and privileges. The ambience of legal rights, fundamental rights and entrenched rights are also described. In conclusion, a categorisation of rights is done.

CHAPTER THREE reflects historical events prior to the inception of constitutionally entrenched fundamental rights in South Africa. Two periods are examined, namely prior to and after 27 April 1994. The examination of the period prior to 1994 is to give an overview of the different South African constitutional dispensations and of the four South African colonies as they existed just prior to Union in 1910, as well as those of the then British protectorates, Lesotho, Swaziland and Botswana. The examination of the period after 1994 is to give an overview of the South African constitutional dispensation as established by the 1993 Constitution that contained a chapter 2 with entrenched fundamental rights. This part of the examination includes an overview of the 1996 Constitution.

CHAPTER FOUR deals with the features of South Africa's constitutionally entrenched fundamental rights. The constitutional environment as from 1994 is analysed by discussing the purpose of a constitution, constitutional status, the divisions of government authority and the constitutional provisions relating to public administration. Following an examination (conceptual) of the meaning of democracy, a description is given of fundamental rights and public administration. Thereafter the bearers of fundamental rights, the application of fundamental rights and the limitation of fundamental rights are discussed. Finally, the constitutional obligation on public administration is analysed.

CHAPTER FIVE contains an analysis (theoretical) of translating constitutional principles into reality. The implementation of constitutional principles and the concretisation of the entrenched fundamental rights are described. Following this, an analysis is done of whether the implementation of the fundamental rights is underway and the expected impact and effect of entrenched fundamental rights on the manner in which public administration is exercised.

CHAPTER SIX contains an elucidation of the hypotheses relevant to the study.

CHAPTER SEVEN describes the survey design and a technique used in the empirical investigation, and provides greater insight into how the survey was conducted and the manner in which respondents participated.

CHAPTER EIGHT outlines the findings and discussions of the data collected from the questionnaires used in the empirical research.

CHAPTER NINE outlines the conclusions and proposals made in terms of the information reflected in the preceding chapters.

Following chapter nine the **APPENDICES** are presented.

A list of **SOURCES** is supplied at the end of the thesis.

1.1 1 Conclusion

This chapter of the thesis explains the purpose of the study, describes the research methodology used in the thesis and paves the way for subsequent chapters 2 to 9 of the thesis. The contents of this chapter indicate that the focus of the thesis is on the manner in which public officials exercise public administration. With chapter 1 as the foundation, chapter 2 describes the law of South Africa, legal *persona*, legal and fundamental and entrenched rights, and a categorisation of rights.



Chapter 2

The conceptual logic of entrenched fundamental rights

2.1 Introduction

The aim of this chapter is to set the first steps towards realising the purpose of the study (see *supra* 1.3) in which public administration and constitutionally entrenched fundamental rights as contained in the Bill of Rights, play the primary roles. The reader will note that although I often refer to section 195(1) of the 1996 Constitution that contains directives as to the manner in which public administration must be exercised, the Bill of Rights remains the primary source of influence, for the purposes of this thesis, on the manner in which public administration is exercised. Granted, fundamental rights were recognised in common law and theology ages before a bill of rights existed. In order to realise the purpose of the study, though, the fundamental rights referred to are recognised in the current Bill of Rights.

Fundamental rights can, however, also be recognised in legislation and law other than in the form of a constitution and/or a bill of rights. This was the situation in the pre 1994 South African and the pre 1910 South African colonial constitutional dispensations which are discussed in chapter 3 of this thesis. This necessitates that there be a clear understanding as to the meaning and sources of legislation and law that recognise fundamental rights. It is my intention, accordingly, to attempt to describe the meaning of "law" and "fundamental rights", and other components related to these two primary aspects, in order to inform the reader, and more specifically public officials, of this mentioned necessity. My opinion is that it is essential that public officials have a clear comprehension of what "law" and "fundamental rights" entail, as this is necessary when public administration is exercised. Fundamental rights and their sources thus form the subject of and present the point of departure of the study.

Accordingly, in this chapter an analysis of the terms "the law", "ethical rules" and "jurisprudence" is made firstly. Secondly, the components of South Africa's law are

described under the four headings of common law, indigenous African law, judicial precedent and legislation. Thirdly, a description is given of legal personality as consisting of natural persons and juristic persons. Fourthly, the term "rights" is analysed for the purposes of distinguishing between different meanings and uses. The term "rights" is described as in a social setting, compared to aspects such as moral expectations, privileges and contingent rights. Fifthly, an obligation, as a legal relationship between persons, is discussed. Sixthly, the term "legal rights" is analysed. Seventhly, an exposition is given of the term "fundamental rights". The exposition includes the process of selecting rights as being fundamental and the situation in Britain. Eighthly, the basic approach to and the ambience of entrenched fundamental rights are discussed. Ninthly, a categorisation of rights is done. The categorisation includes a distinction of fundamental rights and the three generations of rights. Finally, a summary is given of the contents of this chapter.

2.2 Law and jurisprudence

The law, as manifest in the legal system of South Africa, exists in various forms (see *infra* 2.3) and it is therefore necessary that a distinction be drawn between the different forms of law from which rights emanate. Such a distinction is made in order to expose the nature and source of the law by which rights are granted. Initially the meaning of the term "the law" is analysed and a comparison is made between the law and ethical rules. Thereafter an explanation is given of the jurisprudential approach taken in the thesis.

2.2.1 Meaning of "the law"

The term "law" can be used differently and with different meanings. For example, in sport, the law of rugby lies in the rules of the game; in South Africa, the law of the country is made up of legal rules of conduct; in science, the laws of physics lies in formulas; and the law of moral conduct consists of ethical rules. Such laws, in the broadest sense, fall into two groups, namely scientific laws and practical laws. Scientific laws are, for instance, the laws of science. However, because scientific laws do not form part of the study, the aspect will not be discussed further. Practical laws prescribe a course of action that a person should take when doing something. Such practical laws include, for example, the law of rugby, the law of the country, and the law of ethics. Such laws are all practical in the sense that the rules are applied with the intention of guiding the conduct of a person. The feature common to all such practical laws, is the principle of order and regularity, that is, the aim to maintain acceptable conduct by regulating a person's conduct. A law, therefore, prescribes

a particular course of action or conduct in terms of which is stated what persons ought and ought not to do (Hahlo & Kahn 1973:3; Du Plessis 1990:2).

Every type of law has its importance in its area of application. However, not every type of law has such importance in society that it should be made applicable to the conduct of all the persons in the country and be part of the law of the legal system of the country. For example, rugby rules apply to that sport exclusively. Only certain people in the country play rugby and therefore such rules do not apply to all the persons in the country. The law of the country makes up the country's legal system and is one of the social controls that regulate all persons' behaviour in society countrywide. Other social controls such as religion and the ethics of society also exist, but only the law of the country is applied and enforced by the authority of the State such as the courts and the police (Hahlo & Kahn 1973:3; Du Plessis 1990:4). In terms of section 165(2) of the 1996 Constitution, South Africa's courts of law must apply the law in terms of the judicial authority granted to it by the Constitution. The South African Police Services are, among others, compelled in terms of section 205(3) of the 1996 Constitution to uphold and enforce the law.

The law of the country, as manifest in the legal system, is what this study is concerned with because only such law applies to all persons in the country and is given official recognition above other laws such as the laws of sport. It is also only the law of the country that is involved in one or more activities in the daily life of each person. During each day when persons, *inter alia*, buy and sell goods to each other, enter into contracts, accept employment and receive medicine at the pharmacy, the law of the country is involved in each such transaction. The vast majority of such transactions never give rise to a legal dispute but the law is nevertheless part of each and every such matter.

The law of the country is, furthermore, distinguished from other types of laws. The law of the country is made up of a large selection of rules governing a person's conduct. Such selected rules are recognised by the State authority as rules that have to be binding on all persons in the country as a large society, and, if necessary, applied and enforced by courts of law (Du Plessis 1990:4). Other laws do not enjoy such recognition. Dworkin (1995:413) describes the law of a country as that –

“... it aims, in the interpretative spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction. That is, anyway, what law is for us: for the people

we want to be and the community we want to have”.

Dworkin thus portrays the law of a country as consisting of prescriptions aimed at regulating the conduct of society while attempting to indicate the most appropriate action that can be taken in order to build a better society, while also learning from the past. He adds that the law signifies how people are united in a community even though they be divided or differ in their careers, interests and convictions. The law can serve as a support to people striving for personal betterment and an ideal society. Dworkin also describes such law as a living and moving law that aims to keep up with development in order to ensure the protection of every person's interests.

I agree with Dworkin's description of the law consisting of principles. My view is similar to Dworkin's as I regard the law of the country as being made up of a selection of legal rules that regulate the conduct of persons. Such rules contain prescriptions as to how persons ought to perform a particular activity, that is, what a person is permitted to do. Such prescriptions also serve as a social control in that they forbid particular conduct, that is, they require of persons not to perform particular activities. Such a requirement thus becomes an obligation that persons are to adhere to and respect. The mentioned legal rules are applied and enforced by the authority of the State such as is granted to, *inter alia*, the courts of law and the police service.

In this thesis the term the law is accordingly used with the intention of meaning the law as manifest in the legal system of South Africa that is applicable to all persons in the country.

The law can furthermore be distinguished from ethical rules. Ethical rules are made up of a selection of principles also governing a person's conduct and can easily be wrongly taken for as being the law. There are similarities between the law and ethics but there are distinct differences as well. Ethical rules are described next.

2.2.2 Ethical rules

The principles of moral conduct lie in ethical rules. Just as the law regulates a person's conduct, so ethical rules guide a person's behaviour. The ethical rules of society are important social rules but are not in general part of the law (Du Plessis 1990:4).

Ethical rules can, in certain circumstances, overlap with the law and even become part of the law. For example, Mr BP desires a particular expensive watch in a store. As long as

he just desires the watch the matter is only an ordinary event and not of any interest as a legal matter. The ethical rules of society normally sanction such a person's desires because he should not desire what he cannot afford to buy. However, when Mr BP's desires turn into actions and he steals the watch, the ethical rules overlap with the law that now sanctions Mr BP's actions as theft. The ethical rules thus also sanction the action of stealing the watch.

Lyons (1984:61) writes that law interacts with moral opinions. Laws governing sexual conduct, the use of narcotic substances, and a host of other matters, have been motivated (to some degree at least) by ideas about moral rights and responsibilities. Law may thus be shaped by the values people have - the values of those who are able to affect the development of law. Law also has an impact on moral attitudes - the enforcement of law, for example, tends to reinforce the moral value it reflects.

I support the view that Lyons has regarding the interaction between law and moral opinions and that the values people have may shape laws. My opinion is though that this principle differs from one community to another. For example, sexual conduct in the form of prostitution and the use of a narcotic substance such as cannabis (dagga) may be, according to the values in general of the people, acceptable in the community of country A. The values in general of the people in the community of country B may be different in that they do not find such practices acceptable. The law in country B will therefore be shaped by the relevant values of the people and no doubt prohibit such practices. In this case the enforcement of that law will probably have an impact on the moral attitudes of the community so that people will either not follow such practices anymore, or follow such practices in such a way so as not to be seen by others - especially the law enforcers. As Dworkin (1995:413; see *supra* 2.2.1) puts it, law aims to lay principle over practice to show the best route to a better future. In country B the ethical rules reflecting the moral attitude of the community in general, has become part of the law of the country.

The requirements of law and ethical rules are not equivalent. A comparison between law and ethical rules (Hahlo & Kahn 1973:6-7; Lyons 1984:63,70-72) is reflected in Figure 2.1.

FIGURE 2.1 COMPARISONS BETWEEN THE LAW AND ETHICAL RULES

The Law	Ethical rules
Rules governing a person's physical (external) conduct, eg. an act of driving a car	Rules governing a person's moral (internal) conduct, eg. thoughts and desires of driving a car
A particular set of rules recognised by the State as binding on all persons	Rules not recognised by the State as binding on all persons
Only interested in a person's state of mind where the thoughts are manifested in a criminal act	Only interested in a person's actions in so far as those reveal the state of mind
Enforced by institutions of the state with "external" sanctions, e.g. a fine, a prison sentence	Not enforced by the State and only sanctioned by a person's personal conscience
Imposed in the interests of the community: doing justice and maintaining peace and order	Imposed in a person's own interest to achieve virtue: perfecting character and doing good

I am in agreement with the comparison as it differentiates clearly between the primary aspects that the law governs a person's external conduct whereas ethical rules govern internal conduct. My view is also that the law and ethical rules could appear to be very similar in content but there are obvious differences between them. The law is recognised as binding on all persons and enforced by the State authority. Ethical rules are not recognised or enforced by the State authority. The law creates restrictions on behaviour - requirements and prohibitions - that determine what conduct is minimally acceptable within that legal system. Ethical rules usually place moral duties or obligations in this regard.

Ethical rules thus have an important role to fulfil as a social control. Such rules do not form part of the law, but the principle of an ethical rule is sometimes incorporated into a similar legal rule.

2.2.3 Jurisprudence

Jurisprudence comes from the Latin term *iuris prudentia* meaning knowledge of the law. In the widest sense of the word, jurisprudence embraces the whole science of the law, but is also used to signify a branch of the law or the legal aspects of a particular discipline, for example, medical jurisprudence (Hahlo & Kahn 1973:108-9).

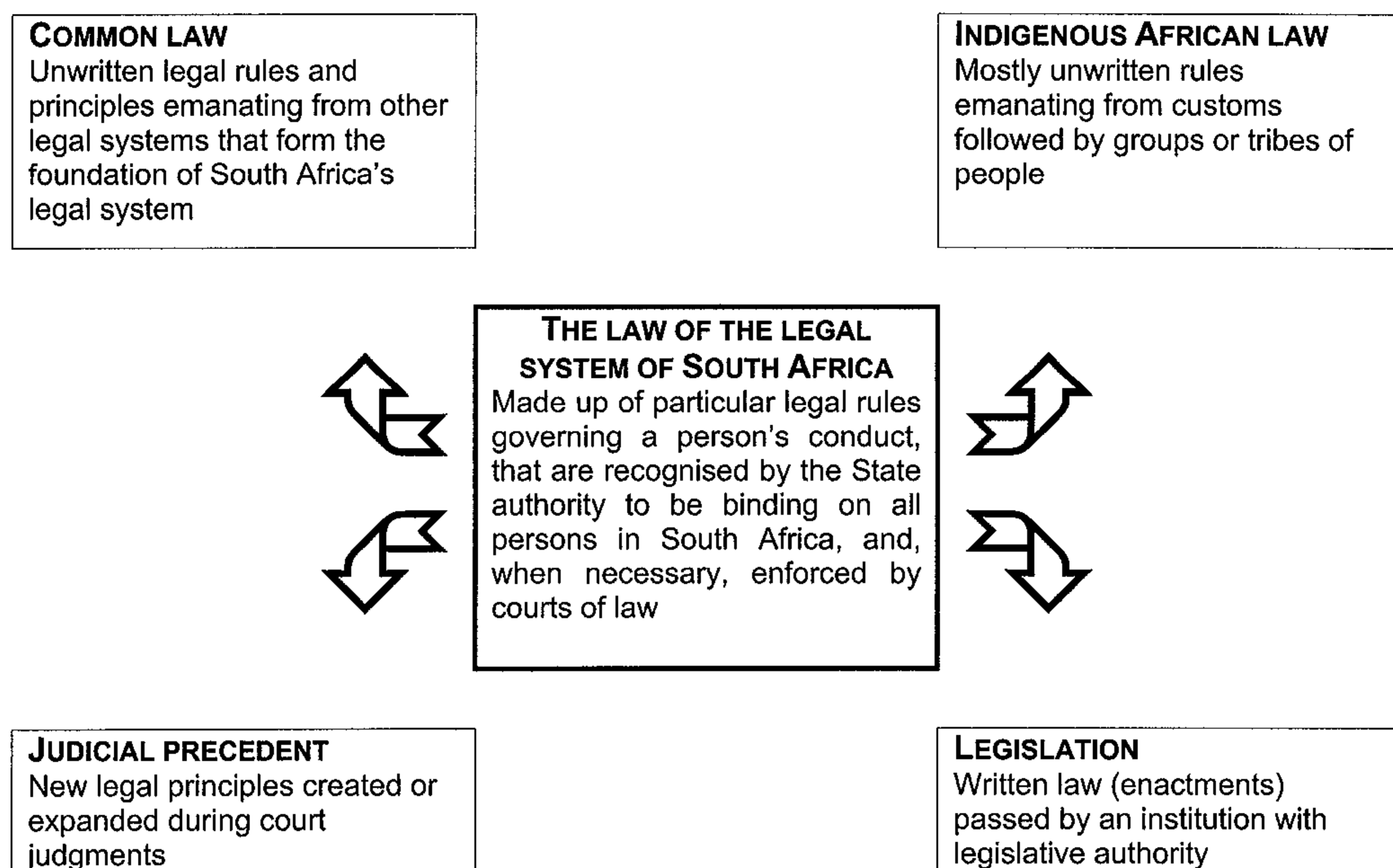
The comparative study of different constitutional systems, and accordingly, different legal positions to find common principles, trends and causes, is described by Hahlo & Kahn

(1973:111) as a jurisprudential approach. In this thesis an analysis is made of the different constitutional dispensations of South Africa since 1910, and of the constitutions of each of the four South African colonies (the Cape of Good Hope, Orange Free State, Transvaal and Natal) just prior to Union in 1910 (see *infra* chapter 3). Such an analysis is made in order to expose, *inter alia*, common legal principles relating to fundamental rights. Therefore, in the thesis, the study of the different constitutions and, accordingly, the different legal positions, is intended to be historical and comparative.

Following now is an exposition of the components of the law of South Africa. This exposition is primarily for the purposes of describing the origin of fundamental rights (see *infra* 2.8).

2.3 Components of the law

The law of South Africa exists in different components and in various forms such as in unwritten law, indigenous law, law created in court judgments, and written law (Perrott 1973:3; Du Plessis 1990:24). There is no precise line of severance between the different forms in which the law exists and a division of such forms should be regarded as no more than convenient compartments for the purposes of exposition (Hahlo & Kahn 1973:115). The components of the law are now described as common law, indigenous law, judicial precedent and legislation, as portrayed in Figure 2.2.

FIGURE 2.2 COMPONENTS OF THE LAW OF SOUTH AFRICA

2.3.1 Common law

The common law of South Africa is made up of unwritten legal rules. Unwritten in this context means that such rules are not codified and not listed or contained in formal statutes. Such rules do, however, appear in literature and their existence is confirmed by means of court judgments. For example, an unwritten legal rule states that a person (A) may not wilfully and without permission take an object that belongs to someone else, and make the object his (A's) own possession. Such an action constitutes the crime of theft. In that the courts of law apply and enforce this unwritten legal rule, the rule has thus been judicially confirmed as being part of the common law and applies to all persons in the country (Du Plessis 1990:24).

The entire common law of South Africa does not originate from the written legislation of South Africa. The greatest part of the present day common law has a historical context. The historical context means that the common law is made up of unwritten legal rules that emanate from two other countries. Firstly, it emanates from the Roman-Dutch Law from the Netherlands that was applied in the former colonies of South Africa prior to 1910. Secondly, the common law is made up of English legal rules that were applied in the mentioned former colonies of South Africa by the British governors (Du Plessis

1990:25,26). All these legal rules have amalgamated to constitute the South African common law.

2.3.2 Indigenous African law

The indigenous African law of South Africa is derived from the customs of particular groups or tribes of people in South Africa. The greatest part of the present day indigenous African law also has a historical context. The customs are mostly unwritten and have been passed from generation to generation verbally. The position is that in a group or tribe of black persons, a custom or usage could exist that is unique to that particular group. Any person who relies on the existence of such a custom, and needs to have that custom enforced, must prove that that custom has been long established and is uniformly observed by other persons, and is reasonable and certain (Bennet 1985:17,19).

In the early years of the twentieth century, the courts of the Union of South Africa had only superficial contact with indigenous African law. When compared with the Western law applied by the courts at that point in time, there was an air of suspicion about the content and application of the so-called customary law (Bennett 1985:18). The first time after 1910, that the Appeal Court of the Union of South Africa had the opportunity to consider and enunciate the qualities required to be existent before a custom could be enforced, was in the court judgment in the case of *Van Breda v Jacobs* 1921 AD 330. This judgment of the Appeal Court then served as the authority on such matters to be followed by all other courts of law (Hosten *et al* 1995:488).

The matter before the court in the *Van Breda*-case, involved a custom between a group of fishermen. In the matter, the Appeal Court had to decide whether the relevant custom relied on in the dispute was in fact in conformity with the custom law of South Africa. The plaintiffs in the matter proved that a custom existed between the local fishermen. On a stretch of beach, certain fishermen would set their lines to catch a shoal of fish seen travelling along the coast. The custom was that other fishermen arriving later at that same stretch of beach would refrain from setting their lines closely in front of the lines of the fishermen who were there first. The Appeal Court was satisfied that the evidence before the court proved that the custom mentioned in the dispute was a reasonable, certain and established custom. Furthermore, the object of the custom was to prevent disputes between fishermen and was fair to all parties involved. The Appeal Court confirmed the existence of the relevant custom and enforced it as part of the indigenous African law.

When a similar matter comes before a court and after the court has affirmed the formation of a custom rule of law, the relevant judgment will thereafter be referred to as authority for the existence of that custom. Customary uses are mostly unwritten and regarded as being similar to common law (Bennet 1985:27,29).

In a matter before a court, persons of the group, tribe or community, who have a good knowledge of the principles involved, usually explain the principles of the indigenous African law verbally. When the court confirms the existence and application of the relevant indigenous custom, the principle or rule acquires the force of law. An example of a custom practised on a tribal basis by Black people, is the customary contract of mafisa. It is a type of loan of livestock on specific terms but is not immoral or repugnant (Bekker 1989:2 and 13).

As a further example, reference is made to the court matter of *Ex Parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A). In this matter a Black woman claimed damages from a Black man on account of seduction in terms of Black custom. The Appeal Court concluded (on page 399 of the judgment) that it was in the interests of justice to apply the indigenous African rules in the matter. In so doing a more adequate remedy was granted to the complainant.

Notwithstanding the piecemeal recognition and application of customary law by the courts, the 1996 Constitution (section 211) now gives full recognition to customary law. The courts are now obliged to apply customary law when that law is applicable in a particular matter, but subject to the provisions of the 1996 Constitution and any other legislation that specifically deals with customary law (section 211 (3)).

2.3.3 Judicial precedent

Law in the form of statutes or written law is, as a rule, created by legislative institutions (see *infra* 2.3.4). In the everyday functioning of the courts of law, the courts interpret and apply the law but do, in a judicial manner, also create law. A fictional view exists that courts are not to create law in order to maintain a division between the judiciary and the legislature in terms of the principle of the separation of powers (Hosten *et al* 1995:428-430). An in-depth discussion on this point is not necessary for the purposes of the thesis. The only part that is necessary to elaborate on is the manner in which courts do create law.

The law is regarded as being very extensive so as to deal with almost every situation that may arise and need regulating. The law can, however, never be so comprehensive in coverage and in detail of every situation. The possibility, therefore, exists that a matter could be before a court for adjudication without the necessary rule of law existing by which the particular matter has to be adjudicated. Such a so-called gap in the law then exists and as it is revealed, it is to be filled by means of judicial law making. The judicial law making results in the court identifying the gap in the law and then providing an appropriate legal rule during the judgment which adjudicates the matter. In this manner the court would have created new law (Hosten *et al* 1995:418).

For example, in the matter of R v Forlee 1917 TPD 52, Forlee was found guilty of contravening Act 4 of 1909 by selling opium, and was sentenced by the court. On appeal the defence argued that Forlee had not committed an offence as the Act in question prescribed no penalty. If no penalty was prescribed then the legislature did not intend to create an offence. The court of appeal found that a specific offence had been created by the Act in question. The absence of a prescribed penal clause meant that the court could exercise its judicial discretion and impose a suitable form of punishment. The trial court thus created law. This judgment was later endorsed by the Appeal Court in the matter of R v Zinn 1946 AD 346.

Another illustration of the reasoning the courts follow in order to create law, is in the matter of R v Pretoria Timber Co (Pty) Ltd and Another 1950 (3) SA 163 (A). The Appeal Court pointed out (on page 170 of the judgment) that it is the duty of the court, when giving judgment, to avoid a result that a statutory law is too vague to be effective just because of an omission in the text of the statute made by the legislature. It is the duty of the court to appropriately fill the gap or omission.

The court therefore does not create law in a similar manner as a legislature with legislative authority because the court is not granted such legislative authority constitutionally. The court simply and only, while in the process of interpreting and applying the law, fashions a new rule to supplement the existing law. Such a creative role by the court does not mean that the court usurps the function of a legislature. The court's role ensures that existing law has a meaningful existence and can be applied with a just end (Botha 1998:30-32).

The new law created by the courts, as described above, is also known as case law in that such law emanates from cases before the court.

2.3.4 Legislation

Legislation is written law. Legislation is thus the expression of rules of law in a formalised way, by an institution endowed with legislative capacity to do so. In South Africa, legislative capacity is currently granted to particular institutions in terms of the 1996 Constitution. Such capacity means that such an institution can consider draft legislation and, when the draft legislation conforms to its purpose, approve that legislation. The institution with the highest legislative authority in South Africa is Parliament. Parliament derives its legislative capacity from sections 43(a) and 44 of the 1996 Constitution. Parliament passes statutes that may be applicable to all persons in the country. The legislative capacity of the provincial legislatures is derived from sections 43(b) and 104 of the 1996 Constitution. Provincial legislatures pass provincial statutes for the locality of the relevant province. Local authorities derive legislative capacity from sections 43(c) and 156 of the 1996 Constitution and pass municipal by-laws for the area of jurisdiction of the relevant local authority.

The 1996 Constitution (section 40(1)) makes provision for government in South Africa to comprise national, provincial and local spheres of government which are distinctive, interdependent and interrelated. This principle of co-operative government means that the pre- 1994 hierarchy of original (a sovereign Parliament) and subordinate (provincial and local authorities) lawmakers no longer exists. Whereas municipal councils could only pass subordinate legislation (by-laws) prior to 1994, such councils are now, similarly to Parliament and provincial councils, fully representative elected bodies that may pass original legislation (still known as municipal by-laws) (Botha 1998:9,11).

A statute often does not contain all the details of the subject matter that it deals with and authorises. This is done in order that a statute is not too long and cumbersome. The greater detail of such a statute is then contained in regulations that the statute authorises to be issued to deal with such detail. Such regulations are subordinate to the authorising statute but still form part of that statute. Regulations are thus part of legislation (Botha 1998:11).

At the end of this exposition of the components of the law, and before analysing the term rights, it is appropriate to explain what legal personality embraces. Such an explanation is necessary because human beings do not only acquire rights.

2.4 Legal personality

For the purposes of illustrating those persons that include more than human beings acquire rights, an analysis is now done of what legal personality comprises.

A person in the language of everyday life is a human being. A person in a legal sense, however, is any being or object which the law endows with the capacity of acquiring rights and incurring obligations. Therefore, legal personality is not synonymous with only a human being but also with any entity which the law endows with such personality.

Legal personality is not a natural phenomenon but a creature of law, and therefore artificial. The law in a country's legal system can personify whatever being or object it deems appropriate. Law can withhold legal personality from human beings, thus demoting them from persons to things. The law can also extend legal personality to beings or objects other than human beings, thus promoting them from things to juristic persons. In South African law, every human being has the capacity of acquiring rights and incurring obligations. Every human being is, therefore, a person in the legal, as well as in the natural sense (Du Plessis 1990:57; Cronje 1999:6) The difference between natural persons and juristic persons is now illustrated.

2.4.1 Natural persons

Natural persons are individual human beings who, in modern law, enjoy legal personality as a matter of course. In South African law every human being has the capacity of acquiring rights and incurring obligations and is thus a person in the legal sense. This does not mean, though, that all persons have the same legal capacity. There are differences in legal status between, for example, major and minor persons, South African citizens and foreigners and so forth. Legal personality begins when a person is born and ends when that person dies (Du Plessis 1990:57; Cronje 1999:6).

Equality between all persons is important and the 1996 Constitution proscribes direct or indirect unfair discrimination (section 9(3)). One must, however, guard against giving mere formal expression to the concept of equality as some discrimination is at times permissible between particular persons, for example, between men and women, and between people from different racial groups (Devenish 1998:49). The mere fact that men and women differ in gender means that they cannot be treated as equals in all instances. The 1996

Constitution makes express provision for fair discrimination (section 9(5)). No two people are the same and sometimes it is necessary to treat certain people differently but without discriminating against them unfairly, for example, by having separate amenities such as public toilets for men and women. Another example is that Black persons may, in certain circumstances, be entitled to preferential or advantageous treatment above persons from other racial groups. This is permissible and is prescribed in section 9(2) of the 1996 Constitution which is aimed at promoting the achievement of equality for persons previously disadvantaged by unfair discrimination (Devenish 1998:47,48). A similar provision was contained in section 80(3) of the 1993 Constitution. The medical school of the University of Natal applied this principle by favouring Black students above Indian students for admission during 1995. The approach by the University was held to be Constitutional by the High Court (*Motala v University of Natal* 1995 (3) BCLR 374 (D), on page 387).

Much more can be written and debated on this issue. It is my opinion that what is written in this paragraph, will suffice for the purposes of pointing out that equality between persons is a seminal right but that an exception of fair discrimination must be taken cognisance of when the right of equality is dealt with. This is an issue that public officials must take careful cognisance of for the purposes of exercising public administration appropriately.

2.4.2 Juristic persons

Juristic or artificial persons are institutions upon which the law bestows the capacity of acquiring rights and incurring obligations. No juristic person can come into existence without a formal act of incorporation by an institution of the State, for example, by being registered as a company at the companies' office of the Department of Trade and Industry. Consequently, a juristic person can only obtain the privileges of legal personality by means of a formal act of the State that, by a fiction of law, equates the legal person to an equal status to that of a natural person. The legal personality so acquired is, however, subject to such limitations as the law may impose (Du Plessis 1990:58, 59; Cronje 1999:7).

In this manner, natural persons and juristic persons can acquire particular rights and incur obligations. More is written about obligations hereunder (see *infra* 2.6).

2.5 Rights

As a point of departure in the discussion of rights, I have to point out that it is my assumption for the purposes of this thesis that all rights emanate from the law (see *supra* 2.2).

When the term rights is used in ordinary usage, the use could lead to an ambiguity arising as to what type of right is being expressed and whether a right is intended or not. Such ambiguities could also occur in the thesis. It is, therefore, a necessity to analyse the term rights for appropriate use in, and understanding of, the thesis. The analysis of the term rights is done under the headings **rights in a social setting; rights; moral expectations and privileges**, and **contingent rights**.

2.5.1 Rights in a social setting

A social setting is necessary for rights to originate and exist in.

Rights usually come into existence due to the culmination of a process. Such a process is, for example, where a group of persons in a section of society in the country makes some form of claim against the governing authority of that society. After being achieved, the rights conferred acquire a new privileged status whereby those acquired rights become part of the foundation on which the organisation of that group of persons, and the community, in which they live, rests. The following setting is given as a hypothetical example. In a certain town the mayor of the town appointed the members of the local town council. A large group of inhabitants of the town decided that it would be more appropriate and acceptable if the inhabitants of the town were to vote for such members. The group of persons approached the relevant authorities and claimed the right to vote for councillors. After much debate and struggle between the parties, the vote was granted. The process thus culminated in the implementation of an election system for councillors. The election system became a rule-governed social practice in the town (Davis 1990:8). The example points to an important aspect that rights can only exist within the context of a shared social practice that in turn presupposes a form of community. The example also illustrates that the election system now operates on a basis serving the inhabitants of the town as a community as each member of the community has a right to vote.

Such a right to vote, as many other similar rights, is 'individuated', as Dworkin (1987:90-1) states. The right is individuated in that it is a right to something, which can be distributed, to all the right holders (as individuals) who qualify as such, and assign the same capacity to each right holder to use that right in the appropriate way. Such a right is thus due to the right holder and due in the same way to each other right holder in the community who qualifies as such.

The practice in question (to vote) was accredited by an appropriate social ratification and acceptance. The practice can be said to be a right insofar as the method of use of the right is endorsed by social recognition. The social setting is necessary because it would be pointless to speak of the right to vote of a person living on a remote island in isolation by choice. In this view, the social order is the source and foundation of the existence of every right. This means that, from society and through the functioning and relationships of society, persons derive the rights they have. The persons mentioned are not only persons who are in some or other manner directly associated with such a society, but include persons who, in an indirect manner, become associated with such a society. Indirect association occurs when a foreigner enters such a society and acquires particular rights, for example as a tourist, refugee, and so forth. The point illustrated, is that a social context is necessary for the recognition of rights. In this sense, it appears thus that only in the social context, does it make sense to talk of rights at all (Burns 1970:27 & 29; Dworkin 1987:17).

Hosten *et al* (1995:543) writes that a right implies a relationship with other persons. The law creates a right and a corresponding obligation. This dual relationship exists between the bearer of the right and one or more persons on who the duty rests to respect and not to violate this right.

I, accordingly, deem the existence of the social setting to be essential before any right can exist. This means that more than one person must be part of the social setting before such rights can be, as Dworkin (1987:90-91) states, individuated and endorsed for social recognition within a shared social practice. I endorse Hosten's (1995:543) point that a right implies a relationship with other persons, as this underscores the statement that a right can only exist within the social setting. Within such a social context legal rules exist as the law. Within such legal rules rights are created, applied and protected.

A distinction between aspects such as rights, moral expectations and privileges, is now given.

2.5.2 Rights, moral expectations and privileges

As the social setting is held to be the foundation of the existence of rights, just so the social order could be the source and existence of moral expectations and privileges. A comparative analysis of the contents of rights, moral expectations and privileges is necessary in order to obtain clarity as to whether a right is intended or not when moral expectations and privileges are referred to.

For the purposes of the comparative examination of the three mentioned terms, the following sentences are to serve as examples of the characteristic use of the three mentioned terms:

The citizen has a right to vote in an election;

A man has a right to his wife's love;

I have a right to choose a car to buy.

2.5.2.1 Rights ordinarily

From the sentences given as examples above (see *supra* 2.5.2), an inference can be drawn that some sort of claim or advantageous position is being inferred in terms of a right mentioned in each sentence. Each sentence could mean any number of things, and therefore, clarity must be found as to what the right that is asserted in each sentence, is intended to be. The conversant using one or more of the sentences probably believes that the right being asserted has a robust identity and is understood in the same way by another conversant. It is also probably this belief that allows participants in, for example a 'legal conversation', to be under the impression that when they are arguing for or against rights, they are actually meaning the same thing, namely 'legal rights' whereas they may have different things in mind (Perrott 1973:1-2; Schlag 1996:264-5).

The point thus being made is that when the term "rights" is used, as in the sentences given above, the term is used with the intention of having a robust meaning. The conversant apparently intends to claim some sort of advantage, while also intending to restrain other persons from disregarding or infringing on that claim. The intention is probably that other persons are obliged to respect that right. It appears thus that when it is stated that someone has a particular 'right', the implication following is that someone else incurs a duty as an obligation towards that right (Perrott 1973:1-2; Schlag 1996: 266-7).

In each of the three sentences, the term "right" is used as if it is on an equal footing with the other two. It is quite obvious that only the right in the first sentence can be created, granted, and protected by the law. The "rights" in the other two sentences can never be rights as intended in this thesis unless granted by the law, and are analysed and discussed next.

2.5.2.2 Moral expectations

In the sentence given above (see *supra* 2.5.2): "A man has a right to his wife's love", the right could merely be intended to mean, or refer to, some value-statement such as desirability. The sentence should rather read: "It is desirable that a man has his wife's love". The sentence thus indicates a preference or a justified value that the man has. The value that the man needs to sustain in his marriage is probably part of his life principles and thus a moral expectation on his part (Perrott 1973:6-7).

The moral expectation of the man cannot be a right as it is not part of a coherent system of legal rules with sanctions for violation of the rules. Should the man not have his wife's love, he or she will not be in breach of any law. If the man should tell other people that he does not have his wife's love, the man or his wife could feel moral guilt by the occurrence but will not be guilty of any offence.

2.5.2.3 Privileges

A tendency could exist among people to refer to a particular situation as a 'right', as appears from the following example:

I have a right to choose a car to buy

In a case as illustrated in the sentence, a privilege rather than a right exists. The existence of many motorcar dealers obviously does not mean that I have a right to choose a car since such a right is not a right in accordance with the requirements of being part of a coherent system of legal rules. Such a right does not involve a relationship with other people. No law will therefore make provision for me to have a right to choose a car to buy and place an obligation on other people to respect such a right. The law can however, limit the privilege of choosing a car to buy. For example, should I be insolvent and a court sequesters my estate, the law can prohibit me from purchasing any property without prior permission from

the administrator of my estate. Such a limitation then places an obligation on me to refrain from choosing a car to actually buy, although it does not take away *in toto* my privilege of choosing a car to purchase on some future date (Hosten *et al* 1995:546,897). The law can also protect such a privilege when it is included in a bill of rights or in other laws (Perrott 1973:5).

As in the case of moral expectations, a privilege thus lacks the existence, as part of a coherent system of legal rules, of authority-conferring rules that create rights in a given situation. In the event of there being no legislative limitation placed on my choosing a car to buy, there is no actual sanction against me exercising such a privilege. Should I fail by own choice to buy a car, I would not have breached any law. For all these reasons, the privilege mentioned in the sentence should be regarded as a mere privilege, rather than a right, if dealt with in the context of a social setting as described above (see *supra* 2.5.1).

Before moving on to a discussion of obligations, the aspect of contingent rights must be explained.

2.5.3 Contingent rights

Contingent rights emanate from contracts and can be regarded as rights.

A contract is usually described as a binding agreement between two or more persons whereby one or each one promises the other to give something or to do or forbear from doing something (the obligation). Examples are: to give – to pay a sum of money or deliver the thing sold; to do – to build a house; to forebear – not to open up a business in competition with the other(s). It is helpful, however, to conceive of a contract also in the sense of an agreement putting an end to an obligation. Thus a better description of a contract would be an agreement intended to create or extinguish personal rights between the parties. The interest protected is the performance of promises (Hahlo & Kahn 1973:122; Hosten *et al* 1995:701).

A contract normally contains conditions. The conditions make the operation, or coming into effect, or the continuance of a contract, dependent on the happening of a future and uncertain event. For instance, *I promise to let you my flat if I go overseas next month*. When the condition (...*I go overseas*...) is fulfilled the effect (...*let you my flat*...) is retroactive – the rights or obligations of the parties are determined as from the initial

agreement. When all the investigative facts required creating a right have occurred (I have gone overseas), the right (to let the flat) is regarded as vested on the date when the right may be actually enjoyed (the date I departed) (Hahlo & Kahn 1973:89-90; Hosten *et al* 1995:720).

A contingent right is sometimes used in the sense of a conditional right. Technically, however, it means a conditional right where no vesting takes place. A contingent right, then, as referred to here, means a conditional right where no vesting has taken place; while a future right must be a vested right where the enjoyment has been postponed (Hosten *et al* 1995:663).

Contingent rights, as emanating from contracts, are therefore rights that do have the existence, as part of a coherent system of legal rules, of authority-conferring rules that create rights in circumstances where contracts are entered into. Should a party to a contract fail to abide by the provisions of the contract, the law can enforce such provisions in order to protect the rights of the other party and compel the first-mentioned party to adhere to the obligations of the contract (Hosten *et al* 1995:701). A party that fails to abide by the conditions of a contract, is in breach of that contract and can be sanctioned by the law. This situation is entirely within the context of a social setting as described above (see *supra* 2.5.1).

2.6 Obligations

When a right is mentioned, an obligation is included by implication. When the law creates or recognises a right, in so doing a corresponding obligation is created. A dual relationship is established as neither the right nor the obligation can exist in a vacuum. A person cannot have an obligation towards nothing (Hosten *et al* 1995:543). The law consists of countless legal relationships between persons that are made up of rights and obligations. For example, when A purchases a radio from B, A acquires a right to receive the radio on making payment for it. B then incurs a duty to deliver the radio. This duty is thus an obligation on a person to do or refrain from doing something and is a correlative of a right. Obligations, just as rights, cannot exist in a vacuum and are attached to persons (Martin 1993: 29; Hosten *et al* 1995:700).

The law creates obligations by prescribing or requiring particular patterns of conduct from a person for reasons of justice and social policy. Such conduct required or prescribed by law,

is usually in the interests of primarily the other inhabitants of the country, but can occasionally also be in the interests of the person bound. For example, firstly, a municipal by-law could prohibit loud music after 22:00 in residential areas. Such a prohibition is not in the interests of the person who usually plays loud music, but it is in the interests of primarily the other inhabitants who are bothered by such noisy music. Secondly, an Act that prohibits the use of narcotic drugs, binds the person using drugs and is also in that person's own interests as it could prevent the person from becoming addicted to drugs (Hahlo & Kahn 1973:76-77; Martin 1993: 31).

Every person has a general duty to obey the law, even though s/he would like some laws to be changed. Laws cannot cover every aspect of every matter dealt with and could therefore evoke some dissatisfaction from certain persons. The point is that each person's duty to obey the law is owed to other persons who in their turn obey the law to his/her benefit. If a person decides that s/he must break the law on the grounds of, for example, religious conscience, then s/he must also submit to the judgment and punishment that the law imposes for such an action. Such a requirement is in recognition of the fact that the defaulter's duty towards other persons was probably overwhelmed but not extinguished by his/her religious principles/duty. Another point is that all the other persons cannot be expected to tolerate the decline in respect for the law in the acts of one or a few people. Such dissenters have to be discouraged from doing what they please and creating situations that encroach on the rights of other persons (Dworkin 1987:186-7). To illustrate this point, a by-law for example states that no person is allowed to make excessive noise in a park adjacent to a hospital. Mr X and a few friends decide to have a motorbike gathering and a noisy rock-and-roll party in a park adjacent to a hospital. A person in the hospital or even a small minority of persons whose right to peace and quiet in the park has been infringed, would be entitled to have the relevant law enforced (Dworkin 1987:194-5).

I am, accordingly, of the opinion that an obligation is a correlative of a right, but also the opposite of a right. A dual relationship is formed by means of an obligation and a right being on opposite sides, as an obligation cannot exist in a vacuum. A duty is a moral or legal responsibility on a person to do something or refrain from doing something. Such a performance has an opposite effect with regard to a right. When a person has a duty to adhere to something, an obligation rests on that person to perform in terms of the requirements of such a duty.

2.7 Legal rights

In the analysis thus far, an attempt was made to illustrate that a right should be distinguished from moral expectations and privileges (see *supra* 2.5.2.1 and 2.5.2.2). Furthermore, rights should be regarded as containing some sort of claim and having a robust identity (see *supra* 2.5). With these aspects in mind, and keeping in mind that the social order is the source and foundation of the existence of rights (see *supra* 2.5.1), it is now necessary to narrow down the source of rights.

A right, as used in the sentences given above as examples (see *supra* 2.5.2), is intended to mean a 'legal right'. For example, the sentence "The citizen has a right to vote in an election" probably means that a law exists in terms of which the citizen acquires a right to vote when an election takes place. The same law could impose a duty on a government institution to ensure that when an election is organised, the necessary arrangements are made such that the citizen can exercise his/her right to vote. The law could also impose a duty on other persons not to in any manner interfere with that right of the citizen. Should the citizen not vote, due to, for example being impeded by a demonstrator or an incomplete voter's role not containing his/her name, a legal remedy in the same law could be available to enforce the citizen's right and rectify the infringement on his/her right. The citizen then has a choice to exercise the legal remedy in order to enforce his/her right or to claim compensation on being unfairly deprived of his/her right (Perrott 1973:2; Dworkin 1987: 17).

In this context, the law relates a particular legal rule to a particular legal situation and in so doing creates a right and a corresponding obligation. The right is thus a legal right (recognised and granted by the law) and forms a relation between persons (see *supra* 2.4) as regulated by law. If the right or the obligation is violated, an imbalance results which the law has to restore (Hosten *et al* 1995:545).

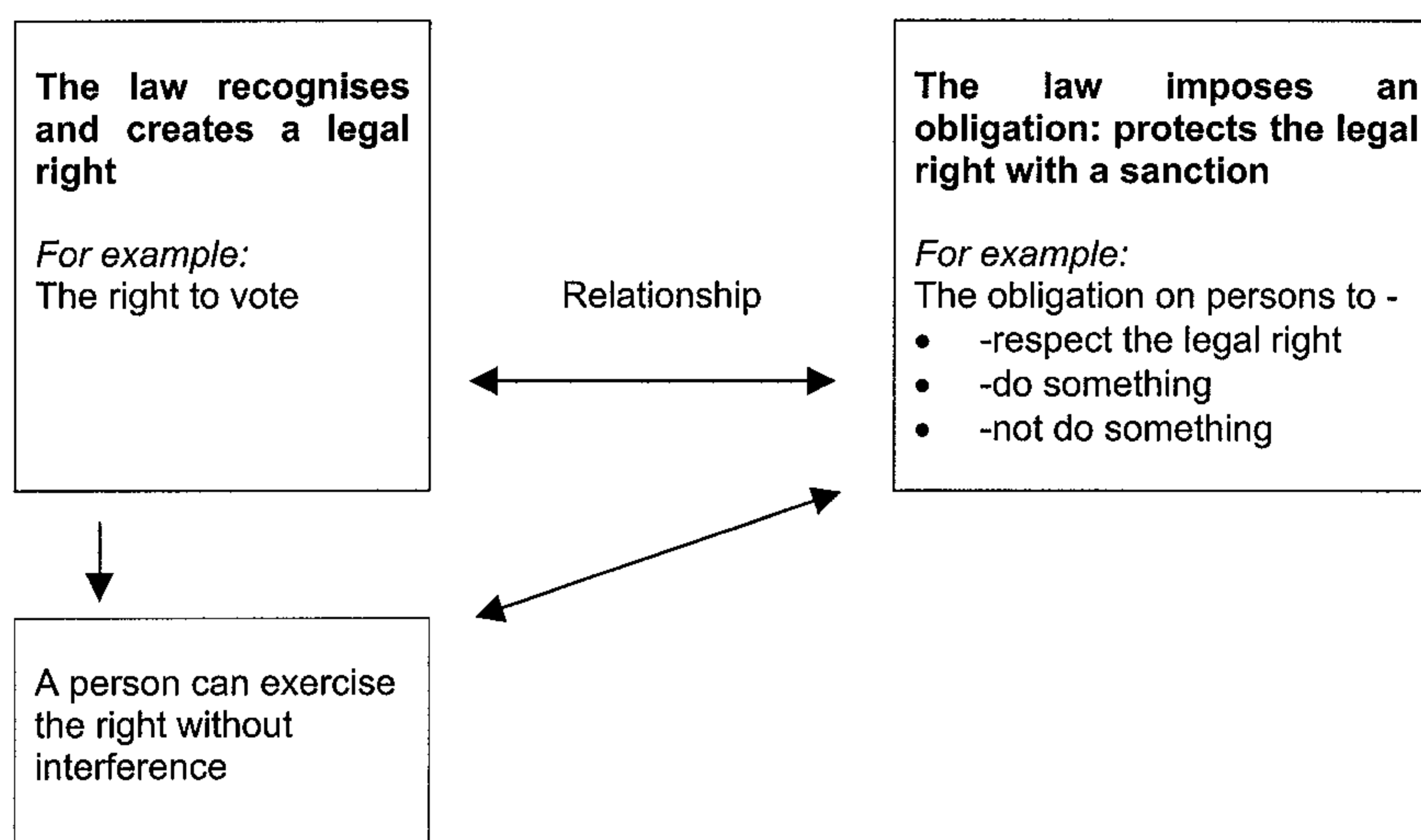
Various writers have described a legal right in different ways.

- Austin (1885:398) writes: "a party has a right, when another or others are bound or obliged by the law, to do or forbear, towards or with regard to him".
- Holmes' (1881:214) description is that "a legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution or compensation by the aid of the public force".

- Buckland (1945:92) writes of "an interest or expectation guaranteed by law".
- Salmond (1966:218) writes of "an interest recognised and protected by a rule of law".
- Hahlo & Kahn (1973:79) are of the view that "legal rights are recognised and protected by the State".

Of significance is that each one of the writers uses the terms law and/or protection in their description of a legal right. The writers indicate that such a right emanates from the law and is guaranteed, enforced and protected by the state authority by means of its, *inter alia*, law courts, police and military forces. I fully agree with each one of the writers, as my opinion of what a legal right is, is similar to their views.

A legal right is thus recognised and created by the law, and equally protected by the law. When such a right is created, the law at the same time creates obligations in terms of which other persons are to do or to refrain from doing something in order to respect that right and not infringe on it. An obligation is the opposite of a right. If there is no obligation then there can be no enforcement of the right. For example, a man says that he has a right to build a certain type of motorcar. This fact is neither contained in a contract nor recognised in any legislation. The man's right is not a legal right and he cannot enforce it as no obligation exists in terms of which other persons are obliged to do or to refrain from doing something. Only when the man's right is entered in a contract or included in a bill of rights or other law, it becomes a legal right coupled to an obligation, and can be enforced by the law. Such an obligation serves as protection towards the use and existence of the legal right. The description is illustrated in Figure 2.3.

FIGURE 2.3 RELATIONSHIP BETWEEN A LEGAL RIGHT AND AN OBLIGATION

From the examples in Figure 2.3, a person's legal right to vote is recognised and created and protected by the law. By imposing an obligation on other persons, a legal relationship is created between a person (as the right bearer) and all other persons on whom a duty rests to respect and not to violate this right. The law also usually states what the content of the legal right is. This means that the right is not unlimited and extends only as far as the enabling law allows (Perrott 1973:3).

The law in South Africa's legal system exists in various forms (see *supra* 2.3). The law in any form (Perrott 1973:3) can thus create a legal right.

Every legal right of a person is an interest that is protected by the law. The protection is primarily against the violation of such rights by other persons. For example, the right of life, liberty, religion, private use of private property, is, *inter alia*, rights that can only be enjoyed depending on other persons being restrained by the law from violating those rights. Therefore, a legal right is granted and guaranteed by the law. The law then provides a justified balance between the use of such a right by one person, and the restrained abuse or violation thereof by another person. Such a balance is just as vital as concerns the protection of legal rights against any arbitrary activities by the state authority (Waldock 1970:83).

The law does provide a guarantee of legal rights by furnishing the legal process that realises such rights. Besides the law, the social solidarity and consciousness of the

inhabitants also fulfil an important role as to the effectiveness of the legal guarantees. This means that the inhabitants have to show their unity and agreement together with tenacious willingness to support such a legal position. Thus, the persons whose legal rights are granted and guaranteed by the law form the social force to uphold that legal position (Waldock 1970:87).

2.8 Fundamental rights

Following the exposition of the term rights, the term “fundamental rights” is now described. The description includes what is intended by describing a right as fundamental and under what circumstances such a description is justified. Thereafter the position in Britain is described.

2.8.1 Selected rights

The term “fundamental rights” implies, in a general sense, that from all the rights that exist, particular rights are, for a given reason, considered essential to the existence of persons. For example, at a particular point in time (say 1994) the political situation in the Country required that certain rights such as equality and human dignity needed to be given more attention and protection than could be given by the courts. The reason being that the political situation leading up to 1994 abused the two mentioned rights and caused people to call out for reform in that regard. The role of the courts in protecting these rights was necessarily limited in a system of Parliamentary supremacy whereby the scrutiny of parliamentary legislation by the courts was expressly excluded by Parliament (Hosten *et al* 1995:961). The denial of the two mentioned rights before 1994 resulted in what could be regarded as a serious injustice. The two mentioned rights are thus termed fundamental in that they are selected from among all the rights that exist and regarded as fundamental for the reasons they were selected. Since 1994 constitutional prescriptions ensure that the courts' judicial functions are meaningfully enhanced compared to the pre- 1994 situation. The courts now play an indispensable role as the guardian of the rights of the inhabitants of the country. The courts now have constitutional authority to review and test any legislation thereby ensuring that all legislation is capable of sustaining an interpretation which is compatible with the fundamental values and principles encapsulated in the supreme 1996 Constitution (Devenish 1998:220). This means that all rights currently enjoy equal and full protection in terms of the Constitution and by the courts, unless justifiably limited by law (1996 Constitution:section 36).

When particular rights are considered to be fundamental rights, they can be listed in a bill of rights for the purposes of receiving more attention and protection. If the rights being asserted are not listed in a bill of rights, but are still meant to receive more attention and protection, they can be so dealt with as legal rights. Such legal rights are then properly called fundamental when expressed in or guaranteed by a law or laws. For example, certain fundamental rights regarding the use of water in a river are expressed in the Water Act. Fundamental rights are, for example, also specified in a written constitution or in a bill of rights, in an enactment of an authorised legislature designed to render the constitution more specific in certain aspects, and in judgments of a high court interpreting the law (Perrott 1973:8).

The additional protection fundamental rights enjoy when being listed, for example in a bill of rights, is that they must by constitutional instruction be promoted and respected. Any abuse of such rights can then be punished in terms of a penalty clause. A penalty clause is necessary, as there are always persons, and government institutions, which will not respect the rights of others unless the superior force of authority controls such persons. When persons abuse the rights of others, the abusers have to be restrained by relevant institutions of authority such as the police and the courts. This situation leads to the authorities having to possess superior force. Such superior force can, however, in turn also be misused. It, therefore, appears that rights are probably most secure among persons of good character, who defend their own rights and respect the rights of others, with little or no governmental compulsion (Goldwin 1994:144).

Fundamental rights can also exist where there is no written constitution. Such a situation is found in Britain.

2.8.2 Britain

The legal system of Britain is based primarily on the country's unwritten common law. For this reason Britain does not have a written constitution. The British constitution is unwritten in the sense that it is nowhere formally enacted and nor is there any document which contains its fundamental principles. It has grown with the centuries and its rules are to be found piecemeal in statutes, case law, ancient practice and prerogative rights, and in conventions (Ridges 1950:5). The provisions of the constitution must be gleaned from among the vast mass of source-material that together forms the whole body of English, Scottish and Northern Ireland law. This law is derived partly from custom, but mostly from

written sources, namely reports of decided cases, statutes, and occasionally the writings of jurists (Yardley 1964:1).

The situation in Britain is that fundamental rights ought to be exercised without limitation or permission. This means that whatever is not prohibited by law, persons should be free to do. Basically all persons are free to do and act as they please with due consideration towards others. This liberty will only be curtailed in so far as such limitation may be essential for the due and just administration of the whole country. The limitation will only then be by clear instruction contained in a law and not by arbitrary power exercised (Yardley 1964:78).

Such a situation gives a person the freedom to benefit him/herself. The situation can, however, also leave a person free to infringe on the rights of other persons, unless restrained. To the extent that government institutions are then called on to restrain such infringement, the intrusive authority of the government increases, and the person's realm of privacy potentially diminishes (Goldwin 1994:145). It appears from this situation that a person has the liberty to exercise any right until the government authority restricts such right.

In Britain, therefore, fundamental rights are not guaranteed by any written constitution. Fundamental rights are guaranteed by the decisions of judges in Britain's courts of law. The principles of such rights are reflected in the precedents which have been laid down by the judges. In this way, the freedom of persons to say, go and do what they choose to, is guaranteed on all lawful occasions, without hindrance from anyone save as permitted by law (Denning 1970:64).

As an example it can be stated that in Britain a person has a right to demonstrate and a right to freedom of speech. These rights are not found in any written law. These rights are thus always to be upheld but only when exercised lawfully. If a group of students should enter a court while a matter is being heard and protest against some decision by the government, the court proceedings will be disrupted. The right to demonstrate and to freedom of speech is maintained. The unlawfulness comes about when the students force their views on other persons and cause unwarranted disruption (Denning 1970:65-67). If the court tried the students, a court precedent will confirm the two mentioned rights. The British courts consider safeguarding the liberty of the subject as one of their most sacred obligations. This point was indicated in the English court judgment of *R v Vine Street Police Station Superintendent: Ex Parte Liebmann* (1916) 1 KB 268, on 275 and 279.

Where the constitution is unwritten, as in Britain, the existence of fundamental rights as such could be regarded as legally insecure. The legal insecurity around certain fundamental rights could, however, be narrowed down when such rights are expressed in court judgments and enactments that are of importance to the structure and content of the whole legal system. For example, in Britain the franchise is part of the substantially unwritten constitution. The right to vote is, however, contained in an enactment that renders the constitutional aspect of franchise more specific (Perrott 1973:8).

Fundamental rights can, therefore, exist and be protected where there is no written constitution. In South Africa, with its written Constitution and Bill of Rights, the existence of fundamental rights can be regarded as being legally secure.

The next paragraph deals with entrenched fundamental rights.

2.9 Entrenched fundamental rights

Under the heading Fundamental rights, and more specific under Selected rights (see *supra* 2.8.1), I wrote that the term fundamental rights implies that particular rights are considered essential to the existence of people. I also wrote that such rights are considered to be fundamental rights for the purposes of receiving more attention and protection. In order to achieve this, the appropriate approach would be to ensure that such rights are given the most comprehensive attention and protection available. In South Africa this can be currently achieved by means of the supreme 1996 Constitution. With this in mind, a basic approach to entrenched fundamental rights and the ambience of entrenched fundamental rights are discussed. The purpose of this discussion is to point out that constitutionally entrenched fundamental rights ought not to be seen as merely "something new" or "a change" in South Africa's constitutional environment. It ought rather to be regarded as an instrument with which to harmonise the public administration by the state authority and the fundamental rights of the inhabitants of the country.

2.9.1 Basic approach to entrenched fundamental rights

In a democratic state without statutory protected fundamental rights, there is a formal position with regard to the protection of an individual's fundamental rights. The position is that every individual has all rights and freedoms to the extent that such rights and freedoms

have not been limited or abrogated by the law. The law containing such limitation or abrogation must be a law conclusively determined by the legislature of the supreme authority (Parliament). This was the position in South Africa before 27 April 1994. The pre-1994 Parliament (the national Legislature) was, however, not restrained (except with regard to the use of the two official languages) by any constitutional provision from enacting laws which discriminated against people and disregarded fundamental rights (Rautenbach 1995:1). This situation saw the withering away of all hope of a sound service-orientated relationship between the state authority and the inhabitants of South Africa.

Fortunately, in the 1996 Constitution there now exists a constitutional framework of procedures and rules which impacts upon and regulates the relationship between the state authority and the inhabitants of the country. This situation means that the relationship between the state authority and the individual is based on legal norms. Such norms appear to be consonant with most religious, philosophical and moral values obtaining in the South African society (Devenish 1998:21,22).

The aspect of fundamental rights involves personal claims of the individual *vis-à-vis* state authority. State authority implies that the government may regulate the everyday life of the inhabitants of the country. This authority, unless legally restricted, may include the authority to totally disregard fundamental rights and practically enslave every individual under the authority of the government. In South Africa, accordingly, the idea of "entrenched fundamental rights" portrays an endeavour to constitutionally preserve particular fundamental rights against abridgement by government authority. This does not imply that entrenched fundamental rights are absolute rights which confer unrestricted claims and competencies upon those claiming them. All rights claimed by individuals have appropriate boundaries/obligations to be determined by legal restriction and by both the equal rights of other persons and by state goals (Van der Vyver 1976:57,64,65 and 83; Wade 1993:604; Law Commission 1994:5; Van der Waldt *et al* 1995:57).

The concept of protected rights thus consists primarily of constitutionally entrenched fundamental rights. In South Africa this currently means fundamental rights enjoy comprehensive protection by being included in the Bill of Rights in the 1996 Constitution. However, in the broader sense, the idea of protected rights includes any means affording protectionism towards individuals' rights. The idea does not exclude any unwritten protection of rights as is found in Britain (see *supra* 2.8.2).

The success or failure of entrenched fundamental rights depends largely on the veneration with which it is adhered to by the government of the day and by the general populace whose rights it guarantees. The ability of the courts of law to enforce the provisions of the entrenched rights also fulfils an important role (McWhinney 1959:32-37). Public and private institutions should also strive to create a fundamental rights culture in administrative functions. Such a culture should envisage the protection of fundamental rights and freedoms as an essential element of social order and good government. This culture and approach should emanate from all sectors of society - the governors as well as the governed (Cowling 1993:102).

2.9.2 Ambience of entrenched fundamental rights

The existence of an individual between birth and death is based on being able to exercise fundamental rights such as, at least, first generation rights (see *infra* 2.10.2). The individual's existence together with the environment that that individual regards as a place of abode will determine the nature and extent of fundamental rights that are significant to that individual's existence. The nature of the rights that an individual living in a remote rural area will associate with and find important to exercise, will probably differ from those of an individual living in an urban area. The diversity of the population of South Africa as regards, for example, cultural principles and religious beliefs, plays a role when the legislator has to determine and define the core human values that underlie the society and need to be enshrined. Once the core rights are enshrined, the requirements of specific interest groups may be addressed in specific legislation. An example is found in section 15 of the 1996 Constitution which enshrines the core right to freedom of religion, belief and opinion. Section 15(3) makes it possible for legislation to be passed to recognize marriages of specific interest groups. Such an arrangement is more practical since the framers of a set of entrenched fundamental rights, cannot be expected to anticipate every possible eventuality to be entrenched (Law Commission 1994: 2, 3 and 20).

Chapter 3 of the 1993 Constitution contained 28 sections (sections 8 to 35) regarding guaranteed rights. There were, however, also other provisions in the 1993 Constitution that applied to all rights. Sections 8 to 32 covered, amongst other aspects, the persons, conduct and interests protected by the listed rights; the binding effect of the rights on public institutions and on their activities; and the control and enforcement thereof. Sections 33 to 35 arranged the limitation and suspension of rights, and the application of international and foreign sources when interpreting the entrenched rights. Chapter 2 of the 1996 Constitution titled "Bill of Rights" contains 33 sections (sections 7 to 39) regarding protected

fundamental rights. Sections 9 to 35 refer to particular guaranteed fundamental rights. Sections 7 and 8, and 36 to 39 arrange the promotion, application, limitation, derogation from, enforcement and interpretation of the Bill of Rights.

An important and very basic rule to be aware of is that the constitutionally entrenched fundamental rights protect the rights and freedoms of the inhabitants of South Africa against infringement by public administration activities. Those rights must be respected, protected, promoted and fulfilled by the state authority. The said rights furthermore apply to all law and bind all public institutions at all levels of government. It appears beyond doubt that the entrenched rights contain enforceable legal rules and not merely policy guidelines or directives of state authority policy. The word "bind" means that public officials in a public institution, when performing administrative functions and exercising their discretions and views, are constitutionally compelled to perform their functions within the context of the constitutional principles (1993 Constitution: section 7; 1996 Constitution: sections 7 and 8).

Another important aspect is that the entrenched rights are justiciable (see *supra* 1.9 "justiciable") and the fundamental rights can be protected and enforced by competent courts of law. The radical change in South Africa from parliamentary sovereignty to a system with constitutional supremacy and entrenched fundamental rights, entails that the activities of public officials are since 27 April 1994, no longer subject to political dominance by the government of the day but subject to constitutional principles (Basson 1995:13).

The ambit of a fundamental right is, however, not absolute or without boundaries and it cannot be applied in public administration merely at face value. The efficacy of each right will depend on the examination thereof within the provisions of its constitutional framework. When a fundamental right is applied, there are several factors that are of significance and need to be taken cognisance of. Such factors include, among other, the application, nature and ambit of each of the different fundamental rights; the statutory limitations placed on each right; and the impact the entrenched fundamental rights have on legislation that came into operation before 27 April 1994. It is now apparent that the entrenched fundamental rights may impact upon and have far-reaching consequences for public administration and also have a major effect upon the manner in which public officials execute their administrative functions. It seems a necessity that public officials be guided by the principles which flow from the entrenched fundamental rights and the law.

Following now is a categorisation of rights.

2.10 Categorisation of rights

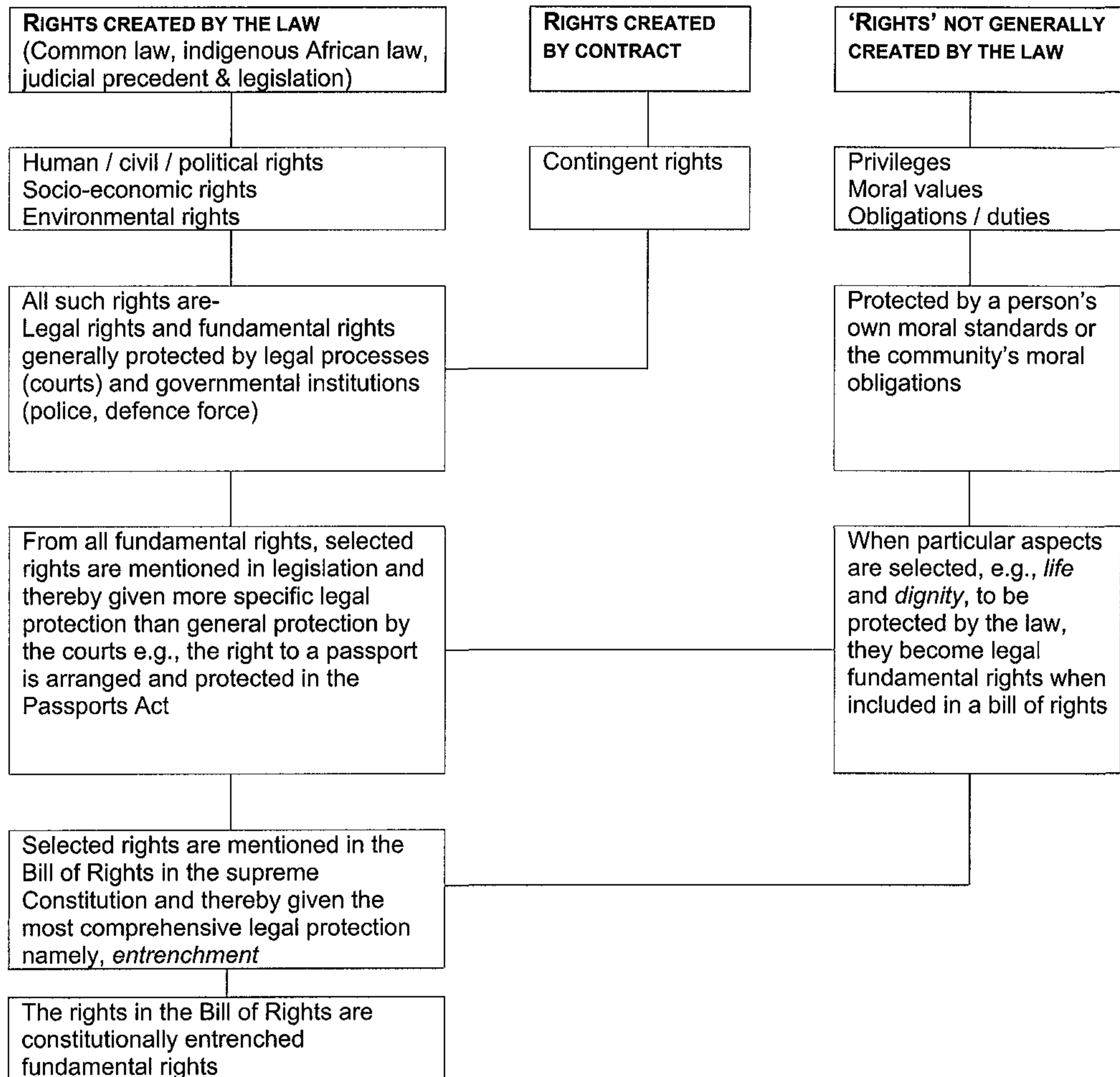
In the discussion that follows a differentiation is made between rights created by the law, contingent rights, privileges, moral values and obligations. Thereafter, an exposition is made of the three generations of rights.

2.10.1 Fundamental rights distinguished

This thesis is primarily concerned with fundamental rights and more specific, entrenched fundamental rights. In Figure 2.4 a categorisation of rights is given and the term "fundamental rights" is used as an inclusive term which is made up of groups such as human/civil/political rights, social economical rights and environmental rights. These mentioned groups of fundamental rights emanate from the law in its different forms.

Selected rights from the 1996 Constitution enjoy either strong protection (entrenchment in the Bill of Rights) or lesser protection (in the Constitution but not in the Bill of Rights, for example section 211(1) that recognises traditional leadership according to customary law). All inhabitants of South Africa and juristic persons have access to all fundamental rights. This access to fundamental rights is, however, subject to particular conditions and circumstances as indicated in Figure 2.4 (Van Niekerk 1990:80 and 87).

FIGURE 2.4 CATEGORISATION OF RIGHTS



2.10.2 Three generations of rights

It is customary to categorise fundamental rights and to distinguish between three generations of such rights. From this grouping it is possible to select and indicate rights which are of such a fundamental nature to a person's daily life and activities that such rights require constitutional recognition and protection. The groups are (Flinterman 1990:76; Van Niekerk 1990:80; Dlamini 1990:96; Hosten *et al* 1995:548):

- First generation rights (blue rights)

First generation rights are civil and political in nature. The state authorities are expected to respect these rights and are prohibited from interfering in the affairs and interests of the individual. These rights are centred on freedom as they instruct the state authorities to refrain from performing any act that will be a transgression of the rights of the individual. People are given the freedom to –

- think of their requirements
- vote for political leaders of their choice
- choose what to do in societal events
- associate with people of their choice
- express themselves politically and otherwise
- have access to information held by public institutions

Examples of first generation rights are the right to vote, the right to freedom of expression, the right to freedom of association, the right to life, the right to freedom of religion, belief and opinion, the right to property, the right to human dignity, the right to freedom of movement, the right to citizenship and the right to equality.

These rights are referred to as *blue rights* as blue is a colour associated with freedom and harmony. It implies that a denial of these rights would lead to violence and disorder.

- Second generation rights (red rights)

These rights relate to the socio-economic requirements of the individual. The rights do not so much strive for the limitation of the arbitrary activities of the authorities, but rather for the improvement of the socio-economic requirements of the individual. Such rights afford people economic, social and cultural security and give people the right to basic necessities in life such as food, shelter, health-care and work. The authorities are not only expected to refrain from interference, but should fulfil an active role in providing such necessities.

Examples of second generation rights are the right to access to housing, the right to basic education, and the right of access to health-care. Enforcing these rights is difficult and sometimes impossible as it depends on a government's resources with which to supply. A government cannot be compelled to provide food and shelter to people if the government

does not have the means and funds to do so. It is for this reason, perhaps, that the South African Bill of Rights only grants a right of access to certain second generation rights (1996 Constitution: sections 26(1),27(1)).

These rights are referred to as *red* rights as red is a colour associated with communism. The rights, for example, to medical care, housing, and education, were stressed and provided in the former communist countries.

- Third generation rights (green rights)

Third generation rights place the emphasis on group rights. The state authority is expected to uphold these rights. The rights are aimed at unity between people and their indispensable solidarity. Examples of third generation rights include the right to peace, the right to self-determination, cultural, religious and linguistic communities, and the right to a clean environment.

Third generation rights are also called *green* rights as they relate to the environment that is represented by the colour green. The most important right here is the right to a clean environment. This would imply the right to unpolluted air, and the right to clean water.

2.1.1 Summary

As indicated in the purpose of the study (see *supra* 1.3), constitutionally entrenched fundamental rights and public administration fulfil the primary roles in the thesis. The aim of this chapter was to analyse the components of South Africa's law as sources of fundamental rights, and give an exposition of the concept of entrenched fundamental rights.

Initially, the meaning of the term the law was analysed (see *supra* 2.2.1). A distinction was drawn between, firstly, the law of a sporting code as being made up of the rules of the game, secondly, the law of the legal system of the country as being legal rules of human conduct, and, thirdly, the law of ethics as being rules of moral conduct. The law of the country was distinguished from the other two types of law by being the only law applicable to the conduct of all persons in the country, given official recognition and applied and enforced by the authority of the state (see *supra* 2.2.1). Thereafter a comparison was drawn between the law and ethical rules. Ethical rules differ from the law due to the rules of law governing a person's physical (external) conduct whereas ethical rules primarily

govern a person's moral (internal) conduct. When such internal conduct becomes an external conduct, for example to steal, the moral conduct then overlaps with the physical conduct. The main difference is that ethical rules are not necessarily binding on all persons, are not part of the law of the legal system of South Africa, and are not enforced by the state authority (see *supra* 2.2.2).

Thereafter it was indicated that the comparative analysis of the Constitutions of the different political dispensations of South Africa, to find common principles, trends and causes, would be a jurisprudential approach. Such an analysis would be done in order to describe, *inter alia*, common legal principles relating to fundamental rights (see *supra* 2.2.3).

The components of South Africa's law were described (see *supra* 2.3). The components are common law (see *supra* 2.3.1), indigenous African law (see *supra* 2.3.2), judicial precedent (see *supra* 2.3.3) and legislation (see *supra* 2.3.4). An analysis of the components of the law was done in order to expose the various sources and nature of the law by which rights are created and granted.

For the purposes of illustrating those persons that include more than human beings acquire rights, an analysis was done of what legal personality comprises (see *supra* 2.4). The analysis indicated that legal personality is not synonymous with only a human being as a natural person (see *supra* 2.4.1) but also with any entity that the law endows with such personality. The last mentioned entity is thus known as a juristic person (see *supra* 2.4.2).

The term "rights" was analysed for the purposes of distinguishing between different terms and uses and to determine whether a right was intended or not (see *supra* 2.5). The analysis was done to indicate that the social order is the source and foundation of existence of every right (see *supra* 2.5.1). Thereafter an examination was done of rights, moral expectations and privileges in order to indicate that moral expectations and privileges ought not to be regarded as rights for the purposes of this thesis (see *supra* 2.5.2). The point was made that moral expectations and privileges are spoken of as rights, but are actually not rights for the purposes of this thesis. Moral expectations and privileges do not form part of a coherent system of legal rules with sanctions for violation of the rules. Contingent rights were also discussed as being created in contracts. Contingent rights are included as rights (see *supra* 2.5.3).

Obligations as legal relationships between persons were discussed (see *supra* 2.6). An important aspect is that an obligation is, just as a right is, created by the law and is the

opposite of a right. If there is no obligation present, then there can be no enforcement of the corresponding right.

The term "legal rights" was analysed in order to narrow down the source of rights (see *supra* 2.7). This was done because I am of the opinion that a legal right has the law as its source and foundation for existence. A legal right is thus created by the law and granted to a person by the law, and also protected by the law. The law also usually states what the content of the legal right is. This means that the right is not unlimited and extends only as far as the enabling law allows.

Thereafter a description was given of the term "fundamental rights" (see *supra* 2.8). The term "fundamental rights" implies that from all the rights that exist, particular rights are, for a given reason, considered essential to the existence of persons. Such rights can then be listed in a bill of rights in order to receive more attention and protection than other rights. By placing those selected rights above other rights for purposes of attention and protection is an indication that such rights are intended to be fundamental. When rights are expressed in or guaranteed by a law or laws, such rights are selected to be fundamental with regard to persons (see *supra* 2.8.1).

An explanation was given as to a basic approach to entrenched fundamental rights (see *supra* 2.9.1). The ambience of entrenched fundamental rights pointed to the fact that statutory entrenchment and especially constitutional entrenchment, affords the highest protection of the rights and freedoms of the inhabitants of South Africa against infringement by public administration activities. Entrenchment means that those rights must be respected, protected, promoted and fulfilled by the state authority. It also appears that entrenched rights contain enforceable legal rules (see *supra* 2.9.2).

A categorisation of rights was outlined in order to provide a clearer comprehension and perspective of the various groups of rights (see *supra* 2.10). The categorisation reflected the logic of the term entrenched fundamental rights as used throughout the thesis. Entrenched fundamental rights enjoy comprehensive protection by being included in the Bill of Rights in chapter 2 of the 1996 Constitution. The categorisation also indicated that moral expectations and privileges are not rights (see *supra* 2.10.1). The three generations of rights were analysed (see *supra* 2.10.2). The first generation of rights is of a civil and political nature. The second generation of rights related to the socio-economic requirements of the individual. The third generation of rights referred to group rights.

Entrenched fundamental rights have now been analysed. When I refer to the "influence of entrenched fundamental rights on the manner in which public administration is exercised" in the chapters to follow, I trust that the reader will comprehend that it is my intention to refer to an influence which is much more than something merely contained in constitutional prescriptions. Chapter 3 of the thesis, accordingly, contains descriptions of the public administration environment of different constitutional dispensations that existed in South African since the Union of South Africa was established in 1910. Similar descriptions are done of the constitutional situations of the former South African colonies, as they existed just prior to 1910, as well as of certain neighbouring southern African countries. The mentioned descriptions are done with the intention of attempting to indicate the extent to which fundamental rights were protected during each of the constitutional dispensations.



Chapter 3

Historical events prior to the inception of constitutionally entrenched fundamental rights in South Africa

3.1 Introduction

To commence this chapter, I want to reiterate that the two salient issues in the thesis are entrenched fundamental rights and public administration. Whereas public administration (see *supra* 1.9 “public administration”) is exercised within every constitutional dispensation globally, entrenched fundamental rights now for the first time prevail in South Africa’s constitutional dispensation (see *supra* 1.2.1).

A comprehensive and non-racial set of entrenched fundamental rights was enshrined in chapter 3 of the 1993 Constitution. Accordingly, on 27 April 1994, the 1993 Constitution introduced South Africa to a new post-apartheid constitutional dispensation subject to a set of entrenched fundamental rights. These rights are now enshrined in chapter 2 of the 1996 Constitution (see *supra* 1.9 “constitution”).

The 1993 Constitution emphasized the protection of fundamental rights. A set of fundamental rights was manifested as a vital component of South Africa’s new constitutional dispensation. This appears to have created a conclusive nexus between public administration and entrenched fundamental rights. The mentioned nexus clearly stemmed from section 7 of the 1993 Constitution. Section 7(1) and (2) provides that the 1993 Constitution’s chapter 3 on fundamental rights shall bind all public institutions (see *supra* 1.9 “public institution”) and shall apply to all public administrative functions performed. Section 7 thus confirmed that when public administration is exercised, such functions shall be exercised with adherence to the provisions of and the principles contained in the set of entrenched fundamental rights. This situation prevails under the 1996 Constitution as corresponding provisions are found in section 8(1) read in conjunction with section 195(1) and (2).

A comprehensive and non-racial set of fundamental rights did not enjoy a constitutionally entrenched status during South African constitutional dispensations prior to 27 April 1994. Only single and mostly racial-oriented rights such as two official languages, enjoyed constitutional protection. Public administration was thus apparently exercised within those dispensations without being subject to such rights with a constitutionally entrenched status. Accordingly, it is my assumption that the manner in which public administration was exercised prior to 27 April 1994, changed when the 1993 Constitution came into operation and prescribed that public administration was subject to entrenched fundamental rights on 27 April 1994. My contention is that the manner in which public administration is exercised, is *de iure* influenced when public administrative functions are performed with an adherence to the provisions of, and principles contained in, a bill of constitutionally entrenched fundamental rights. This implied change in the manner in which public administration is exercised forms the focal point of the thesis.

In an attempt to illustrate the mentioned implied change, the public administrative environment of South Africa's different constitutional dispensations prior to and after 27 April 1994 are analysed. The effect of the constitutional dispensations is described by depicting the political environment and the extent to which fundamental rights were/are protected or disregarded. Particular reference is made to the manner in which public administrative functions are and were legislatively prescribed and exercised. A comparative analysis is ultimately done.

The relevant historical events are reflected as from 31 May 1910 when the first South African constitution came into operation. However, in order to provide a clear perspective of the constitutional environment of 1910 itself, it is imperative to refer to particular aspects of the public administrative dispensations of the four former South African colonies (Cape of Good Hope, Natal, Transvaal and Orange Free State) and also of particular neighbouring British protectorates (Lesotho, Botswana and Swaziland).

In this chapter, a description is firstly given of the constitutional dispensations of the four former South African colonies (Cape of Good Hope, Natal, Transvaal and Orange Free State) and of three British protectorates (Lesotho, Botswana and Swaziland). Secondly, an exposition is given of the South African constitutional dispensations which existed after 1910 and prior to 1994. The majority of the facts are descriptive of the events leading up to the inception of constitutionally entrenched fundamental rights in South Africa. The inception of the constitutionally entrenched fundamental rights is described thirdly. Finally, a summary is given of the contents of this chapter.

3.2 Constitutional dispensations prior to Union

To place the then British style and dominance of the South African constitutional environment of 1910 in a clear perspective, the events leading up to that state of affairs are examined. There were no bills of rights as such in the constitutional dispensations examined. The facts reflect to what limited extent fundamental rights were protected and adhered to in public administration.

It is not my intention to give a detailed account of the public administration environment of each of the mentioned colonies and protectorates. It is my intention to deal with the constitutional and public administration environment as briefly as possible. Each account is merely aimed at being a historical survey to touch on principal features of the public administration situation of the relevant colony and protectorate during the latter part of the nineteenth century and up to 1910. This is done so as to reflect constitutional prescriptions relating to public administration and fundamental rights.

3.2.1 Cape of Good Hope

The second British occupation of the Cape of Good Hope took place on 10 January 1806. All executive and legislative authority was vested in the governor. The governor of the Cape ruled supreme as an autocrat, being subject only to the British government in London. The governor supervised the Cape's administration of justice and had complete control over public administrative matters. The governor governed the Cape in a bureaucratic (see *supra* 1.9 "bureaucratic and autocratic") manner with public officials from England to manage public affairs. Their high salaries absorbed more than one fourth of the entire revenue. Many practices by the governor disregarded the fundamental rights of the local inhabitants and led to much protest among the inhabitants. English was proclaimed the only official language, taxes were high and particular groups of people were classified as inferior to the Europeans. Almost thirty years later a supreme court with professional judges was established, which put an end to the judicial functions of the governor. Consequently, the unsympathetic rule by the governors was partly reformed (Theal 1894:139,148,176 and 196; Walker 1928:197-199).

On 1 July 1853 a parliament was constitutionally established at the Cape. The parliament consisted of the governor, a legislative council and a house of assembly (Constitution Ordinance 1852:section 1). The chief justice of the Cape presided over the legislative

council while the governor made the laws. Section 8 of the Cape Constitution contained the first and only constitutionally protected fundamental right. Section 8 provided for a non-racial males-only franchise with a low voting qualification. The Constitution did not contain any provisions relating to other fundamental rights. Apart from a few important revisions, the 1852 Constitution remained the Constitution of the Cape up to 1910.

The executive authority remained in the hands of the governor. This situation changed on 28 November 1872 when responsible government was granted to the Cape in terms of the Constitution Ordinance Amendment Act, 1872 (Act 1 of 1872). From 1 December 1872, executive authority resided for the first time in a prime minister and a cabinet. In this way the British cabinet system was introduced to the Cape, and the Cape colony achieved complete colonial self-government, that is parliamentary government with ministerial responsibility. This governor's position was radically altered. He was a representative of the British government but had to execute his duties on the advice and with the approval of the Cape ministry. All legislation, however, still had to be assented to by the British parliament in London (Muller 1993:188).

Up to about 1870, more than 90% of the inhabitants of the Cape were employed in agriculture and stockbreeding. Secondary industries such as the wine, clothing and wagon-building trades developed slowly. The importation of textiles, metals and general goods increased steadily. National income was derived from, among others, taxes on imports, business transactions and fines. The discovery of diamonds between 1867 and 1870 in the northern Cape, stimulated growth in the Cape's economy. Communication, the postal service and industry grew and improved rapidly. The railway development of the Cape was under government control and by 1892 the Cape railway line had reached Johannesburg (Muller 1993:204,205).

By the end of the nineteenth century, the Cape colony had a broad public service that operated in terms of the 1852 Constitution, as amended. Apart from the franchise, as mentioned above, the Constitution still did not, at the turn of the century, contain further provisions relating to fundamental rights. All the Cape's public and government institutions were British oriented and in this manner a strong British influence remained at the Cape. The Cape's constitutional model remained substantially unaltered until Union in 1910. This model was applied in the other three British colonies (Natal, Transvaal and Orange Free State) after being annexed by Britain (Wiechers 1985:193).

It appears to me that the Cape's Constitution did not contain any protected fundamental rights, other than the franchise, that could have had an influence on the manner in which the executive authority was exercised. Public administration was thus apparently, prior to 1910, exercised in an autocratic and bureaucratic manner with little regard given to fundamental rights.

3.2.2 Natal

On 12 May 1843 Britain annexed the Republic of Natalia - as it was then named. On 31 May 1844 Natal became a district of the Cape colony. The government instituted for Natal, was a typical British Crown Colony system of government. A lieutenant governor was the head of the executive council. He was assisted by an executive council of five members and acted in an executive capacity only. The executive council sat behind closed doors and its proceedings were secret. Legislative authority remained with the Cape government and all legislative approvals had to be received from Cape Town or London. Later a council of three could assume legislative authority in matters of urgency. The lieutenant governor and other council members were responsible to ministers of the British Crown in London, who in turn were responsible to the electorate in Britain. The lieutenant governor's ultimate responsibility was therefore to an authority that knew little or nothing of the affairs of the colony of Natal at that point in time (Robinson 1900:21,22; Hall 1969: 2,115; Muller 1993:214,217).

The inhabitants of Natal had no say in legislative or executive policy and there was no means by which they could control or influence the actions of the British public officials. The inhabitants could only express their wishes in the form of petitions to the lieutenant governor. This situation led to Crown colony government, in its arbitrary manner, not being popular with the inhabitants of Natal (Hall 1969:3, 116).

The lieutenant governor was responsible to appointment public officials to administer the affairs of the colony. A major difficulty that he encountered was the lack of local suitably qualified officials. When officials from Britain were appointed in Natal, they at first experienced difficulty in adapting to the circumstances. Only after long periods of time, they grew accustomed to their new environment (Hall 1969:57).

On 24 March 1857 Natal obtained a limited form of representative government. A legislative council could pass laws and control Natal's finances. The inhabitants were

mostly involved in agriculture and the government's primary actions were to promote trade, build roads and control customs at the Durban harbour (Muller 1993: 219,225).

Britain established responsible government in Natal on 10 May 1893 in terms of the Constitution Act, 1893 (Act 14 of 1893). The Constitution provided for a parliament of two houses consisting of a legislative council of eleven members and an elected assembly of 37 members. The Constitution did not contain any references to fundamental rights. The Franchise Amendment Act, 1896 (Act 8 of 1896) wasn't very liberal and prescribed a voting qualification to virtually eliminate the vote of non-White voters.

Constitutionally Natal remained part of the Cape of Good Hope. Appointments of public officials were done by the Natal executive council in terms of directions from the colonial office in London. The constitutional environment in Natal and the public administration that Natal had until Union in 1910 was thus in accordance with the British system as applied in the Cape. Only in terms of the 1894 Civil Service Act, were fixed rules laid down in terms of which a public service was established (Lynch 1975:4; Nieuwoudt *et al* 1979:74).

It is my assumption that the public administration in Natal was very similar to that of the Cape of Good Hope. Judging from the principles of the 1896 Franchise Act and the absence of any protection of fundamental rights in the 1893 Constitution, it appears that the British government intended to keep the Natal administration British oriented. Public administration was therefore not subject to constitutionally or other protected fundamental rights and was thus apparently exercised in an autocratic and bureaucratic manner, similar to that in the Cape. This situation remained so until Union in 1910.

3.2.3 Transvaal

In 1853 a newly formed Afrikaner state was named Die Zuid-Afrikaansche Republiek and in 1902, as a British colony, renamed the Transvaal. On 13 February 1858 a constitution for the Republic, the Grondwet van die Zuid-Afrikaansche Republiek, 1858, was passed by its Volksraad. Section 29 of the 1858 Constitution declared the Volksraad to be the supreme authority and legislative body. The executive State President was assisted by an executive council in administering the Republic (section 171). The public administration of each district regarding, *inter alia*, the sale of ammunition and property, market and pound fees, taxes and licences, was managed by a landdrost assisted by public officials (Theal 1894:336; Bot 1965:2-4).

The Constitution also provided that there would be one independent and free nation (section 3) but that there would be no equality between Coloured and European (White) citizens (section 9). A constitutionally entrenched fundamental right was contained in section 10 in that slavery was prohibited. The franchise was granted to all White male citizens of 21 years and older (section 31). The supreme court exercised the judicial authority (sections 127 and 143) and legal officials were to be independent and execute their duties in terms of the country's laws (section 15). In terms of section 149 White males were not to be sentenced to corporal punishment by a court. The Constitution granted another constitutionally entrenched fundamental right in section 19 which made provision for freedom of the press, subject to the press being responsible for defamatory reports.

The government was a single body - the Volksraad - that had no actual government departments before 1877. The Volksraad performed its executive duties in a perfunctory manner. Nevertheless, the inhabitants of the Republic had experiences of the public administration of the Cape Colony. The efforts of the Volksraad were apparently directed towards securing the control of the central government in order to secure the local liberties they sought as emigrants from the British dominated Cape colony. This approach appears from the contents of the 1858 Constitution (Du Toit 1975:14,110). The 1858 Constitution of the Republic was not merely a haphazard document but rather a document that gradually developed with experience - rejecting that which appeared alien to the inhabitants of the Republic, and accepting that which was considered just and reasonable (Du Toit 1975: 41).

Britain annexed the Transvaal in 1877. Annexation was lifted in 1881. The 1858 Constitution was then re-enacted on 19 July 1889. Another Volksraad was constituted in terms of this Constitution. In the Transvaal's constitutional system, the Volksraad was the supreme authority before the Constitution. If a decision by the Volksraad were contrary to the provisions of the Constitution, the decision would be regarded as valid and would lead to an amendment of the Constitution (Van Oordt 1899:605). The State President had no authority, while exercising his public administrative duties, to infringe on citizens' fundamental rights. He could, however, request the Volksraad to do so by means of legislation (Van Oordt 1899:483). The principle implied that every citizen had unlimited freedom and could, within the law, exercise any fundamental right (Constitution 1889: section 8). No person had authority to infringe on the freedom and rights of other persons. Rights and freedoms were only limited by legislation (Van Oordt 1899:551). This principle was similar to the one followed in Britain (see *supra* 1.9 "constitutionally entrenched" and *supra* 2.8.2).

After the restoration of the Republic's government in August 1881, the Republic's civil service, finance and education, among others, had to be completely re-organised. A railway system was gradually developed and the main discovery of gold in the mid 1880's helped to improve the Republic's financial position (Muller 1993: 276, 281, 283). The education department appointed a school superintendent to ensure proper control over schools. The superintendent had to report to government on progress made with the organisation of education. All teachers in government schools were public officials. To ensure that a proper postal service was maintained to the benefit of the public, the executive council appointed a postmaster general. The postmaster general had to furnish a 1000 pounds guarantee and could be fined 5 pounds for negligence of duty (Du Toit 1975:124,136,141).

Britain again annexed the Transvaal in 1900. Until Union in 1910, Lord JX Milner developed the public administrative sector according to British principles. The culture and infrastructure of the public administration was similar to that of the Cape (Walker 1928:517).

I assume that the public service of the Republic differed radically from that of the Cape and Natal. The aspects of education and postal services, that were described, are indicative of efforts by the Republic's executive council to develop and exercise public administration to the benefit of the inhabitants. A cardinal point is that the State President had no authority to disregard fundamental rights when exercising his public administrative duties. I have no hesitation in stating that between 1881 and 1900, the Republic of Transvaal's public administration was subject to constitutionally entrenched fundamental rights. Unfortunately, the situation changed in 1900 when Britain annexed the Transvaal and implemented a British oriented public administration.

3.2.4 Orange Free State

In 1854 the Republic of the Orange Free State was established. The constitution of the Orange Free State of 23 February 1854 was heavily influenced by the constitutional principles of France and of the United States of America which recognized the principle of protecting fundamental rights against infringement by governmental activities (see *infra* 3.3.1.3) (Thompson 1954:49; Muller 1993:235).

The Constitution provided that citizenship of the Republic of the Orange Free State could be acquired by White persons born and living in the territory (section 1). The franchise was

available to all citizens who were majors (section 4). In terms of section 58 the laws of the Republic were equal towards all persons, and section 59 provided that each inhabitant of the territory was to be law-abiding. Personal freedom was guaranteed for those living within the law (section 61). Other fundamental rights constitutionally protected were property rights (section 60) and the freedom of the press, providing such activities were within the law (section 62).

The Constitution provided that the Volksraad had the highest legislative authority (section 5). The Volksraad was, however, subordinate to the Constitution as it guaranteed civil liberty in terms of section 61. In terms of section 31, the executive State President was the head of the executive and administrative authority. The State President and the public departments were responsible to the Volksraad for all their activities. The State President was assisted in his duties as head of state by the executive committee which consisted of the government secretary, the landdrost and three non-official members (Muller 1993:235).

Section 48 placed the judicial authority with the courts but did not expressly confer upon the courts the right to test legislation. Section 12 of the Lawbook of the Orange Free State, 1854, however, provided that the High Court had the authority to ensure that all legislative activities within the state were executed within statutory prescriptions. This came to be accepted as the authority of the courts to review enactments of the Volksraad (Boule 1989:120). This granted the courts the authority to protect fundamental rights against infringement by the government.

By 1860 the State President had introduced a series of ordinances and administrative measures aimed at stabilizing the entire public service which was still in disarray at that point in time. The government appointed several British persons from the Cape Colony to important government posts but also concentrated on training young people from the Free State to fill the increasing number of vacancies (Muller 1993:246).

During the 1870's the government passionately promoted education and appointed talented persons from abroad as principle of the two schools which offered advanced education in the Free State. By 1879 Bloemfontein had been connected telegraphically with Cape Town and Durban. In 1889 a mounted police force was established for the purposes of controlling stock theft and enforcing labour legislation. By 1893 the Free State's public service had progressed into a stable administration (Muller 1993:250,252).

Britain annexed the Republic on 24 May 1900. On 5 June 1907 the Orange Free State was granted responsible government which remained based on British principles until Union in 1910 (Denoon 1972:105). The franchise during this period remained confined to White males.

My assumption is that the Orange Free State strived at developing its public service between the 1870's and the 1890's. The constitution of the Free State protected certain fundamental rights and placed the Volksraad subordinate to the authority of the constitution. This situation, together with the fact that the courts had authority to review legislation and thereby ensure that legislative provisions did not infringe on fundamental rights, reveals that public administration in the Free State was subject to constitutionally protected fundamental rights. When Britain annexed the Free State in 1900, the government structure and environment changed and was similar to that of the Cape Colony until 1910.

3.2.5 Lesotho

In 1831 Moshoeshe I, the founder of the Basotho nation, offered a haven to destitute people who fled from the reign of terror by Zulu kings. Moshoeshe's group later settled in Thaba Bosiu in the west of Basotholand, the present Lesotho. Moshoeshe instituted himself as king and to his community he extended protection, land and cattle in return for loyalty and allegiance (Theal 1894:171).

Moshoeshe's political-administrative structure was based on an autocratic-monarchical system by which the king made the law and applied it through the chiefs. The king regularly consulted his royal advisors and the pitso (the assembly of people) on certain affairs. The king's own opinion usually triumphed but he was careful to avoid giving a clear impression that his decisions were autocratic. This could be regarded as the traditional public administration in the form of chiefs' orders and activities. This indigenous African law (see *supra* 2.3.2) included fundamental rights which related to groups rather than to individuals. The status of a man was largely determined by his position in a collectivity, such as a village, age group or clan. This approach differed from the Western approach in terms of which the individual could lay claim to a large variety of rights within the society in which he lived. The traditional system also had several norms such as the subordinate status of women, that were accepted and practiced as part of the collective approach. Seen from a

Western point of view, such norms were quite inconsistent with the principle of guaranteed fundamental rights (Reyntjens 1992:41 and 47).

In the traditional society there was no question of a differentiated, individualized existence or individualized fundamental rights. At communal gatherings the chief of each community dealt with basic requirements and fundamental matters affecting all the people of that community. Protection was therefore offered to communal fundamental rights only. Political rights were unknown and the franchise right did not exist at that point in time. Consequently, during that period there were no public institutions to manage public affairs and exercise public administration, as it is known in a Western sense (Grobbelaar 1939:xii-xv; Hailey 1953:74).

Britain annexed Lesotho in 1868. In 1884 Lesotho became a British protectorate and was placed under the administrative authority of the British High Commissioner. British administration was only indirectly applied in Lesotho in order to preserve the indigenous and customary method of Basotho governance. The maintenance of a customary form of political assembly was also provided for in paragraph 16 of the appendix to the South Africa Act, 1909. This influenced Lesotho's subsequent constitutional development. The form of governance which accordingly emerged, was entirely different to the parliamentary pattern set by Britain in the four South African colonies (Grobbelaar 1939:2).

In 1908 Britain considered incorporating Lesotho into the Union of South Africa under one government and made provision for the incorporation in the South Africa Act, 1909 (section 151 and appendix). Due to South Africa's policy at that stage of racial separation, the idea of incorporation was abandoned (Hailey 1953:79). Lesotho's constitution of 1965 provided for independence from Britain and contained a set of entrenched fundamental rights aimed at protecting individual fundamental rights.

I assume that the traditional society of Lesotho did not have a public service and public institutions as it is known in a Western sense. There was no written constitution or other laws, by means of which fundamental rights could be protected. The political-administrative structure had some similarity to the British system in that it was autocratic. Only communal fundamental rights existed and the protection thereof stretched as far as the decision of the king. It appears thus that Lesotho's political environment did not contain constitutionally protected fundamental rights, as known in a Western sense.

3.2.6 Botswana

After much conflict between Tswana tribes and between Whites and Tswana tribes, Britain in 1885 annexed the territory of Bechuanaland, later known as Botswana. In order to preserve the indigenous and customary method of governance in Botswana, Britain only indirectly applied administrative authority over the protectorate. The maintenance of a customary form of political assembly was also provided for in paragraph 16 of the appendix to the South Africa Act, 1909. As in the case of Lesotho, the incorporation of the protectorate into the Union of South Africa was considered in 1908 but later abandoned (Hailey 1953: 271).

The Batswana people were comprised of independent tribes and did not have an overarching governing person or body such as a paramount chief or a monarchy. The most of the Batswana belonged to the Setswana-speaking tribes. The minority belonged to the Bakalanga, Baherero, Basarwa and other semi-nomadic groups (Botswana 1986:1-7). In each tribe there was a tribal chief-in-council. The council itself consisted of headmen whose posts were hereditary. Each headman represented a ward and exercised legal authority. On the local level, the head of a family was the authoritative figure. The tribal chief symbolized political unity, prosperity and spiritual contact with ancestors. The tribal chief's family council decided on aspects such as family matters and marriages of headmen. Tribal fundamental rights were cared for collectively and there was no question of a claim to individualized fundamental rights. Each tribe had a tribal court which applied tribal law (Coetzee 1986:2). The unrestricted and autocratic authority of the tribal chiefs and the customary system of governance, in terms of indigenous African law (see *supra* 2.3.2) continued unabated until 1919. Britain then instituted the Native Advisory Council and the European Advisory Council as advisory bodies between tribes (Hailey 1953:210). On 30 September 1966, with a constitution containing a bill of rights, Botswana gained independence from Britain and became a republic (Coetzee 1986:39).

I assume that, as in the case of Lesotho, Botswana had an indigenous and customary political system. Botswana did not have public administration and a public service, as it is known in a Western sense. Tribal fundamental rights were cared for collectively and tribal chiefs exercised political authority in an autocratic manner. Botswana did not have a written constitution and there was thus no system of constitutionally protected fundamental rights.

3.2.7 Swaziland

In 1815, groups of Black people known as the Embo-Nguni settled in the region known today as Swaziland. In terms of Swazi customary law, the established foundation of the Swazi socio-political system was the double kingship between the king and the king's mother. The king was not an absolute monarch since he ruled in consultation with his council of advisors while being under the control of his mother. The king's mother had authority to bring the king to order in matters where his decisions may have been to the detriment of the national interest and welfare of the Swazi people (Matsebula 1988:8-11). Swaziland thus had a non-autocratic socio-political system.

The political-administrative structure of Swaziland was based on indigenous and customary principles. In the early Swazi traditional society, the basic requirements and fundamental matters affecting all the people of a community, were dealt with on a communal basis. Protection of communal fundamental rights existed. No person was offered protection of individualised fundamental rights. British and Afrikaner political-administrative principles later manifested themselves in the Swaziland system when White people bought Swazi agricultural land and then sought protection of their property rights. The White Afrikaners from the Transvaal and the British, accordingly, influenced the constitutional development of Swaziland. The influence was in the form of developing principles regarding land transactions, borders, defence, mineral rights, grazing rights and trade. In 1875 the Swazis entered into a protection agreement with the Transvaal in terms of which the Swazis were subjects of the Transvaal but were allowed to manage their own public administration (Leyds 1914:318). In 1881 Britain's annexation of the Transvaal ceased and Britain declared that Swaziland should exist as an independent protectorate rather than be subordinate to Britain (Matsebula 1988:61). The maintenance of a customary form of political assembly was also provided for in paragraph 16 of the appendix to the South Africa Act, 1909.

From 1884, the then king of Swaziland, Mbandzeni, appointed White persons as his resident advisors with authority to issue land concessions and collect revenue. Many concessions were issued and in 1887 the Whites living in Swaziland set up a committee (known as the "White Committee") to manage and protect "White matters". The South African Republic (Transvaal) administered Swaziland from 1895 until 1899. This administration wasn't very successful and caused unrest among the Swazi's as the authority of the Swazi king was subject to the approval of the administrator. In 1899 Britain

took over total control of Swaziland until Swaziland's independence in 1968. Swaziland's 1968 constitution contained a bill of rights to protect, *inter alia*, the land rights of Whites (Coetzee 1986:243).

My assumption is that the indigenous and customary political-administrative structure of Swaziland was of a non-autocratic socio-political nature. Communal fundamental rights were protected in terms of the customary system. No written constitution and no public administrative institutions existed, as it is known in a Western sense. The nature in which the king exercised his authority while being under the control of his mother, and the protection of the interests and welfare of the Swazi people against arbitrary decisions by the king, is an indication that the Swazi system was very similar to one in which constitutionally protected fundamental rights existed. The influx of Whites into Swaziland in the 1870's, brought about changes in the Swazi political system although the basic customary structure remained the same.

3.3 South African constitutional dispensations

Three different constitutional dispensations existed in South Africa between 31 May 1910 and 27 April 1994. For the purposes of this chapter of this thesis only, the events described are grouped into four periods, namely 1910 to 1944, 1945 to 1960, 1961 to 1982, and 1983 to 1994. My intention is to describe two aspects. Firstly, the extent to which fundamental rights were protected constitutionally, and by means of other legislation, during each of these mentioned periods. Secondly, the manner in which the governing authority exercised its executive functions and, accordingly, public administration. This will enable me to analyse the extent to which protected fundamental rights had a *de iure* influence on the manner in which the governing authority exercised its executive functions.

3.3.1 Period 1910 to 1944

The first South African constitutional period commenced on 31 May 1910 when the four former British colonies, the Cape of Good Hope, Natal, Transvaal and Orange Free State, were joined on 31 May 1910 to constitute the Union of South Africa. The four colonies then became the provinces of the Union. In terms of the provisions of the preamble to, as well as section 9 of the 1909 South Africa Act, 1909, South Africa became an independent self-governing state within the British Commonwealth of Nations with the King of England as symbolic head of state. The British Westminster constitutional style and traditions,

accordingly, still applied in and dominated the South African governmental system (Thompson 1960:460; Dugard 1978:5; Wiechers 1989:46). Before 1910 South African public life was influenced and dominated by social and political differences between the Afrikaners and the British, also referred to as the "Boer versus Brit" situation. The position of other racial groups than the White group, drew and enjoyed little or no attention (Thompson 1960:6-7). At the same time, the international community gave no consideration to the lack of protection of different racial rights and justice in South Africa. Colonialism, in which the suppression of liberty played a central role, was widely accepted and practiced throughout the world (Thompson 1960:103-105 and 187; Wamala 1994:311-312).

3.3.1.1 South Africa Act, 1909

The South Africa Act, 1909, was passed by the British parliament on 20 September 1909 and came into operation on 31 May 1910. Its primary function was to constitute and arrange the Union of South Africa (see preamble to and section 4 of the 1909 Act).

At that point in time the Union had a multi-cultural society characterised by distrust towards each other following the 1899 - 1902 war (Engelenburg 1928:81 and 87). It is my view that under those circumstances, the 1909 Act may have been the appropriate and ideal instrument by which a comprehensive protection of fundamental rights could have been introduced to South Africa. The 1909 Act was, after all, the first legislation to arrange public affairs and administration on a national basis. A National Convention was held to plan and draft the South Africa Act, 1909. The Convention met on three occasions between 12 October 1908 and 11 May 1909. Both the government and opposition parties of the four colonies were represented at the Convention (Muller 1993:381). The Transvaal and Orange Free State delegations must have, to my mind, still been very much aware of the extent to which fundamental rights were protected in their respective Republican constitutions. The concept of protected fundamental rights could have been a basis upon which the diversity between the Boers and the British inhabitants of the new Union of South Africa could possibly have been removed and replaced with trust, co-operation and societal equilibrium.

The 1909 Act did not, however, include a comprehensive set of entrenched rights, but confined itself to only arranging odd aspects relating to fundamental rights. This limited entrenchment of fundamental rights was apparently ensured by the pervasive influence of British constitutionalism of parliamentary supremacy (see *supra* 2.8.2), which regarded

constitutional guarantees as unnecessary (Van der Vyver 1976:76). The drafters of the 1909 Act, JX Milner and JC Smuts, were devoted to the British Westminster system (Thompson 1960:4 and 6), and this resulted in the Westminster tradition enjoying more precedence in South Africa's constitutional matters than the requirements of the Union itself (Thompson 1960:95-97; Wiechers 1989:46). This view was unchallenged in all British controlled territories and contributed to the little interest shown towards constitutionally entrenching fundamental rights comprehensively when the 1909 Act was being prepared (Dugard 1978:16 and 25).

Only a few matters relating to fundamental rights were entrenched in the 1909 Act. These were the protection of the Cape franchise for all persons irrespective of race or colour (section 35(1)), the protection of registered voters in all provinces irrespective of race or colour (section 35(2)), and that English and Dutch would be the official languages on a footing of equality (section 137). The 1909 Act restricted particular rights on the basis of colour. The qualifications to be elected as a member of the House of Assembly or to the Senate, included that the person had to be of European (White) descent (sections 44(c) and 26(d), respectively).

The Parliament of the Union had supreme authority over the Union (section 59). Section 95 of the 1909 Act constituted the Supreme Court of South Africa with original jurisdiction to test the validity of provincial ordinances (section 98(3)(b)), but not parliamentary legislation. The exclusion of the courts' jurisdiction to test parliamentary legislation against unconstitutionality, infringement of fundamental rights and inconsistency with existing democratic values, confirmed Parliament's unlimited legislative authority.

3.3.1.2 Aspects of the public administration environment of the Union

Just prior to Union, each of the four South African colonies had responsible government and a public service based on British form, principles and culture. After Union the four public services amalgamated to constitute the Union Public Service (Wiechers 1985:194; Nieuwoudt *et al* 1979:74-76). The South Africa Act, 1909 only provided a framework for a public service structure and the Union Public Service was created in terms of the Public Service and Pensions Act, 1912 (Act 29 of 1912). Until the Union Public Service started functioning on 1 August 1912 (Proclamation No. 1014 of 25 July 1912), the public service of the Transvaal, as instituted and developed by Lord JX Milner, served as an interim Union Public Service (Muller 1993:232).

The public service which was formed after 1910 was based on similar British constitutional principles as which formed the basic infrastructure in earlier years (Thompson 1960:199; Denoon 1972:115; Wiechers 1989:46). Public administration was exercised in a manner aimed at controlling public affairs rather than rendering a service to the public. During the 1930's, following the effects of the drought and depression, certain government departments were created in order to render a public welfare service to the White community (Eloff 1981:16). This change in government attitude did not in general change or improve the lack of equality and humanism as only particular fundamental rights of only one group of people, based on colour, were addressed. The manner in which public administration was exercised in public institutions was clearly illustrated in the matter of *Benjamin v Pietermaritzburg Liquor Licencing Board* 1939 NPD 121 which was heard by the Natal Supreme Court. The Licencing Board had refused an application for a liquor license because the hotel concerned was situated in a non-White area. In an appeal against the decision of the Board, the court found that the Board had discriminated against Indians and Coloureds on a racial basis. The discriminative actions by the Board weren't prescribed in the relevant liquor legislation and were thus not justified. My view is that the Board exercised public administration in a manner that disregarded fundamental rights. No written constitutional prescriptions existed at that point in time in terms of which the Board was compelled to exercise public administration subject to entrenched fundamental rights.

The government's inclination to arrange public matters with a clear distinction between the racial groups was built into parliamentary legislation. The infringement on fundamental rights emanating from such legislation was almost beyond belief. In terms of the Native Land Act, 1913 (Act 27 of 1913) (now repealed), certain areas of land were identified where only Black persons were permitted to acquire demarcated portions. Only Blacks were allowed to purchase or lease such land from the Black owner. The freedom of trade, *inter alia*, of non-Blacks with Blacks, was restricted. The Native Administration Act, 1927 (Act 38 of 1927) (now repealed), provided that Black persons were required to carry passes to enter certain residential and business areas defined by the Governor General as White areas (section 28). These provisions of section 28 restricted, *inter alia*, the freedom of movement by Blacks. In terms of section 4 of the Immigrants Regulation Act, 1913 (Act 22 of 1913) (now repealed), the Minister of the Interior was empowered to prohibit as immigrants "any person or class of persons deemed on economic grounds to be unsuited to the requirements of the Union or any province thereof". The then Minister declared every Asian person to be unsuited to the Union and to every province in which he/she was not already domiciled. The effect of the prohibition was that all Asians became prohibited immigrants and their free movement from one province to another was restricted. It was in

fact the government's intention to exclude Asians from particular rights (Hansard 1913: columns 1769-1773).

The increasing discriminative restrictions were discouraging particularly for persons other than Whites. This led to the establishment of a Black group naively optimistic (at that point in time) of achieving politically based equality with Whites, and of acquiring respect for their fundamental rights. In January 1912, a small group of educated Black people arranged a meeting near Bloemfontein at which the South African Native National Congress (name changed to African National Congress in 1923) was established with the reverend John L. Dube as the president. The aim of the Congress was to promote a sense of national identity among all Blacks in South Africa and to devise ways and means of ending the political colour prejudice towards Blacks (Lapping 1986:52). During 1914 the Congress fruitlessly sought a reversal of the exclusion of Blacks from South Africa's political institutions and of the land restrictions on Blacks as embodied in the 1913 Native Land Act.

I presume that it was the government's intention that public administration be exercised in a manner that disregarded fundamental rights, especially as far as non-White persons were concerned. My presumption is strengthened by the facts that only odd aspects relating to fundamental rights were included in the 1909 Act and that public administration was exercised in a manner aimed at controlling public affairs. This leads me to believe that, towards White persons, public administration wasn't necessarily exercised in a manner that had regard to their fundamental rights.

This brings me to the aspect of the judiciary during that period. Even though the 1909 Act did not contain distinctive prescriptions relating to public administration and did not include a comprehensive set of non-racial entrenched fundamental rights, I want to assume that the judiciary would have endeavoured to bridge the gap in the 1909 Act by protecting fundamental rights. I also want to, perhaps naively, assume that the approach by the judiciary would guide the governing authority's actions to have a regard for fundamental rights when exercising public administration.

3.3.1.3 Judicial review of legislation

The events surrounding the judiciary (see *supra* 1.9 "judiciary") and its efforts to protect fundamental rights against infringement by governmental activities, were perhaps the most controversial. This also illustrated the negative authoritarian attitude that existed towards the principle of entrenched fundamental rights during this period. The South Africa Act,

1909 created a judicial system that had a prescribed judicial function. There existed, however, a controversy as to the inherent authority of the judiciary to judicially inquire into parliamentary legislation. This legislation naturally created public administration that arranged public matters and, accordingly, affected fundamental rights.

The controversy emanated from events which took place earlier in the former colonies. The British occupation of the Cape in 1806 brought with it the British legal influence on South African law. Also introduced at that time was the British concept of parliamentary supremacy with the notion that no authority other than parliament itself may control an act of parliament (Wessels 1908:386, *passim*). This view was unchallenged in all British controlled territories and contributed to the exclusion of the courts' testing right of legislation when the South Africa Act, 1909, was being prepared (Dugard 1978:16 and 25).

In the United States of America the principle of judicial review of legislation was established by 1803. The principle was established by the judgment in *Marbury v Madison* 5 US 137 (1803) and not by means of legislation. No explicit reference is made to the principle in the American constitution or other legislation though. Chief Justice John Marshall stated that it was the task of the judiciary to protect the fundamental rights of the individual against infringement by the government. It was also an inherent authority of the judiciary to determine the constitutionality of legislation. The judgment in the *Marbury* case thereafter formed the basis of constitutional decision-making in the United States without any governmental interference as to the principles involved (Currie 1988:15).

In the Orange Free State the competence of the courts to review enactments of the Volksraad was recognized in section 12 of the Lawbook of the Orange Free State, 1854 (see *supra* 3.2.4). The Free State high court exercised this authority in the matter of *Cassim and Solomon v The State* (1892) 9CLJ 58. In the matter the accused were touring Arabs and charged with contravening section 10 of Ordinance 29 of 1890. Section 10 provided that no Asian person could dwell in the Orange Free State without the permission of the State President. The accused pleaded that section 10 was unconstitutional. They added that section 10 was in conflict with section 58 of the Free State constitution which provided that the laws of the Free State were equal towards all persons (see *supra* 3.2.4). The court reviewed the relevant enactments and upheld the validity thereof. The court pointed out that the accused were not, however, citizens of the Free State and, therefore, not entitled to the rights guaranteed in the constitution. The court held that the government therefore did not infringe on the fundamental rights of the accused.

In the Transvaal Chief Justice Kotzé and Justice Ameshoff also had the approach of upholding judicial testing of legislation as inherent to the court. This was illustrated in 1897 in the matter of *Brown v Leyds* NO (1897)4 CLJ 71. The facts of the case were that on 19 June 1895 a proclamation by the Transvaal's State President was published in the Government Gazette. The notice stated that as from 19 June 1895, the farm Witfontein would be declared a public gold digging. At 08:00 on 19 June 1895 Brown applied at the mine office for prospecting rights but was told to return at 10:00. Before 10:00 the mine office received a telegram stating that the proclamation was being withdrawn. Brown's application was refused. The withdrawal of the proclamation was published in the Government Gazette on 20 June 1895. Brown instituted a claim against the government that the prospecting rights be granted or that compensation be paid to him. Chief Justice Kotzé gave judgment against the government. Brown was entitled to acquire prospecting rights on 19 June 1895 because the second proclamation had only appeared the day after. Furthermore, the government had failed to follow the constitutionally prescribed procedure of dealing with the matter legislatively. The administrative process was invalid due to incompatibility with the constitution. By way of a mere Volksraad decision, the government had denied Brown prospecting claims and thereby unjustifiably infringed upon his rights. The constitution did not expressly grant the Supreme Court jurisdiction to judicially test legislation, but Chief Justice Kotzé held that the court had inherent jurisdiction to test legislation and administrative procedures followed by government. He repeatedly referred to the above-mentioned *Marbury* case and the reasoning of Chief Justice John Marshall. My view is that this judgment could have served as a guide to the governing authority as regards public administration and fundamental rights.

Chief Justice Kotzé's application of the court's inherent judicial testing jurisdiction precipitated a political crisis and resulted in President Paul Kruger discharging him on 16 February 1898. President Kruger labelled the testing right of the court as a "principle of the devil" which the devil introduced into paradise to test God's word, and that only the sovereign and not the subordinates could disapprove of laws (Kotzé 1949:xxxiv and xli). Chief Justice Melius de Villiers of the Free State supported Kotzé's view on judicial review (De Villiers 1897:38) as did Justice JBM Hertzog (Vd Heever 1946:47). Sir Henry de Villiers, Chief Justice of the Cape colony, did not support Kotzé's view and preferred the sovereignty of the Volksraad (Walker 1925:293-4).

This principle of judicial review was, however, thereafter followed by Chief Justice De Villiers in the case of *Zgili v McLeod* (1904) 21 SCR (Cape) 150. In his judgment he stated that it is the primary function of the court to protect the fundamental rights of individuals

which may be infringed. In the case the defendant was an inspector of Native Locations in Aliwal North and entered Zgili's house in search an illegal alcoholic brew. The defendant did not have the necessary licence and no by-law authorized him in general to enter Zgili's house without permission. Justice De Villiers added that it was within Zgili's rights to seek the protection of the court against the unauthorized actions of the authorities.

The split on the issue of judicial review of legislation which existed between the colonial judiciaries, remained the same when the Supreme Court of South Africa was created in terms of the South Africa Act, 1909. The political decision-makers had statutorily denied the judiciary the authority to judicially test enactments of Parliament and to thereby provide judicial guidance to political decision-makers in matters of public administrative conflict. Such an attitude did not vest confidence in the judiciary, which was to be regarded as an instrument of justice, objectivity and a method of conflict resolution which can grant justice to those who seek protection of their fundamental rights. It consequently remained in the hands of politicians to allow the judiciary to inquire into legislation which appeared to be contrary to sound constitutional principles, or which blatantly infringed upon fundamental rights. With such a restriction on its independence, the judiciary then became powerless to protect fundamental rights which were invaded, something which could have led to an end to liberty and justice (Kotzé 1949:267, 268 and 293).

Thus, as Dugard (1978:24) puts it, and I concur, the constitutional situation after 1910 was that sovereign authority was in the hands of the legislature which could manipulate the law and public administration. Judicial independence was permissible provided that the judiciary was impotent against the legislature. I assume that public administration in such an environment is not subject to entrenched and non-entrenched fundamental rights. The 1950's would portray similar events between the judiciary and the legislature.

3.3.2 Period 1945 to 1960

The discussions of events during this period is primarily aimed at illustrating that the protection of fundamental rights apparently became a matter of immense concern to the international community but not necessarily to the governing authority in South Africa. I will also discuss opportunities that arose in South Africa whereby the government could have responded to pleas for a more comprehensive protection of fundamental rights, but apparently chose not to add to the few constitutionally entrenched fundamental rights in the

1909 Act. This then illustrates that during this period, public administration was still not subject to a comprehensive set of non-racial entrenched fundamental rights.

The colonial mentality and the lack of equality and humanism, prevailed during the period 1909 to 1944. The constitutional protection of fundamental rights and the observance of such rights in public administration enjoyed virtually no attention. The international community during World War II (1939 to 1945) furthermore acutely experienced the disregard for the protection of fundamental rights. The end of the war in 1945, however, heralded in a new era in which the suppression of and disregard for fundamental rights were mooted with a view to being addressed (Dugard 1978:46).

When World War II drew to a close in 1945, the leaders of the allied nations joined forces to find a formula for the prevention of the catastrophe of war. Their deliberations led to the founding of the United Nations Organization in 1945 whose constitution, the United Nations Charter, expressed faith in the principle of human rights and fundamental freedoms as a sure safeguard for world peace (Van der Vyver 1976:125). Articles 55 and 56 of the United Nations Charter introduced the globalisation of fundamental rights.

3.3.2.1 United Nations Universal Declaration of Human Rights

The United Nations was formed in 1945 and its General Assembly adopted the Universal Declaration of Human Rights on 10 December 1948 (UN Doc A/811). In the preamble it is stated:

"We, the peoples of the United Nations, determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ... without distinction as to race, sex, language or religion".

This precipitated similar actions in countries around the world. The United States of America moved towards relinquishing segregation in 1954 (Brown v Board of Education 347 US 483, 1954). West Germany, India and other countries adopted bills of rights, international covenants on fundamental rights were adopted and imperial powers set about dismantling their colonial empires. General JC Smuts from South Africa was chairman of the commission that in 1945 drafted the constitution of the United Nations' General Assembly and he himself drafted part of the preamble to the Charter. South Africa, however, chose not to endorse the Charter in 1948 (Van der Vyver 1975:35). It was in that

very assembly soon afterwards that South Africa's race policies caused the country to be placed in the world's pillory (Lapping 1986:88).

3.3.2.2 South Africa's political environment

Global progress regarding the protection of fundamental rights was evident. South Africa's political dispensation, however, adopted the policy of apartheid (see *supra* 1.9 "apartheid") in terms of which fundamental rights were disregarded in the form of, among other, racial discrimination and political repression. Racial segregation had, however, been practiced for some 300 years in southern Africa and "apartheid" was merely the term used by the victorious political party (the National Party) in the 1948 general election to describe the continuance of such segregation. The political ruling group in South Africa practiced racial segregation towards the politically subdued people of a different skin colour. It appeared that no equality existed between different colour groups of people in South Africa and priority was given to the interests of the White population group. Social rules were stripped of informality and flexibility, and made rigid and uniquely enforced by law. The discriminatory laws and their enforcement are what made apartheid unique among countries where discrimination was practised (Van der Vyver 1976:4-5; Dugard 1978:53; Lapping 1986:xiii, xiv and 39).

Issues such as classification into population groups according to skin colour, separate educational systems and institutions, separate residential areas, some without urban amenities, illustrated that fundamental rights were politically disregarded by the government of the day. In terms of the provisions of the Population Registration Act, 1950 (Act 30 of 1950) (now repealed), the Department of Home Affairs kept a population register in which each individual was registered and classified into a particular race group, mainly according to colour, in order to determine the person's social, economic and political status. A further example is found in the Reservation of Separate Amenities Act, 1953 (Act 49 of 1953) (now repealed), in terms of which separate facilities were provided in public premises for different racial groups. Such separate facilities need not have been equal in content and facilities may have been provided for one racial group without any facilities for any other racial group. The Immorality Act, 1957 (Act 23 of 1957) (now repealed), prohibited sexual relations between White persons and non-White persons.

The political environment accounted for much discrimination by granting certain fundamental rights to a particular group of persons while restricting particular fundamental rights of another group of persons, usually based on the colour of the group. This caused a

sense of inferiority and humiliation among the group restricted (Van der Vyver 1975:88; Law Commission 1994:6).

3.3.2.3 Freedom Charter

The Freedom Charter emerged in 1955 as a document voicing the pleas of Black people for equal political, economic, educational and social opportunities and standards with White people. This was reflected in Mandela's statement (cited in Mandela 1986:173) on 20 April 1964 in the Rivonia trial that:

"... the realisation of the Freedom Charter would open fresh fields for a prosperous African population of all classes, including the middle class. The ANC has never at any period of its history advocated a revolutionary change in the economic structure of the country, nor has it, to the best of my recollection, ever condemned capitalist society".

The representatives at a national Congress of the People adopted the Charter on 26 June 1955. The African National Congress (ANC) only adopted the Charter as part of its policy on 31 March 1956 at a National Conference (Feit 1962:17). The Charter also represented the ideological blueprint of the ANC and was intended to set out positive objectives in a way that would be acceptable to others.

The content of the Charter was influenced by and related closely to the United Nations Declaration of Human Rights (see *supra* 3.3.2.1). A significant number of clauses in the Charter constitute a reaction to the racist policies embedded in legislation which controlled the lives of Blacks. This was a direct outcome of the socio-political conditions which contained harsh, oppressive and unjust principles. The Charter therefore stood as a product of the demands of many Black persons for political reform.

The Charter consists of a preamble and ten sections, each with a number of articles under such headings as: The people shall govern; all national groups shall have equal rights; and all shall enjoy equal human rights. The basis of the Charter appeared to be that "the people shall govern" in a so-called one-man-one-vote political system in which everyone's human rights shall be protected. The Charter also contains provisions relating to work and financial security, free and compulsory education, and higher education which shall be open to all persons by means of state allowances. It furthermore declares that all people shall have houses and their families shall be provided with security and comfort; that rents

and prices shall be lowered; that food would be plentiful and no one shall go hungry; that there shall be free medical care and hospitalisation for all; that slums shall be demolished and new suburbs built where all shall have transport, roads, lighting, playing fields; that all shall have the right to rest, leisure and recreation; and that there shall be peace and friendship (Freedom Charter 1955, as contained in Feit 1962).

The contents of the Charter promised justice, peace, reconciliation and prosperity. The impression was created that injustice would largely disappear as soon as fundamental rights were protected. Such protection was to be chiefly directed at the elimination of discriminatory practices and the limitation of state authority over the individual.

Despite strong criticism of the Charter, it enjoyed wide support. At that point in time the envisaged protection of fundamental rights was perhaps a matter of faith and a symbol of hope to people who were politically humiliated. Du Toit's (1984:62) description relates closely to the possible views at that time:

"Human rights are the concrete content of the deepest yearning and desires of rudderless and bewildered humanity. The atrocities of the Second World War, the evils of political oppression, military regimes, hunger, poverty and suffering in all the world have let mankind take hold of the ideal of the rights of man as the ultimate and perhaps last means of saving this world from final destruction".

The political environment in South Africa during 1956 (see *supra* 3.3.2.2) was undoubtedly the reason why the Freedom Charter appeared to be politically and economically naive. The environment was nowhere near the envisaged dispensation in which the Charter had to function. As Potgieter (1989:2) points out, and I agree, this made the Charter politically impracticable at that point in time.

3.3.2.4 Molteno Commission

A political party, the Progressive Party, in existence at the time, established the Molteno Commission in 1960. The Commission's members included constitutional lawyers and persons who were eminent in many spheres in South Africa. The terms of reference were to investigate and report on, *inter alia*, proposals for a reformed constitution which would contain safeguards for each of the racial communities against domination by any other, and would guarantee the fundamental human rights and liberties of the individual (Molteno 1960:5). The Party Congress accepted the Commission's recommendations on 15/16

November 1960. In its report the Commission proposed, *inter alia*, that a sovereign parliament was inappropriate to South Africa and recommended a constitutional system with a bill of rights, protected by judicial review, in a federation (Molteno 1960:50-66). The Commission's recommendations became part of the political debate in South Africa. Attempts, however, by the Progressive Party and the Natal Provincial Council to have a bill of rights included in the republican constitution of 1961, failed dismally. The indication was that the ruling political party (the National Party) was not interested in protecting fundamental rights and liberties for all South Africans (Dugard 1988:30). This indication was in fact what Dr HF Verwoerd, the prime minister in 1960, had in mind when he declared that such a scheme would mean sacrificing the sovereignty of Parliament, which was unthinkable (Hansard 1960:column 101).

I assume thus that from the given political point of view, governmental actions, no matter how arbitrary and unfair, would never be subject to entrenched and non-entrenched fundamental rights. The possible alternative to this situation was that the judiciary would protect fundamental rights while its judgments would serve as a guide to public institutions on how public administration could be exercised with due regard to fundamental rights.

3.3.2.5 Judicial review versus parliamentary supremacy

The South Africa Act, 1909, excluded the court's right to test parliamentary legislation and did not contain a comprehensive set of non-racial entrenched fundamental rights. Parliament passed discriminating laws at its leisure (see *supra* 3.3.2.2). The government appeared uncontrollable in the manner in which it manipulated Parliament and exercised its authority. Not being subject to the Constitution, Parliament's supremacy expanded and legal curbs on Parliament's actions demised since the National Party gained the political authority in 1948. Principles such as "civil liberty" and "rule of law" were placed second to parliamentary supremacy.

In 1951 the Separate Representation of Voters Act, 1951 (Act 46 of 1951) (now repealed), removed the Coloured voters from the electoral roll in the Cape. During the legislative process the two houses of Parliament sat separately, as is customary when dealing with routine legislation. In the case of *Harris vs Minister of the Interior* 1952 (2) SA 428 (AD), the Appellate Division found that the mentioned 1951 Act had no legal power. The Appeal Court pointed out that in dealing with matters affecting the entrenched equal language rights (section 137) or the Coloured vote (section 35), Parliament could not follow the ordinary bicameral procedure. In such a case, Parliament had to function with both houses

at a joint meeting. This was prescribed in section 152 of the South Africa Act, 1909. The Appeal Court thus, in a sense, upheld the constitutionality of entrenched fundamental rights by enforcing the procedures to be followed in dealing with entrenched rights.

The government of the day did not abide by the judgment of the Appeal Court. Parliament shortly thereafter passed the High Court of Parliament Act, 1952 (Act 35 of 1952). This Act provided that Parliament could, sitting as a High Court of Parliament, review any judgment of the Appellate Division invalidating a statute of Parliament. The High Court of Parliament thereafter set aside the decision in the Harris-case.

In the sequel to the first Harris-case, *Minister of the Interior vs Harris* 1952 (4) SA 769 (AD), the Appeal Court found that the High Court of Parliament was not a court but simply Parliament in disguise. Furthermore, that the entrenched sections in the South Africa Act, 1909, envisaged judicial protection of the procedures to be followed by a proper court of law (my underlining) and not a disguised court (*Minister of the Interior vs Harris* 1952(4) SA 769).

Parliament later passed the South Africa Act Amendment Act, 1956 (Act 9 of 1956). This Act limited the competence of the courts to inquire into or to pronounce upon the validity of any law passed by Parliament, other than a law which alters or repeals the entrenched provisions of sections 137 or 152 of the South Africa Act, 1909.

The then Prime Minister, Dr DF Malan, reacted in 1952 by stating that Parliament would not be prepared to acquiesce to the judiciary to assume the testing right and the right to pass judgment on Parliament exercising its legislative powers (Hansard 1952(a):column 3426-7). Dr TE Dönges, the then Minister of the Interior, was also opposed to judicial review and rejected the doctrine which placed a democratic parliament in a subordinate position to the law courts (Hansard 1952(b):columns 6025 and 6030).

Following these events, the government had confirmed its stance as to support the principle of parliamentary supremacy above judicial review of legislation. The judiciary found itself in the same position as in earlier years (see *supra* 3.3.1.3) and the government's disregard for the protection of fundamental rights remained unchanged (Law Commission 1994:5-6). In fact, my view is that the government confirmed that its executive actions and, accordingly, public administration, would continue to be exercised while not being subject to entrenched fundamental rights. My assumption is based on the fact that the government, by means of the events mentioned in this paragraph, went out of its way to eliminate even the judiciary's

attempts at protecting fundamental rights. I see no difference between this occurrence and that which the judiciary experienced in 1895 (see *supra* 3.3.1.3).

3.3.3 Period 1961 to 1982

Before continuing, I need to inform the reader that it is still my intention to describe the constitutional environment of this particular period. The aim is to illustrate the extent to which fundamental rights were constitutionally protected and describe the circumstances under which the governing authority avoided having its executive actions and public administration being subject to entrenched fundamental rights. I have no doubt that the courts reviewed government actions and public administrative actions of public institutions. This did not, however, alter the fact that the Constitution did not contain a comprehensive set of entrenched fundamental rights and that public administration was not subject to such rights and non-entrenched rights.

South Africa entered its bleakest - from a democratic point of view - political period in the 1960's, and fundamental rights were grossly disregarded. The government of the day banned peoples' organizations and individuals, detained dissidents and curtailed freedom of speech by a network of laws (Dugard 1978:30). Despite this attitude the government later, during the 1970's, supported a bill of rights in the constitution of Namibia (Boule 1978:55) and in the then Bophuthatswana's constitution, in 1977. These factors, among others, gave rise to a new interest in the protection of fundamental rights but the political circumstances as from 1961 remained oppressing.

3.3.3.1 Republic of South Africa Constitution Act, 1961 (Act 32 of 1961)

The 1961 Constitution installed a republic in South Africa but brought about little change to the institutional life of the country. Section 59 of the 1961 Constitution emphasized that Parliament was the sovereign legislative authority with authority to make laws for peace, order and good government of the Republic. It also stated that no court of law shall be competent to inquire into or to pronounce upon the validity of any statute passed by Parliament, other than a statute which repeals or amends the entrenched language rights in sections 108 and 118 of the 1961 Constitution. Sections 108 and 118 afforded special protection to the equal freedom, rights and privileges of the two official languages of that time, namely English and Afrikaans.

The government of the day was accordingly in a position to pass legislation through Parliament without the fear of judicial obstruction as to the reasonableness of the provisions thereof. Public administration was exercised to give effect to the policies of the government as contained in the legislation and was in no way subject to a comprehensive set of constitutionally protected fundamental rights and non-entrenched rights.

3.3.4 Period 1983 to 1994

My intention with this paragraph (3.3.4) is primarily to inform the reader about South Africa's third Constitution. The aim is to describe some of the attempts to procure a South African bill of rights and the consistent rejection thereof by the ruling political party (the National Party). I also intend attempting to describe the "political frustration" that the 1983 Constitution brought about, and the dawning of a constitutional turnabout - the long awaited change in government policy regarding a bill of rights. All these events had a direct impact on public administration, as the inclusion of a bill of rights in South Africa's Constitution would most probably have brought about a change in constitutional prescriptions regarding governmental functions and activities.

The realization that the 1909 and 1961 Constitutions had facilitated the degradation of fundamental rights, raised hopes that the envisaged 1983 Constitution would entrench a comprehensive set of non-racial fundamental rights. The judiciary (Corbett 1979:192) and previously opposing jurists (Van der Vyver 1975:27) showed support for a bill of rights and that judicial review of legislation be included in the envisaged 1983 Constitution.

3.3.4.1 Constitutional Committee of the President's Council

The Constitutional Committee of the President's Council published a report in 1982 that indicated that the ruling political party had decided to retain its policy (see *infra* 3.3.4.2) regarding fundamental rights (Constitutional Committee 1982: ch 9, para 9-10). In 1983 the government rejected a proposal that a bill of rights be included in the envisaged 1983 Constitution (Hansard 1983: columns 11197-9). The reason was that individual fundamental rights were emphasized by the proposal whereas the government was more inclined to place the emphasis on maintaining group rights.

This meant that another attempt at procuring a South African bill of rights, failed dismally.

3.3.4.2 Republic of South Africa Constitution Act, 1983 (Act 110 of 1983)

The reader will note from the discussion to follow that the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983), introduced changes to the constitutional and political environments. The 1983 Constitution did not, however, contain a bill of rights or prescriptions that would possibly have a direct impact on the manner in which public administration is exercised.

Parliamentary sovereignty and supremacy, not subject to any legal limitation, was confirmed in the preamble to the 1983 Act. As before, Parliament was sovereign, which meant that it could continue to adopt any law, no matter how unfair or discriminatory. The validity of such laws could not be challenged in court as the testing right of the courts was excluded. Parliament could thus, as during the previous constitutional dispensations, legislate on matters affecting every aspect of the lives of the inhabitants of South Africa (Mureinek 1994:31). In executing government policies, the functions of public institutions were not subject to fundamental rights. Certain government actions and administrative activities by public institutions were, no doubt, challenged in court, but this, to my mind, could not be seen to be similar as to having a bill of rights to impact on public administration in a uniform manner.

The constitutional reform that the 1983 Constitution embodied was a degree of political authority sharing among racially defined communities. This consisted of a tricameral legislature with separate Houses of Parliament for Whites, Coloureds and Indians. Black persons remained excluded from this national political process. The ruling White political party retained its dominance in Parliament, thereby protecting the political supremacy of the White population. Black persons were only involved in political processes in demarcated self-governing areas. This position meant that the White privilege was entrenched and the Black inhabitants of South Africa were excluded from any meaningful participation in the everyday activities of the national government and public institutions. The Black inhabitants were expected to merely obey government dictates and not to participate in any critical inquiries about the society they would like to become, and the best way of becoming it (Mureinek 1994:31). It was abundantly clear that by excluding a part of the inhabitants from participating in national politics, the South African constitutional order was suffering a political imbalance and crisis. The 1983 Constitution did not end racial discrimination and disregard of fundamental rights, but rather maintained the status quo (Wiechers 1983:57).

The 1983 Constitution did not grant a universal franchise to all inhabitants of South Africa, nor did it even recognize their right to citizenship, instead it perpetuated segregation. Draconian laws trampled upon the fundamental rights of the majority of the population by and people were denied their freedom, equality and human dignity (Mureinik 1994:31). In fact, during this period more persons were alienated from fundamental rights in South Africa's politically fragmented society than were placed on an equal footing, as concerns fundamental rights, with fellow inhabitants of the country (Schlemmer 1983:63). The 1983 Constitution did not therefore create an enabling environment in terms of which fundamental rights of all inhabitants could be protected in a meaningful way.

3.3.4.3 Limitation on judicial authority

In 1983, constitutional recognition was still not given to the fact that the inherent legal independence of the Supreme Court could be regarded as the cornerstone of a democratic constitutional system. Furthermore, the extent of independence of the Court could not ensure that legal process would be applied objectively and without prejudice (Wiechers 1985:325-328). The Supreme Court could have exercised a control function over public administration, but was barred by the many statutory provisions limiting the Court's authority of revision in particular matters (Wiechers 1985:316, 340 and 342). If not so limited, the Court could, in terms of its inherent jurisdiction, inquire into any public administrative action amounting to an unjust infringement of fundamental rights. If an individual approached a Court with an action of unjust infringement of fundamental rights, he/she would accordingly enjoy the protection of the Court's authority to revise public administrative activities which encroach on the individual's fundamental rights, unless the Court's authority was limited in legislation. This was pointed out by the Court in its judgment in *Chunquete v Minister of Home Affairs* 1990 (2) SA 836 (W) on 844 E-H.

The government's attitude towards the judiciary existed notwithstanding the stance of the Appeal Court expressed as early as 1923 in the matter of *Union Government v Fakir* 1923 AD 466 on 471:

"I should like, without attempting to dictate to the legislature, to point out the great danger involved in departing from a well-known rule of constitutional law in all civilized countries - namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts".

Legal council portrayed a similar approach to that of the judiciary. It was stated that the Supreme Court should not be barred from entertaining any matter in which fundamental rights are at issue because only the Court has the jurisdiction and authority to protect individuals' rights from the arbitrary actions by public institutions (Frowein 1990: 252 and 258). The Supreme Court was considered the ideal forum to interpret and analyse statutes in order to ensure that public administration is exercised without unwarranted infringements on fundamental rights (Chaskalson 1985:433).

These calls by the judiciary and legal council were, to my mind, not fruitless as political changes were about to be made in the not too distant future.

Before closing off this paragraph, I need to add that the South African common law recognised a wide range of fundamental rights such as the right to life, liberty, property, freedom of speech, movement, and so on. In terms of the 1909, 1961 and 1983 Constitutions, however, these rights could be suspended or curtailed by legislation by virtue of the fact that Parliament was supreme. The role of the courts is necessarily also often limited by Parliament in such a system. There were nevertheless court judgments which have succeeded in providing a considerable degree of protection to fundamental rights where the scrutiny of the courts wasn't expressly excluded in legislation of Parliament (Hosten 1995:961).

3.3.4.4 Constitutional environment from 1990 to 1994

The prolonged political and constitutional impasse in which South Africa found itself, had to give way at some or other time to a more democratic and tolerant culture. During the late 1980's international political changes were taking place. The then ruling political party in South Africa (the National Party) grasped the opportunity to make a radical change in its policy and move from antagonism to a true democracy (De Klerk 1994:5-6). The government took a quantum leap and announced on 2 February 1990 that a new constitutional order, encompassing *inter alia* equal fundamental rights, no discrimination and a bill of fundamental rights, would be introduced to South Africa (Hansard 1990: column 1 passim).

To begin the process of change, the government held meetings with interested parties. These meetings were held at Groote Schuur on 4 May 1990, in Pretoria on 6 August 1990 and at DF Malan Airport in February 1991. Eventually the Congress of a Democratic South Africa (CODESA) was set up and held in Kempton Park on 20 and 21 December 1991.

Negotiations for a new constitutional dispensation were underway and were attended by political groups. On 16 and 17 May 1992, CODESA II was held but the process reached its nadir during the second half of 1992. Discussions later resumed and led to the Record of Understanding on 26 September 1992. Negotiations resumed early in 1993 and on 28 and 29 November 1993, a draft interim Constitution was finalised. An election date for 27 April 1994 was set (De Klerk 1994:6-9; Law Commission 1994:10).

The date had thus been set by which equilibrium in South Africa's constitutional environment would be reached; equilibrium in the sense of at least removing the policy of apartheid that was the root cause of the political and social imbalance in the country. Fundamental rights for all persons in South Africa would then be entrenched. The wall of apartheid, the abominable practice, had finally cracked and would inevitably collapse, leaving a more benevolent constitutional environment. Carpenter (1987:362) remarked that an occurrence such as this would be very prominent at the time it transpires as it would undoubtedly have an effect on the executive functions of public institutions and public officials and limit encroachment upon the fundamental rights and interests of the inhabitants of the country.

3.4 Inception of constitutionally entrenched fundamental rights

South Africa had reached the stage where its constitutional environment was in the process of transition and transformation. The public administrative environment, not being subject to fundamental rights, would constitutionally transform to one being subject to fundamental rights. South Africa was moving from an authoritarian to a constitutional form of government. The site of the political power struggle had shifted from the preservation of the structural inviolability of the apartheid state to the entrenchment of fundamental rights and freedoms of the inhabitants of the country (Du Plessis 1994:92). This major change to a constitutional governmental system was brought about by means of the 1993 Constitution. (Only relevant aspects of the 1993 Constitution are described hereunder. In chapter 4 of the thesis more comprehensive details regarding the Constitution and public administration are described.)

3.4.1 Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)

The 1993 Constitution was passed by Parliament on 22 December 1993 and came into operation on 27 April 1994. The 1993 Constitution came into operation in a constitutional environment with immense imbalances and had to function and transcend the political past responsible for the imbalances (Law Commission 1994:6). The major task of constitutionally bridging the past with the future is reflected in the preamble to the 1993 Constitution of which an extract reads:

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

The words in the extract indicate that the 1993 Constitution has an aim to serve as a bridge between the past and the future. The 1993 Constitution also envisages making a complete break with the political past. These aims are also reflected in the postscript to the 1993 Constitution (directly after section 251). The postscript also succinctly captures the spirit of these aims. The first paragraph and part of the third paragraph of the postscript reads:

"This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past ..." (my underlining).

The quoted text highlights features such as that the 1993 Constitution intended serving as a "constitutional bridge" in terms of which the inhabitants could move away from the past which was characterized by strife, conflict, suffering and injustice. The 1993 Constitution also served as a foundation for the recognition of fundamental rights whereby equality between all inhabitants could exist. With these features operative, inhabitants could ultimately transcend the divisions and strife of the past. The 1993 Constitution's purpose

was also to provide a standard against which future conduct in pursuance of the aim could be measured (Wendland *et al* 1995:2). The 1993 Constitution thus theoretically heralded in a newfound dignity and worth for the inhabitants of South Africa. The old culture of authority was replaced with a new culture of justification.

Whereas all the previous South African Constitutions contained practically no protection of fundamental rights, the 1993 Constitution contained an abundance of non-racial and justiciable and entrenched rights. Chapter 3 of the 1993 Constitution contains an exposition of entrenched fundamental rights. Probably one of the more imminent matters appears in section 7(1) and (2) of the 1993 Constitution. Section 7 provides that the 1993 Constitution's chapter 3 on fundamental rights would bind all public institutions and would apply to all public administrative functions performed. These provisions of section 7 confirm that public administration, when being exercised, would be subject to a set of entrenched fundamental rights. The protection of a set of fundamental rights against governmental activities had now, after years of strife, at last been constitutionally entrenched.

3.4.2 South African Law Commission's Report

On 23 April 1986, the then Minister of Justice announced that the government had requested the South African Law Commission to investigate and make recommendations regarding the protection of group and individual rights within the South African constitutional dispensation (Hansard 1986: columns 4107). On 11 March 1989, the Commission published a working-paper (Working-paper 25, Project 58: Group and human rights) supporting the principle of entrenched fundamental rights in a new constitution. The working-paper was widely received and supported. A few months later, on 2 February 1990, the then State President announced that the government was in favour of constitutionally entrenched fundamental rights (see *supra* 2.3.4.3). The Commission's interim report containing a draft set of rights was handed to the Minister of Justice in October 1991, who tabled it in Parliament. After the interim 1993 Constitution was promulgated on 27 April 1994, the Commission's final report on Group and Human Rights was finalised in October 1994 (Law Commission 1994:1-2).

The Commission reported that the 1993 Constitution governed the relationship between the state and the inhabitants of South Africa (paragraph 3.2s of the report). The introduction of a justiciable (see *supra* 1.9 "justiciable") set of entrenched fundamental rights for South

Africa in 1994 ushered in an entirely new legal and constitutional dispensation. South Africa had never had a justiciable set of fundamental rights. The Supreme Court had never had a substantive testing right whereby the laws of the legislature could be reviewed and annulled on the grounds of general, moral or ethical norms, or the fundamental rights of individuals. Under a justiciable set of fundamental rights, a court would acquire such authority. This approach affords individuals' fundamental rights greater protection. This, however, places new and grave responsibilities on the representatives of the people in legislative bodies, from the highest to the lowest. It also demands that they realize that the provisions of the 1993 Constitution restrict their executive and administrative authorities. This requires of the courts, particularly the Constitutional Court, special wisdom to exercise, in a sound manner, the authority granted it. This also demands an entirely new view of the authorities of the executive authority (Law Commission 1994:5-6).

The new constitutional environment, together with entrenched fundamental rights, will have to transcend an unfortunate political past. It remains a challenge for the politicians, executive authority and society, to uphold and successfully implement the entrenched fundamental rights in public administrative activities. The effect entrenched fundamental rights may have on the manner in which public administration is exercised, may be evident in practice (Law Commission 1994:6-7).

3.5 Summary

Prior to 27 April 1994, South Africa was entangled in a prolonged fundamental rights impasse. This was predominantly due to political forces with different ideological approaches to, among others, constitutional and social issues. The consequence was the development, over the years, of a fundamental rights-disregarding political and social culture and environment.

At the turn of the century and at Union in 1910, influential decision-makers in South Africa's constitutional environment regarded entrenched fundamental rights as unnecessary. The South Africa Act, 1909, only entrenched language rights, provincial registered voters and the Cape franchise. The right to be elected as a member of the House of Assembly was restricted by the 1909 Act to White persons only (see *supra* 3.3.1.1). Notions of equality and humanism were thus lacking due to the infusion of racism into the Union's constitutional system. To compound the situation, colonialism, in which fundamental rights were suppressed, was internationally accepted. This constitutional situation led to

legislation being passed and public matters being executed with a clear distinction between people of different colour. The public administrative environment was accordingly based on discriminatory principles and the infringement on fundamental rights. It was in fact the government's intention that public administration should be exercised with a disregard for fundamental rights (see *supra* 3.3.1.2.).

The particular form, principles and culture of the public administrative environment of the period commencing in 1909, were based on the British system which existed in the former British colonies prior to Union (see *supra* 3.3.1.1. and 3.3.1.2). The colonies of the Cape and Natal experienced the British autocratic and bureaucratic constitutional system with, especially, franchise discriminatory principles (see *supra* 3.2.1 and 3.2.2). The constitution of each of the Republics of the Transvaal and the Orange Free State did contain provisions protecting fundamental rights. The constitutions, however, also restricted particular fundamental rights of certain peoples, usually based on colour (see *supra* 3.2.3 and 3.2.4).

The approach towards the protection of fundamental rights did not differ much in Lesotho, Botswana and Swaziland. The Black groups in the three mentioned countries lived in customary societies in which all members of the society enjoyed the protection and support of the wider societal structure. This traditional protection covered fundamental rights such as the freedom of association (within the customary society), and socio-economical support such as the education of children (within the customary society), the supply of sustenance and a job opportunity to work for the society (see *supra* 3.2.5, 3.2.6 and 3.2.7). The traditional society functioned in a *collective* manner. This meant that the group and not the individual, was the primary protected unit. The individual was regarded as an integral part of a group, be it the clan, tribe or ethnic group, within which he had a status and role. The unrestricted and autocratic authority of the tribal chiefs and the method of customary governance in Lesotho and Botswana thus offered no protection to individualized fundamental rights (see *supra* 3.2.5 and 3.2.6). Swaziland's constitutional system (see *supra* 3.2.6) and the form of governance remained customary. The political-public administrative system, however, did contain principles pertaining to the protection of particular fundamental rights. There was also a clear division between White and Black affairs in the constitutional system (see *supra* 3.2.5, 3.2.6 and 3.2.7).

The constitutional and public administrative system, with which the Union of South Africa commenced in 1909, may in fact have been quite in accordance with the developments experienced in the different societies. Perhaps only the efforts of the judiciary prevented government authority from disregarding fundamental rights entirely (see *supra* 3.3.1.3).

During the major part of the period 1945 to 1961, the then ruling political party adopted the term apartheid to describe the government's continuance of racial segregation and political disregard for fundamental rights (see *supra* 3.3.2.2). While the international community moved towards adapting the United Nations Declaration of Human Rights, the South African government distanced itself from such a step. The pleas for reform contained in the Freedom Charter had no effect on the government (see *supra* 3.3.2.3). The government even rejected the Molteno Commission's recommendation which would have led to sacrificing the sovereignty of Parliament (see *supra* 3.3.2.4). Even the efforts by the judiciary to establish judicial review of legislation, was firmly rejected by government (see *supra* 3.3.2.5). By the year 1961, the public administrative environment, accordingly, experienced no change away from disregarding fundamental rights.

The Republic of South Africa Constitution Act, 1961 (Act 32 of 1961), did not improve matters regarding fundamental rights. The 1961 Constitution did emphasise that Parliament was the sovereign legislative authority and that no court of law shall be competent to inquire into, or pronounce upon, the validity of any statute passed by Parliament. Public administration was, therefore, exercised to give effect to the policies of government and was not constitutionally subject to a comprehensive and non-racial set of fundamental rights. Judicial objection as to the reasonableness of legislation leading to public administration, was statutorily limited (see *supra* 3.3.3.1). This position of government was confirmed in the 1982 report of the Constitutional Committee of the President's Council (see *supra* 3.3.4.1).

Constitutionally, everything concerning fundamental rights remained unchanged when the 1983 Constitution sustained a political imbalance in society by retaining the political supremacy of one group of persons above the other (see *supra* 3.3.4.2). The situation regarding the judiciary also remained unchanged (see *supra* 3.3.4.3). On 2 February 1990, however, a radical change in government policy was announced. The process of change from antagonism to a true democracy was debated among political parties. On 28/29 November 1993 a draft interim Constitution was finalized and an election date set for 27 April 1994. Equilibrium in South Africa's constitutional environment was then within reach (see *supra* 3.3.4.4).

The 1993 Constitution installed a new constitutional dispensation. The 1993 Constitution removed institutionalised racial discrimination, installed entrenched fundamental rights and judicial review, and provided for a systematic rehabilitation of impoverished communities (see *supra* 3.4.1). The audacious political leadership by all parties concerned, eventually

cut through the Gordian knot that entangled the country in a spiral of racial discrimination and disregard for fundamental rights.

In chapter 4 of the thesis, features of the 1993 Constitution and the 1996 Constitution containing entrenched fundamental rights are analysed. Thereby the provisions of the mentioned Constitutions relating to public administration are described. An exposition is also given of excerpts from the mentioned Constitutions relating to the application and limitation of fundamental rights.



Chapter 4

Features of South Africa's constitutionally entrenched fundamental rights

4.1 Introduction

Chapter 3 of the thesis reflects the major change that the 1993 Constitution introduced to South Africa on 27 April 1994, namely, a new post-apartheid constitutional dispensation. The more benevolent constitutional dispensation, accompanied by entrenched fundamental rights, statutorily and theoretically heralded in a newfound dignity and worth for the inhabitants of South Africa (see *supra* 3.4.1).

Chapter 3 of the thesis focuses on the fact that the 1993 Constitution was the supreme law of South Africa and regulated public administration (sections 4 and 7(2)). These facts are now, respectively, contained in sections 2 and 8(1), read in conjunction with section 195, of the 1996 Constitution. This implies that public administration shall be exercised in terms of constitutional provisions and limitations and shall adhere to constitutionally entrenched fundamental rights. Public officials, when exercising public administration, are accordingly obliged to respect these constitutional parameters in order to avoid encroaching upon the fundamental rights of any person. A societal perception, or perhaps an expectation, probably exists that there will now be less reason for discontent among the inhabitants of South Africa as their newfound dignity and worth will not likely be infringed on by the arbitrariness of public officials. The perception may be based on the assumption that the manner in which public officials exercised their administrative functions during the apartheid era, changed abruptly on 27 April 1994. It is believed that from that date public officials are performing their functions according to the transparent and protective paradigm portrayed in the 1993 Constitution (see *supra* 3.4.1) and now portrayed in the 1996 Constitution.

In reality, however, after 27 April 1994, the public administration environment still contained the remnants of apartheid legislation. The constitutional protection of fundamental rights could only be applied as from 27 April 1994. Accordingly, the callous lack of values that

dominated this environment during the apartheid era, could only from that point in time be constitutionally addressed and systematically eradicated. It appears rather that on 27 April 1994, public administration entered a very turbulent period with a critical challenge to reshape itself and the manner in which it is exercised. Of immense importance is the realisation that the constitutionally entrenched fundamental rights as it appears "on paper" could not have brought about an abrupt change in this "manner" on 27 April 1994. It appears rather that constitutional theory and public administration practice may have to interface with each other in the apparent disarray in the public administration environment and in time shape a manner, according to the transparent and protective paradigm portrayed in the 1993 Constitution (see *supra* 3.4.1) and now portrayed in the 1996 Constitution.

Since 27 April 1994, all legislation that discriminates unfairly between persons is invalid (1993 Constitution: section 8(1) read with section 9). The South African lawbook, however, still contains legislation originating from the apartheid era that can only be removed by means of a prescribed legislative process (see *infra* 4.6.2). Accordingly, it is more likely that only after all the legislation of the apartheid era has been amended or repealed to remove discriminative law, and public officials adapt to performing their functions as constitutionally prescribed, there could be a ripple effect leading to the contemplated manner of exercising public administration.

Part of the challenge and dilemma facing public officials is possibly that they are constitutionally obliged to apply the entrenched fundamental rights when performing their functions. However, the said rights cannot be applied across the board without regard to specific prescribed rules or reservations. Such rules or reservations are, among others, the method of application, the nature and ambit of each fundamental right, and the statutory limitations placed on each right. These aspects have to be taken into consideration, and are examined in this chapter of the thesis.

Accordingly, in this chapter the new constitutional environment as from 27 April 1994 is firstly described. This description covers certain general aspects, the constitutional status, the different branches of government and the constitutional provisions that relate more closely to public administration. Secondly, an analysis is made of the concept "democracy". An analysis of fundamental rights that relate to public administration is done thirdly. Fourthly, a description of the bearers of fundamental rights is given. Fifthly, the application of entrenched fundamental rights is analysed. Sixthly, an exposition of the statutory limitations on fundamental rights is given. Seventhly, the constitutional obligation on public

administration is described. Finally, a summary is given of the contents of this chapter which are not merely historical but intended to also be descriptive, analytical and comparative.

4.2 Constitutional environment as from 1994

The 1993 Constitution installed a post-apartheid Constitutional dispensation in South Africa on 27 April 1994 (see *supra* 3.4.1). When the 1996 Constitution came into operation on 4 February 1997 (see *supra* 1.9 "constitutions") and repealed the 1993 Constitution, the constitutional environment installed on 27 April 1994 was maintained. Several provisions of both Constitutions relate to public administration and the manner in which public administration functions are to be exercised. Accordingly, a general description is given of the mentioned Constitutions, an exposition is given of the status of each Constitution, an analysis is made of the different branches and levels of government authority, and thereafter a selection of the provisions of the two Constitutions that have a direct bearing on public administration, are examined.

My intention with these discussions is to attempt to illustrate that the change in the constitutional environment was of a radical nature if compared to the apartheid constitutional era. It is in fact the change that impacts on public administration and the manner in which it is exercised.

4.2.1 Purpose of a constitution

It has become a universal tendency, with a few exceptions, for every state to have a written document as a constitution (Vorster 1982:109). Constitutions are not, however, universally identical in content. According to Renwick and Swinburn (1980:17), a constitution contains the principles and rules according to which a state must be governed. Strong (1972:10) and Andrews (1968:3) point out that a constitution arranges the organisation of a state's institutions, the authority and functions allocated to each institution, and also the manner in which the authority must be exercised. I agree with the statements of these writers. To add to the statements, my view is that a constitution usually prescribes the manner in which allocated authority must be exercised and usually places an obligation with a sanction on public institutions to adhere to such prescriptions. I believe this to be a form of control over the activities of public institutions.

The 1993 Constitution came into operation as an interim Constitution (section 73(1)). This meant that the 1993 Constitution contained specific rules according to which South Africa had to be governed from that point in time. It contained many transitional provisions primarily aimed at bridging the former apartheid constitutional dispensation with the post-apartheid constitutional dispensation (1993 Constitution: preamble and postscript). This implies that the 1993 Constitution formed a symbolic bridge between a past filled with conflict, diversity and suffering (see *supra* 3.3.4.4) and a future based on democracy, constitutional protection of a comprehensive set of fundamental rights, and envisaged peaceful co-existence between all the inhabitants of South Africa (Van Wyk 1994:52).

Public administration formed part of the mentioned bridging process with a challenge to reshape and adapt to the new constitutional state. All public institutions faced this challenge in every sphere of government where public administration was exercised (1993 Constitution: section 4(2); 1996 Constitution: section 195(2)). I assume that when the 1993 Constitution came into operation, the process of reshaping and adapting public administration to the new constitutional requirements should have been set in motion. I accept that such an exercise cannot be done hastily and needs to follow a gradual inception in order to reach a point where the application of constitutional prescriptions and the manner in which public administration is exercised, is done uniformly by all public institutions.

4.2.2 Constitutional status

From the establishment of the Union of South Africa in 1910, until 27 April 1994, South Africa had only known a system of parliamentary sovereignty. The will of Parliament, and therefore the will of the strongest political party in Parliament, reigned supreme (Law Commission 1994:5-6; Olivier 1994:56). Parliament commanded law, the constitution included, and the constitutional environment was characterised by a culture of supreme parliamentary authority.

The 1993 Constitution factually ended this prolonged system and introduced South Africa to a benevolent constitutional environment based on constitutional supremacy. In many countries the constitution is the sovereign law of the state. This means that the constitution is the highest form of law and that it has a higher status than other law (Rautenbach & Malherbe 1994:18). In practice, the higher status of the constitution means that all public institutions, including Parliament, are bound by the provisions of the constitution and that no law may be in contravention thereof (Wheare 1951:7). This meant that any law or activity

inconsistent with the provisions of the 1993 Constitution would have been of no force or effect (section 4(1)). In South Africa the 1993 Constitution became the supreme law of South Africa and enjoyed such supreme status (Rautenbach & Malherbe 1994:19). This cardinal aspect of constitutional supremacy is now contained in section 2 of the 1996 Constitution.

One reason why countries grant such sovereign status to the constitution is that the constitution is regarded as the instrument by which the governing authority can be regulated and limited (Wheare 1951:9 and 10). In South Africa this has the effect that all contemporary public administration activities at all levels of government are subject to the provisions of the 1996 Constitution and must be performed in adherence to the principles contained in this Constitution and chapter 2 which contains the Bill of Rights. These requirements are what I referred to above (see *supra* 4.2.1) when I stated that the 1993 Constitution contained specific rules according to which government authority and public administration had to be exercised as from 27 April 1994. This means that the constitutional requirements are to, without exception, be adhered to.

The supremacy of the constitution also means that the manner, in which the executive exercises its authority, is subordinate to the law as norm. By implication this means that the manner in which public administration is exercised must be aimed at maintaining lawfulness (Basson & Viljoen 1991: 226 and 228; Rautenbach & Malherbe 1994:18). The fact that the governing authority, and its actions, is subject to the law, aims at protecting the rights and freedoms of the individual (Basson & Viljoen 1991:231).

A constitution normally regulates the relationship between the individual and the state authority. A democratic constitution also reflects the value that people attach to orderly human relations and to individual freedom under the law. A constitution furthermore sets out the framework and the principal functions of the different government institutions, and declares the principles by which such institutions shall operate. In fact, it includes the whole system of government at all levels (Wade *et al* 1993:3-5; Van der Waldt *et al* 1995:3). For the first time in South Africa's history, constitutionalism in the widest sense of the word is functional. It has the primary effect of being a common denominator in every aspect entwined in South Africa's political dispensation, public administration included.

4.2.3 Divisions of government authority

My intention is to describe the different divisions of government authority in order to illustrate that different divisions of government in different spheres jointly manage South Africa's public administration. This means that constitutional prescriptions regulating public administration are applicable in a similar fashion where public administration is exercised.

Both the 1993 and the 1996 Constitutions regulate how public administration is to be exercised in different divisions and in different spheres of government (see Figure 4.1). Provision is constitutionally made that government authority be divided into three divisions. This apparently aims at functional independence from each other and that state authority is not exercised arbitrarily (1993 Constitution: Schedule 4 VI; 1996 Constitution: sections 44, 85 and 165). The divisions are the legislative authority, the executive authority and the judicial authority.

4.2.3.1 Legislative authority

The legislative authority is vested in Parliament to make laws on a national basis in accordance with constitutional principles (1993 Constitution: section 37; 1996 Constitution: section 43(a)). All enactments are subject to the provisions of the entrenched fundamental rights. Parliament (the legislature) is thereby precluded from passing legislation that, among others, negates basic fundamental rights.

4.2.3.2 Executive authority

The executive authority is vested in the President (1993 Constitution: sections 75 and 82; 1996 Constitution: section 85(1)). The President exercises the executive authority together with the other members of the cabinet. The main task of the contemporary executive is to make policy decisions, ensure the observance of the Constitution, and to ensure that laws passed by the legislature are carried out. To facilitate this, public institutions such as government departments are created with a cabinet minister as the political head of a department. The executive and public institutions are obliged to ensure that all public activities are exercised with adherence to constitutional requirements as any conduct that is inconsistent with the 1996 Constitution is invalid (1996 Constitution: section 2).

4.2.3.3 Judicial authority

The judicial authority is vested in the courts (1993 Constitution: section 96(1); 1996 Constitution: section 165(1)). The judicial system is made up of a number of courts (see *supra* 1.9 "courts"). Its task is crucial in that the courts are charged with ensuring that laws are enforced equally towards all people and all matters. The courts furthermore have to ensure that in matters before the courts, the Constitution is observed by public institutions and all inhabitants of the country. The judiciary functions impartially and is subject only to the 1996 Constitution and to law. No person or public institution may interfere with the functioning of the courts (1996 Constitution: section 165(3)).

Chapter 8 of the 1996 Constitution regulates the judicial authority and the administration of justice. The Constitutional Court, the Supreme Court of Appeal and the High Court have the authority to enquire into the constitutional validity of an Act of Parliament, a provincial Act and any law or conduct that is inconsistent with the Constitution. In matters before such courts, all three courts are competent to strike down an executive or administrative action or conduct that violates the provisions of the 1996 Constitution (sections 167 and 172). The courts may order the public institution concerned to refrain from such action or conduct, or to correct it. These principles have remained the same after having been introduced in terms of sections 98(2) and (7), 101(3) and (4), respectively, of chapter 7 of the 1993 Constitution.

4.2.3.4 Spheres of government

In most countries, government functions are divided between two or more tiers or levels of government. In South Africa there is no longer a kind of pyramid-like structure with the central government on top, provincial government in the middle and local government at the bottom and each tier or level functioning on its own. I say this because the idea in South Africa is that all spheres of government on the three-tier constitutional structure are to jointly manage the public administration affairs of the Republic (see my following paragraphs). The three spheres are the:

- national government that deals with matters relating to the country as a whole (section 85)
- provincial government that deals with matters relating to a particular province (section 125)
- local government that deals with matters within a demarcated municipal area (section 151)

The 1993 Constitution specified the authority that would be exercised at different levels of government. Constitutionally, a structure is created that allowed for a government at national

level (section 75), nine provincial government levels (section 124), and local governments, each within a particular area of jurisdiction (section 174). The 1996 Constitution maintains such a structure but refers to "spheres of government" instead of "levels" (sections 85, 125 and 151, respectively) (see Figure 4.1 hereunder). The national government and provincial governments each have a legislature to make and amend national legislation and provincial legislation, respectively. Each sphere of government also has an executive authority to execute relevant legislation. Each local government may make and administer by-laws for the effective administration of matters which are assigned to it by the 1996 Constitution and by national and provincial legislation (1996 Constitution: section 156).

National, provincial and local spheres of government are distinctive but remain interdependent and interrelated. All spheres of government have to conduct their activities in, among others, an effective, transparent and accountable manner. This has the effect that all spheres of government on the three-tier constitutional structure jointly manage the public administration affairs of the Republic (1996 Constitution: sections 40 and 41(1)).

FIGURE 4.1 CONTEMPORARY CONSTITUTIONAL ENVIRONMENT

Supreme 1996 Constitution with Bill of Rights: s2		
DIVISIONS OF GOVERNMENT AUTHORITY NATIONALLY		
LEGISLATIVE (PARLIAMENT)	EXECUTIVE	JUDICIAL
Makes laws in the form of statutes s44	Executes statutorily prescribed functions by means of public administration s85(2)	Courts interpret and apply law. Make law by means of judicial precedent s165(2)
Activities of all 3 divisions subject to constitutional principles and Bill of Rights ss2 and 8(1)		
Each division functions independently from the other 2 divisions		
s44(4)	s85(2)	s165(2)
⇒	⇒	Other 2 divisions may not interfere with activities of courts s165(3)
⇐	⇐	Constitutional and High Court may review legislation and activities of other 2 divisions s172(1)

SPHERES OF GOVERNMENT AUTHORITY			
3 SPHERES	LEGISLATIVE	EXECUTIVE	3 Spheres are distinctive but interrelated s40 Jointly manage public administration affairs of Republic s41(1)
NATIONAL 1 central authority	Parliament makes national legislation s44(1)	President and Cabinet s85(2)	
PROVINCIAL 9 provincial authorities	Provincial legislature makes provincial legislation s104(1)	Premier and Executive Council s125(1)	
LOCAL within a demarcated area	Municipal Council makes by-laws s156(2)	Municipal Council s156(1)	

4.2.4 Constitutional provisions relating to public administration

I presume that all the provisions of a constitution relate to public administration in some way or another. For the purposes of the thesis, I intend doing an exposition of the provisions of the 1993 Constitution and the 1996 Constitution that relate more directly to public administration and the manner in which public administration is to be exercised. The adoption of a bill of rights on 27 April 1994 can be regarded as a move towards sophisticating public administration.

Probably the most cardinal aspect impacting on public administration, to be heralded in by the 1993 Constitution, is constitutional supremacy which was binding on legislative, executive and judicial institutions (see *supra* 4.2.2). This principle is maintained in the 1996 Constitution (section 2). This implies that the 1996 Constitution holds the key to the principles by which public institutions in all spheres of government shall operate as well as exercise public administration activities and decisions (see *supra* 4.2.2). Section 195 of the 1996 Constitution is the key and contains basic values and principles, such as impartiality, fairness and equality that ought to govern public administration. In terms of section 195(1), public administration must be governed by the democratic values and principles enshrined in the Constitution, and must be accountable and transparent. The 1993 Constitution did not contain a provision similar to section 195.

The implication of the mentioned sections 2 and 195 of the 1996 Constitution is that no public administration function may be performed autonomously. Such functions have to be performed within the parameters laid out in authorising legislation and in the 1996 Constitution. The primary aim of public administration, namely to promote the general welfare of the inhabitants of South Africa, will thereby constantly be strived at.

This does not mean that as from 1994 public administration is exercised in a specialised and faultless manner. Public officials are only human and fallible beings and can be inclined to make mistakes and/or serve personal and political interests above the interests of the inhabitants of the country. The constitutional rules, which direct the government in public administration activities, also aim at ensuring that a public institution does not encroach upon the preserves of other public institutions. Furthermore, each public institution shall refrain from abusing its authority and from functioning unreasonably (Olivier 1994:62). This could promote the independent functioning of each public institution from the other and prevent that state authority is exercised arbitrarily. This principle was prescribed

in Schedule 4 VI of the 1993 Constitution and is now contained in section 195(1)(f) of the 1996 Constitution.

Section 212(1) and (2)(e) of the 1993 Constitution regulated the public service. This section stipulated that the public service should provide an effective public administration and loyally execute the policies of the government of the day in the performance of its administrative functions. The public service is now regulated in similar phrases in section 197(1) of the 1996 Constitution. Section 7(1) and (2) of the 1993 Constitution provided that the constitutionally entrenched fundamental rights should be applied to all public administration functions performed. This principle is confirmed in section 8(1) of the 1996 Constitution. These provisions thus provide standards against which public administration conduct is to be measured. In fact, public administration has to ultimately function in terms of the provisions and limitations contained throughout the entire 1996 Constitution.

4.3 Democracy

Coupled with constitutional supremacy, democracy appears to fulfil a very important role with regard to public administration. A clear illustration of the meaning of democracy is called for, as neither the 1993 nor the 1996 Constitution contains a definition of the concept. I intend to attempt to give a clear illustration of the concept.

In the preamble and postscript to the 1993 Constitution, the spirit of the relationship between South Africa's people and the state authority was succinctly captured (see *supra* 3.4.1). It was quite prominently indicated that the said relationship was founded on democracy and in a democratic state. In the preamble to the 1996 Constitution, it is stated that the South African society is based on democratic values and fundamental human rights. It is also stated that the people of South Africa shall build an united and democratic South Africa in which government is based on the will of the people.

In terms of the provisions of the 1996 Constitution, South Africa is established as a democratic constitutional state with a democratic system of government (section 1). It is also stated that the Bill of Rights contained in chapter 2 of the 1996 Constitution is the cornerstone of democracy in South Africa and affirms the democratic values of human dignity, equality and freedom (section 7(1)). The Bill of Rights applies to all law and public institutions (section 8(1)). The effect of these provisions is that democracy could be

regarded as the foundation on which the South African society and government, and accordingly public administration, rests.

March and Olsen (1995:2-3) write that democratic governance originated in states with relatively small populations and developed its modern forms over several years. They add that democracy is a culture and a particular form of human coexistence. It is an accumulation of concrete institutional practices, rules and procedures that are tied to democratic ideals. Those ideals secure their essential character from confidence in the ability of people to govern themselves.

March and Olsen (1995:4) continue to argue that an essential part of democracy is a commitment to personal liberty and individual responsibility. With this comes the requirement of political equality among people and their collective participation in governing affairs. Such fundamental rights should be protected by the political system and by the obligations of individuals. Another essential part of democracy is the regulation of arbitrary authority in order not to undermine a democratic system of institutions and rules.

Dworkin's (1995:3) definition of the concept democracy is government by the people, whereby the people act collectively. This collective action by the people is, for example, to elect political leaders in a multi-party political election, - something that no individual does or can do alone. The political leaders so elected in a majority from one political party or from a coalition between two or more parties, form the government. Such majoritarianism does not, according to Dworkin (1995:2-3), constitute democracy unless particular conditions are met. Such conditions are in the form of enabling and disabling constitutional rules. Enabling rules are, for example, constitutional provisions that stipulate who may vote in elections and what the administrative functions of electoral officials are. Disabling rules are, for example, constitutional provisions which restrict the authority of such appointed electoral officials. Therefore, not only are enabling rules prerequisites of democracy, but disabling rules are also plainly essential to democracy. A government that functions as a democratic government, needs to adhere to both enabling and disabling constitutional rules in order to uphold democracy.

According to Hirst (1990:23) democracy is a form of government, that is, government by the people. This implies, in its simplest form, that democracy is the direct rule of the people themselves as a body without superior authority set over them. This is known as "direct democracy". Such a democracy, however, in order not to be inconceivable, necessitates that the number of people remains small. For example, a group of people lives within a

demarcated area which is their country. At pre-arranged times, all the people assemble to discuss and decide on matters of governance. In this manner the people themselves constitute the body that governs.

Hirst (1990:24) adds that if the democratic sovereign authority does reside in the people but there are too many individuals for the purposes of direct democracy, delegated authority is given to an elected government. The elected government then gives expression to the will of the people. This is known as representative democracy. For example, in a country like South Africa, the population is too big to apply the system of direct democracy. It is impossible for all the people to assemble in one place to form a government to govern themselves. Each person, therefore, then has a representative to attend the assembly on his/her behalf. Usually such a representative represents a large number of people in a constituency. The national assembly of a parliament is accordingly made up of all the representatives of the people in the country. The parliament (legislature) makes laws that do not infringe on the basic fundamental rights of individuals because the people will not consent to such an infringement. An executive authority and administrative apparatuses implement the legislation made by the parliament.

Hirst's statement (1990:25-27) points out that there are, however, circumstances that are inconsistent with the above-sketched representative democracy. The first of these circumstances is that it is parliament that makes laws. The people elect political representatives but cannot choose the executive decisions such political representatives make. The second circumstance stems from the perception created that the laws are general rules that cannot infringe on individual fundamental rights. The perception is that the executive authority is merely an impartial agency that enforces those laws. In actual practice, the government initiates legislation that prescribes authority of decision and action to particular public administrative institutions. The third circumstance is that there is no pure process of political representation and manner of judging how represented the people actually are. Hirst (1990:27) quite rightfully sums up this statement with the words that the theoretical view of a representative democracy is far at variance with its practice.

The common denominator emanating from this analysis is that democracy means, simply stated, "government by the people". This involves that the people living in a country decide how they are to be ruled by the government of the day. March and Olsen write of "a particular form of coexistence" and "an accumulation of institutional practices, rules and procedures that are tied to democratic ideals". This is an indication that democracy needs to develop over a period of time in order to realise the "democratic ideals". March and Olsen

also write of a "commitment to ... individual responsibility" and a "collective participation in governing affairs". This sets the requirement for the people living in the particular state to adhere to if the "democratic ideals" are to be realised. I support March and Olsen's description but need to add that democracy is not reached only when the requirements that they describe, are attained. I am of the opinion that democracy can exist even though not all the people in the country are committed to collective participation, since it is doubtful whether such a high degree of participation is ever reached.

According to Dworkin, a democratic government "needs to adhere to both enabling and disabling constitutional rules". Such rules are aimed at granting authority to government and also restricting such authority, respectively. I view this as an essential aspect of a sound democracy. March and Olsen also touch on "the regulation of arbitrary authority in order not to undermine a democratic system". I am of the opinion that democracy cannot exist if government authority is not adequately regulated and limited, for example by means of a supreme constitution. In the event of a state not having a supreme constitution, and the courts have no or limited jurisdiction to review government actions, it can hardly be said that democracy exists. In South Africa the supreme 1996 Constitution grants and limits government authority and is, to my mind, an indication that democracy exists. With reference to Hirst's description, South Africa's constitutional dispensation is a representative democracy rather than a direct democracy.

Another point I need to add is that Dworkin (1995:3) writes of democracy as government by the people. Such a government is usually elected in a majority from one political party. My opinion is that the words "government by people" can imply that government takes place with the consent and in the interests of "the people". This scenario also implies that a central government exists in which representatives of their choice represent all the people. My view is that such a government is simply a government of the "majority of the people" as "all the people" didn't elect such a government. In this instance democracy will, to my mind, probably involve the minority of the people acceding to the will of the majority of the people. It can, however, also happen that the will of the majority could be undemocratic in the sense that, if implemented, such a will could possibly disregard the interests of all the people who are not part of "the majority". My idea is that a true democracy should not only promote "the will of the majority" but also take careful account of the interests of those "outside the majority".

The basic principles and requirements which could be deemed part of a democratic constitutional dispensation, government and, by implication, society, appear to be part of the

1996 Constitution. These issues are, *inter alia*, **elections, multi-party political system, accountability, control of the abuse of governmental authority and bill of rights**. A brief note on each of these aspects is given:

- **Elections**

By means of an election the people choose political leaders to govern them. Every person who qualifies to vote should in no way be barred e.g. by intimidation, from participating and exercising that right (1996 Constitution: section 19).

- **Multi-party political system**

A multi-party political system allows for more than one political party to participate in elections and fulfil a role in government, e.g. as an opposition party (1996 Constitution: section 57(2)).

- **Accountability**

The government governs with the consent of the people and is accountable to the people for all its governmental executive activities (1996 Constitution: section 195(1)(f)). This accountability includes, *inter alia*, allowing the inhabitants of the country access to governmental assemblies, e.g. to parliamentary sessions (1996:Constitution: section 59).

- **Control of the abuse of governmental authority**

This misuse or abuse of authority by public authorities can, *inter alia*, be limited by dividing the governmental authority into three divisions, e.g. legislative, executive and judicial (see *supra* 4.2.3). Each division is obliged to not assume any authority or function except those conferred on it in terms of the Constitution, perform its functions in a manner that does not encroach on the functional integrity of another division, and co-operate with the other divisions in trust and good faith (section 41). These principles serve to control the abuse of governmental authority and need to be in a supreme constitution in order for the constitution to be the highest form of authority.

▪ Bill of rights

A bill of rights, constitutionally entrenched, guarantees listed rights and freedoms. In this manner, human values are respected and protected. Such values are, among other, equality between people, human life and education (1996 Constitution: chapter 2).

My conclusion is that, from the illustration of democracy, South Africa's constitutional environment is a representative democracy. Public administration ought thus to be exercised in all public institutions in a manner which reflects democratic values such as, *inter alia*, human dignity and equality. Several values are contained in the Bill of Rights and accordingly, selected fundamental rights which relate more closely to public administration are now analysed.

4.4 Fundamental rights and public administration

Public administration regulates or has an influence on every aspect of an inhabitant's life in South Africa. This has probably led to inhabitants becoming more aware of their rights and freedoms as created in the 1993 Constitution and currently in the 1996 Constitution and other law. Inhabitants are inclined to more often insist on the maintenance of a human rights culture, transparency, lawfulness and fairness in public administration (Brynard 1995:511). The preamble to the 1993 Constitution made provision for citizens to exercise fundamental rights and freedoms. This Constitution became synonymous with freedom and democracy. In this sense the 1993 Constitution fulfilled an important role in the protection of rights and freedoms to prevent a recurrence of the disregard for rights and freedoms as experienced during the period of apartheid. A right is often described as a relation between persons as regulated by law, in other words, the law creates a right relating to a person and in so doing creates a corresponding obligation which another person has to respect and adhere to (Hosten 1995:543). I assume that inhabitants have become more aware of and familiar with the situation that the law prescribes particular actions in favour of the inhabitants which are to be exercised by public institutions. It is thus this obligation that inhabitants now can insist on being, as Brynard (1995:511) states, transparent, lawful and fair. After all, the 1996 Constitution (sections 7(2), 8(1) and 195) obliges public institutions to exercise public administration in this manner. This obligation did not exist in this form prior to 1994 and I assume that where inhabitants prior to 1994 insisted on transparent, lawful and fair public administration from public institutions, no similar constitutional or moral or common law obligation or sanction existed to support such an insistence.

The question arises whether public officials who were in the public sector prior to 1994, have adapted the manner in which they exercised public administration before 1994, to conform to present constitutional prescriptions. In this regard the question also arises as to whether public officials are fully aware of the contents of the Bill of Rights and section 195 of the 1996 Constitution. These are questions which will be dealt with in the questionnaire used in the empirical survey (see *infra* chapters 6 and 8).

Hosten (1995:544) writes that a right should be regarded as a dual relationship – between on the one hand the bearer of the right, and on the other hand all other persons on whom the duty rests to respect and not to violate this right. I support this statement as my view is that when public administration is exercised, public institutions are in a dual relationship with one or more inhabitant and need to take careful account of the manner in which public administration is exercised so as not to violate any rights. This means that public officials should be conversant with the contents of the Bill of Rights and other provisions of the 1996 Constitution that relate closely to public administration in order to be aware of the principles surrounding fundamental rights and the basic values and principles which govern public administration. The question arises whether public officials have been adequately informed officially and been provided with guidelines to assist them during the transformation process. These are also aspects which are dealt with in the empirical survey mentioned above.

My view is that public officials need to be adequately informed of the contents of the Bill of Rights and relevant sections of the 1996 Constitution. Public officials are not usually expected to be able to interpret law and therefore additional guidelines explaining the application of the principles of fundamental rights are necessary. My view is based on Hosten's (1995:545) statement that no right is absolute in the sense that it is unlimited. It is through this limitation that the law regulates the interests of persons. If a person transgresses the limits of his/her right, the right of another person may be violated. When public officials draft legislation (for example, bills and regulations), it is imperative that they be aware of such constitutional prescriptions.

The 1993 Constitution contained an abundance of protected fundamental rights. Many of the rights enumerated in chapter 3 of the 1993 Constitution were, though, not newly conferred on the inhabitants of South Africa. They (for example, the right to life, liberty, property, and so on) were recognised and protected (in a sense) by common law and the courts (see *supra* 3.3.4.3). The difference was that the rights could no longer be limited, suspended or abridged by Parliament at will, but only strictly in accordance with the provisions of the constitution. This situation is currently the same in terms of the 1996 Constitution (Hosten

1995:977). I assume that when public administration was exercised prior to 1994, the manner in which it was exercised with regard to fundamental rights, depended to a large extent on whether Parliamentary legislation existed in terms of which certain fundamental rights were limited, suspended or abridged. I suppose that in the contemporary constitutional environment such legislation will only exist in extreme exceptional circumstances.

The preamble to the 1993 Constitution stated that all South Africans were entitled to a common citizenship and that there was equality between men and women so that all citizens were able to enjoy and exercise their fundamental rights and freedoms. Section 3 arranged language rights. The whole of chapter 3 of the 1993 Constitution entitled "Fundamental Rights", contained an exposition of entrenched fundamental rights. The 1996 Constitution is, just as the 1993 Constitution was, a value-laden statute. This is reflected in, *inter alia*, section 1 of the 1996 Constitution which provides that South Africa is a sovereign and democratic state founded on values such as human dignity, equality, non-racialism and non-sexism. The 1996 Constitution's section 3 arranges a common South African citizenship. Section 6 provides for the protection of eleven official languages and for the use and respect of other languages used by South African communities. Chapter 2 of the 1996 Constitution contains a Bill of Rights that enshrines the fundamental rights of all the inhabitants of South Africa.

Devenish (1998:33) writes that all the values encapsulated in the 1996 Constitution are designed to ensure human dignity and freedom in a political system that is characterised by accountability, responsiveness and openness. The immanent values are of an universal character and they give rise to a system of democratic government. Devenish (1995:34, 35) argues that the new constitutional order, based on constitutionalism, requires that those who govern be obliged to conduct the business of government in accordance with prescribed rules. The constitution also guarantees that the business of governing is publicly accountable.

I agree with Devenish's expression but have to add certain qualifications. The 1996 Constitution may "ensure human dignity and freedom" in its value-laden provisions, and the political system may be characterised by "accountability, responsiveness and openness". My view is that the inhabitants can only be ensured of such issues if the executive and public institutions exercise public administration strictly in accordance with constitutional principles and thereby place the interests of the inhabitants before the interests of the governing authority. Devenish states that this is what constitutionalism requires of those who govern. His point that the constitution "guarantees that the business of governing is publicly

accountable", is doubtful. My view is that the Constitution, at most, "requires" such accountability, as it cannot guarantee that all public institutions will comply fully with all its prescriptions - even though they should.

Several of the fundamental rights listed in chapter 3 of the 1993 Constitution and in the Bill of Rights (chapter 2 of the 1996 Constitution) relate closely to public administration. The governing authority and public institutions are obliged to "respect, protect and fulfil" (1996 Constitution: section 7(2)) all fundamental rights as this shields the inhabitants against the abuse of government authority as was quite common during the apartheid political dispensations (Devenish 1998:45).

Selected fundamental rights are now scrutinised with reference to both mentioned Constitutions.

- Equality (1993 Constitution: section 8; 1996 Constitution: section 9)

All people are considered equal before the law and must be equally protected by the law irrespective of race, gender, age, sex, disability, religion and belief. Furthermore, on these grounds, people cannot be treated differently or unfairly. Public institutions must therefore exercise public administration with adherence to the stated requirements. The present government's policy of affirmative action is committed to uplifting and improving the lives of people discriminated against in the past. This policy appears to violate the right to equality but is made lawful in certain circumstances. Such circumstances can be arranged in legislation (for example Basic Conditions of Employment Act, 1997 (Act 75 of 1997) and Employment Equity Act, 1998 (Act 55 of 1998)) aimed at the protection or advancement of disadvantaged people (sections 8(3) and 9(2), respectively) (Hosten 1995:982).

Section 8(2) of the 1996 Constitution proscribes "unfair discrimination". This implies that "fair discrimination" is permissible. Devenish (1998:48) explains that this situation means that those inhabitants discriminated against unfairly in the past, are now entitled to preferential or advantageous treatment so that genuine equality for all inhabitants will ultimately emerge in the South African society. I agree with this statement but assume that "genuine equality" for all inhabitants can only be attained according to the availability of resources such as finance, jobs and education.

- Human dignity (1993 Constitution: section 10; 1996 Constitution: section 10), freedom and security of the person (1993 Constitution: section 11; 1996 Constitution: section 12), and privacy (1993 Constitution: section 13; 1996 Constitution: section 14)

A person has the right to be treated with respect at all times. Human dignity is a right which has to be observed by particularly a public institution such as the South African Police Services. This right is not only confined to respect for a person's feelings but also respect for the person's body. However, the right to dignity may be limited if the state has an interest to protect. For example, if there is good reason to believe that a person is in possession of drugs, the police may lawfully arrest the person and conduct a body search. If there is no just cause for such action by the police, a person has the right not to be deprived of freedom arbitrarily. The right of privacy prevents the police from arbitrarily searching a person's home and seizing possessions (Hosten 1995:983).

Devenish (1998:51) states that the protection of human dignity is inherent in the protection of virtually all other rights and should be regarded as the foundation of all fundamental rights. It is, however, not possible for dignity to be realised amidst rampant crime and poverty. I agree with this statement. My view is that when public administration is exercised, public officials should see and deal with the inhabitant as a customer and as an individual. Racial or colour distinction should not, except where essential in a particular matter, be a factor in service delivery by public institutions, as it were prior to 1994.

- Citizenship (1993 Constitution: section 20, read with section 5; 1996 Constitution: section 20, read with section 3), and freedom of movement (1993 Constitution: section 18; 1996 Constitution: section 21)

A person lawfully residing in South Africa, or born to South African parents, is entitled to South African citizenship. This implies that the person has a right to a South African passport and freedom of movement. The person may thus leave the Republic to travel abroad and enter the Republic as he/she wishes. A citizen is also entitled to other rights, for example, political rights (sections 21 and 19, respectively) that flow from the fact that such a person is a South African citizen. As a citizen of the Republic, such a person also has certain obligations, for example, a duty to be loyal to South Africa. Public officials are obliged to observe these rights when exercising public administration functions in connection with such matters (Hosten 1995:984; Devenish 1998:63).

- Access to information (1993 Constitution: section 23; 1996 Constitution: section 32)

Everyone has the right of access to information held by the state, and another person if such information is required for the purposes of exercising or protecting any rights. National legislation (Promotion of Access to Information Act, 2000 (Act 2 of 2000)) has been promulgated and implemented to arrange procedures to give effect to this right, as it could become an administrative and financial burden to the state to provide such information on request. This requirement should not, to my mind, stand in the way of public institutions adhering to the prescriptions of this right.

Access to information that is regulated by legislation, can make provision for the limitation of the right in order to facilitate law enforcement, and to preserve and defend state secrets, national security, privacy, professional privilege and public interest privilege (Devenish 1998:79). I agree with this statement, as there should be exceptions to the access to any information. My view is further that the limitation of access to information must be carefully and clearly drafted as there should be no opportunity for public institutions to make misuse of the limitations in order to refuse to supply certain information.

Devenish (1998:80) argues that the right to access to information is predicated on the need for accountability. This right is an endeavour to establish an open society and is a reaction against the appalling levels of secrecy that characterised the governing authority during the apartheid era. De Giorgi (1999:24) writes that the apartheid regime and its public administration were characterised by secrecy and restrictive measures to prevent the public and media from gaining access to and disseminating information held by government institutions. She adds that this created the ideal climate for abuse of powers and gross human rights violations.

I fully endorse these statements, as the inhabitants of South Africa should be entitled to know what the governing authority is doing for them, or why certain requests were refused. Public officials are, to my mind, compelled to render "just administrative action" (dealt with hereafter) in order to avoid having to provide information to a claimant if an action should arise concerning some administrative activity that does not fully comply with prescribed requirements.

- Just administrative action (1993 Constitution: section 24; 1996 Constitution: section 33)

Public institutions are by legislation given authority to make their own rules/regulations regarding administrative functions and procedures. They can conduct their own disciplinary hearings and can dismiss employees under certain circumstances. The right to just administrative action implies that public institutions are obliged to not exceed their authority and always apply the correct procedure when exercising an administrative function. Public institutions must always exercise lawful and reasonable administrative action and where necessary, give written reasons for decisions taken. These are essential aspects for public officials to adhere to as inhabitants can insist on transparent, lawful and fair public administration (Brynard 1995:511).

The requirements of "lawful and reasonable" public administration correspond with public administrative requirements in section 195 of the 1996 Constitution. Section 195 prescribes that public administration must, *inter alia*, be impartial, fair, equitable, without bias, accountable and transparent. These requirements are obligatory and public officials are compelled to perform their functions in this manner or be faced with invalidity in terms of section 2 of the 1996 Constitution.

In conclusion of the discussion in this paragraph, my view is that public administration has strict constitutional prescriptions to adhere to in order to avoid being invalid in terms of section 2 of the 1996 Constitution. I also assume that public officials should be made aware of the constitutional burden on the public administration environment and the consequences of not complying with any of the prescriptions. My idea is that a special effort should be made to inform public officials of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) and assist such officials to understand and apply the provisions of this mentioned Act. The fact that public administration is now subject to constitutionally entrenched fundamental rights and a supreme constitution, requires of public officials to exercise public administration in new and unfamiliar manner that did not exist in terms of previous constitutions. These are aspects that can be tested by means of the empirical survey dealt with in chapters 6 and 8 of this thesis.

The activities of officials primarily involve decisions regarding a person as a bearer of fundamental rights affected in some or other manner. It is therefore necessary to illustrate who the bearers of fundamental rights are.

4.5 Bearers of fundamental rights

The public administration activities of public officials are primarily in the form of rendering services to the inhabitants of the country. Before an official performs an administrative activity and applies relevant fundamental rights, it would be of importance to be aware of which people are the bearers of which rights and whether certain people are excluded from being the bearer of a particular right. The Bill of Rights in the 1996 Constitution, just as chapter 3 of the 1993 Constitution did, contains various categories of fundamental rights. Certain of these rights are guaranteed to particular persons only. The bearers of fundamental rights are now distinguished between under the headings of "natural persons" (living human beings) and "juristic persons" (institutions which are non-living beings). The 1993 Constitution did not, and the 1996 Constitution does not contain definitions of "natural person" and "juristic person". Both concepts are therefore used in the thesis with an ordinary meaning as indicated between brackets.

My view is that this is an aspect that public officials should be informed about in order to apply the principles of fundamental rights correctly. Particularly the fact that certain fundamental rights are guaranteed to particular persons and that a distinction must be made between natural and juristic persons, is another indication that public officials must apply fundamental rights with caution in order to avoid not complying with constitutional requirements such as "just administrative action".

The concepts of "natural persons" and "juristic persons" are now defined.

4.5.1 Natural persons

The provisions of the 1993 Constitution's chapter 3 on fundamental rights protected all natural persons (living human beings). With a few exceptions every person was the bearer of all rights contained in the 1993 Constitution. This is confirmed within the first 32 sections of the 1993 Constitution (sections 5(3), 6, 7(4)(a), 8(1) and (3)(b), 9, 10, 11(1) and (2), 12, 13, 14(1), 15(1), 16(1), 17, 18, 19, 22, 24, 26(1), 27(1), 28(1), 29, 31, and 32 where "every person shall have the right to/is entitled to ...". A similar situation regarding the bearers of rights exists in the 1996 Constitution. This is also confirmed within the first 35 sections of the 1996 Constitution (sections 9(1), 10, 11, 12(1) and (2), 14, 15(1), 16(1), 17, 18, 23(1), 24, 26(1), 27(1), 29(1), (2) and (3), 30, 32(1), 33(1), 34, and 35(1) and (2)) in which the words "everyone has the right ..." appear 25 times.

In particular instances, only certain natural persons are the bearers of particular rights. This is determined largely by the nature of, and other particulars concerning each such right, for example, where certain rights are reserved for South African citizens. Only citizens are bearers of certain selected rights because citizenship is a status accorded to particular persons who comply with legislative prescribed conditions. Such selected rights are then privileges coupled to such a status (Rautenbach 1995:36). South Africa has a large number of inhabitants who are non-citizens and/or temporary residents and who are accordingly excluded as bearers of the rights accorded to citizens. The position regarding selected rights for citizens in terms of the 1993 Constitution remained virtually the same but was supplemented in terms of the 1996 Constitution. In the following Figure 4.2 a comparison of the two situations is reflected.

FIGURE 4.2 ENTRENCHED RIGHTS ACCORDED TO CITIZENS

1993 Constitution	Entrenched fundamental rights accorded to citizens	1996 Constitution
s 5(3)	To enjoy all rights, privileges and benefits of SA citizenship	s 3(2)(a)
ss 6 & 21(2)	Entitled to vote	s 19(3)(a)
s 20	To enter, remain in and leave the Republic	s 21(3) The "right to leave" now also accorded to non-citizens
s 20	To not be deprived of citizenship	s 20
s 21(1)	To participate in political matters	s 19(1)
s 21(2)	To stand for election to public office	s 19(3)(b)
1993 Constitution	Further rights accorded to citizens	1996 Constitution
None	To free, fair and regular elections for any legislative institution	s 19(2)
s 19 Right accorded to every person	To reside anywhere in the Republic	s 21(3) Right accorded to citizens only
None	To a passport	s 21(4)
s 26 Right granted to every person to pursue a livelihood	To choose a trade, occupation or profession freely	s 22 Right accorded to citizens only

The effect flowing from the fact that certain rights are reserved for, and accorded to, citizens only in the form of advantages coupled to such a status, is that non-citizens are totally excluded from those reserved rights. For example, non-citizens are totally excluded from the right to vote in South African elections and the right to a South African passport. With regard to the processes of entering, remaining in and leaving the Republic, citizens have a reserved

right to exercise those processes with a passport. Non-citizens do not have South African passports and do not have a right to enter and remain in the Republic. Non-citizens can, however, enter and sojourn, but not remain, in the Republic after complying with legislative conditions and procedures and obtaining the necessary documentary permission. They can be refused entry to the Republic.

The rights accorded to arrested, detained and accused persons (1996 Constitution: section 35), are available only to persons who find themselves in such a position. Other inhabitants are excluded from such rights simply because the nature of the relevant rights are not applicable to other inhabitants who are not arrested, detained or accused persons. In the event of any inhabitant committing a crime and being arrested, the said rights will at that point in time be accessible to that person.

Another example is that every child shall have the right to security, basic nutrition and basic health and social services (1996 Constitution: section 28). Various categories of people, who are no longer children, may however, just like children, be in need of security, nutrition, health and social services. This does not necessarily mean that they have to do without those services even though such rights are not entrenched in their favour. The people who cannot be categorised as "children" simply have to obtain similar services from public institutions which are available to render such services.

An important point is that the constitutionally entrenched fundamental rights are not the only rights available to the inhabitants of South Africa. The constitutional entrenchment of fundamental rights must not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation. The prerequisite is that any other right is recognised to the extent that it is not inconsistent with constitutional provisions and principles (Rautenbach 1995:36; 1993 Constitution: section 33(3); 1996 Constitution: section 39(3)).

4.5.2 Juristic persons

Juristic persons (institutions which are non-living beings) are constitutionally recognised as a category of bearers of rights. Juristic persons are entitled to the constitutionally entrenched fundamental rights to the extent required by the nature of the rights and the nature of that juristic person. Only certain juristic bearers of rights are identified and no constitutional protection is afforded to the formation, existence and functioning of juristic persons. This is

however, effected by the entrenched right to freedom of association (1993 Constitution: section 7(3); 1996 Constitution: section 8(4)).

Juristic persons, as non-living beings, are excluded as the bearers of certain rights. Particular rights, or part thereof, can only be applicable to natural persons. The nature of the following entrenched fundamental rights makes it quite apparent why juristic persons are excluded as the bearers thereof:

(Hereunder, between the brackets, the relevant sections in the 1993 Constitution are noted first and the corresponding sections in the 1996 Constitution are noted second)

- Equality of men and women and a prohibition on discrimination on the grounds of gender, colour, descent, race, sex, language, age, culture, disability, religion (section 8(2)/section 9(3))
- Human dignity (section 9/section 10)
- Life (section 10/section 11)
- Physical integrity (sections 11(2) and 12/sections 12(1)(d) and (e), and (2), and 13)
- Personal freedom, including guarantees concerning arrest and detention (sections 11(1) and 25(1) and (2)/sections 12(1)(a) and (b), and 35(1) and (2))
- Citizenship (section 20/section 20)
- Rights of children (section 30/section 28)

Juristic persons may be bearers of particular rights with certain qualifications, such as:

- The equality principle generally applies to juristic persons (section 8(1)/section 9(1) and (2))
- Privacy against arbitrary searches of property and seizure of possessions (section 13/section 14)
- Freedom of religion (section 14(1)/section 15(1))
- Freedom of expression, especially freedom of the press and other media (section 15(1)/section 16(1)(a))
- Freedom of artistic creativity and scientific research (section 15(1)/section 16(1)(c) and (d)), and regarding academic freedom in institutions of higher learning (section 14(1)/section 16(1)(d))
- Freedom of assembly (section 16/section 17)
- The right to petition the government (section 16/section 17)
- Freedom of association (section 17/section 18)
- Access to courts of law and guarantees in criminal trials (sections 22 and 25(3)/sections 34 and 35(3))
- The right to information held by the state (section 23/section 32)
- Property rights guaranteed against arbitrary deprivation (section 28/section 25)

When public officials are aware of who the bearers of fundamental rights are in a particular matter to be dealt with, the application of fundamental rights involved in that matter must also adhere to certain prescribed requirements. These requirements are analysed accordingly.

4.6 Application of fundamental rights

When attempting to apply the set of fundamental rights to public administration activities, public officials should be aware of statutorily prescribed formalities which have to be followed and "obstacles" such as statutory and other requirements which have to be adhered to. These formalities and requirements include the interpretation before application of a provision containing a fundamental right, the validity of public administration activities performed in terms of legislation in force at the commencement of the 1993 Constitution on 27 April 1994 and in terms of legislation declared invalid after the commencement of the 1993 Constitution, and also the position of South African common law and customary law. These aspects are, accordingly, analysed.

My view is that all public officials are not in a position to, of their own accord, interpret and apply the constitutional rules and fundamental rights relating directly to public administration. Public officials need to be adequately informed and guided in this regard. This is another aspect that should have received priority attention in order to equip public officials with the relevant knowledge and information to interpret and apply fundamental rights according to constitutional prescriptions. This situation is part of the empirical survey dealt with in chapters 6 and 8 of this thesis.

4.6.1 Interpretation and application

The application of the provisions of entrenched fundamental rights involves more than merely noting the contents of a legal rule and applying it. The application involves applying norms after interpreting an authoritative text which in this context at this point in time, is the 1996 Constitution.

The interpretation and application of fundamental rights is not an exclusive function of competent courts of law because at present, all public institutions and all individuals concerned are also involved with interpreting and applying the 1996 Constitution. For example, the Department of Home Affairs interprets and applies the constitutional provisions relating to citizenship (sections 3 and 20) and passports (section 21(4)). The said

Department applies the constitutional norms when registering people as citizens and when issuing passports to citizens. Even if a court has the final word in a matter before the court concerning the interpretation and application of fundamental rights involved in the relevant matter, the court is not the only institution involved in this field. The court normally exercises the judicial function only on the initiative of litigants and most often bases a decision on presentations made on behalf of litigants (Rautenbach 1995:18).

Public officials seeking an interpretation of a particular fundamental right ought, therefore, to consult more sources than only court judgments and utilise all information gathered in concert.

4.6.2 Administrative activities and the commencement of the 1993 Constitution

Regarding the contents of this subparagraph, my view is that public officials cannot be expected to, of their own accord, be legally minded in order to comprehend the aspect of "declarations of invalidity of legislation". This is an important aspect to public officials as it affects the source of their activities, namely legislation. I assume that officials should be adequately informed to how to deal with this aspect.

The 1993 Constitution's chapter 3 on fundamental rights bound all legislative and executive public institutions and applied to all law in force, all administrative decisions taken and activities performed from 27 April 1994 and during the operation of the 1993 Constitution (section 7). Laws that were in force immediately before the commencement of the 1993 Constitution, remained in force (section 229). The implication was that the constitutionally entrenched fundamental rights were to be applied to administrative decisions taken, and also to public administration activities which were performed in terms of laws in force, and any law that came into operation during the currency of the 1993 Constitution.

In the event that the Constitutional Court found a law to be inconsistent with the 1993 Constitution, it declared such a law invalid to the extent of its inconsistency (section 98(5)). The Constitutional Court could then have required Parliament to correct the defect in the law. The law, however, remained in force pending correction. Unless the Constitutional Court ordered otherwise (section 98(6)), the declaration of invalidity of a law -

- that existed at the commencement of the 1993 Constitution, did not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
- passed after the commencement of the 1993 Constitution, invalidated everything done or permitted in terms of such a law.

An important aspect is that when a competent court invalidates an existing law or part of it, that law or part is not immediately invalid and out of operation (1993 Constitution: section 98). The law remains valid until authoritatively amended. The court does not have the authority to, of its own accord, repeal the law or amend the part affected by the declaration of invalidity. An extensive legislative process must deal with the actual repeal or amendment. When the legislature has drawn up a repealing or an amending bill, the bill must be passed through Parliament. Once passed, the new Act then contains provisions which repeal or amend the affected law. On the date that the new Act comes into operation, the lacuna created by the declaration of invalidity is rectified. Administrative activities performed in terms of that invalidated laws, after the commencement of the declaration of invalidity, thus remain valid until also declared invalid. It appears that all such administrative activities should in principle also be invalid although such an occurrence may cause much disruption in practice (Rautenbach 1995:11).

It is also of significance that administrative decisions taken before the commencement of the 1993 Constitution will not be subject to judicial review under the mentioned section 98. However, the procedures pertaining to judicial review that existed in terms of the inherent jurisdiction of the High Court and that were not restricted by an Act of Parliament, prior to the existence of section 98, remain available for the purposes of such administrative decisions, if necessary. Furthermore, any administrative activity performed after the commencement of the 1993 Constitution, in pursuance of such a decision, will be subject to review under the said section 98 (Cachalia 1994:19).

Section 8(1) of the 1996 Constitution contains provisions to a similar effect as those in section 7 mentioned above. Section 8(1) thus confirms that the entrenched fundamental rights listed in the current Bill of Rights (1996 Constitution: chapter 2) are continuously to be applied to public administration activities. All laws enacted prior to and after the 1993 Constitution took effect, remain in force after the 1996 Constitution took effect but the provisions thereof are subject to being consistent with the 1996 Constitution (Schedule 6: item 2). A competent court can thus declare any law or administrative conduct that is inconsistent with the 1996 Constitution, invalid to the extent of its inconsistency. Such a

court's declaration of invalidity may be suspended for any period to allow the legislature to correct the legislative defect (1996 Constitution: section 172(1)). The situation in terms of the 1996 Constitution therefore perpetuates the situation which existed in terms of the 1993 Constitution.

4.6.3 Common law and customary law

The constitutionally entrenched fundamental rights were, in terms of the 1993 Constitution, and shall, in terms of the 1996 Constitution, be applied to both South African common law and customary law. It was made applicable firstly by the use of the collective noun "law" in section 7(2) of the 1993 Constitution, which stated that chapter 3 of the 1993 Constitution on fundamental rights shall apply to all law in force, all administrative decisions taken and activities performed during the operation of the 1993 Constitution. Section 8(1) of the 1996 Constitution contains a similar principle. Secondly, the common law and customary law were subjected to the rights contained in chapter 3 of the 1993 Constitution. Any common law limitation on such rights was unconstitutional unless the limitation conformed to the requirements of the 1993 Constitution's section 33(1) (see *infra* 4.7.1.1). This principle remains the same in terms of section 36(2) of the 1996 Constitution. Thirdly, common law and customary rights other than those contained in chapter 3 of the 1993 Constitution were constitutionally recognised to the extent that they were not inconsistent with the provisions of the mentioned chapter 3 itself (1993 Constitution: section 33(3)). This recognition is similarly contained in section 39(3) of the 1996 Constitution. Finally, the courts were constitutionally enjoined to have due regard to the spirit, purport and objectives of the 1993 Constitution's chapter 3 when interpreting, applying or developing common law and customary law (1993 Constitution: section 35(3)). This principle is now contained in section 39(2) of the 1996 Constitution (Cachalia 1994:20-21).

4.7 Limitation of fundamental rights

Statutory limitations placed on fundamental rights usually contain cumbersome formalities and requirements, which public officials should be aware of and have to adhere to when applying the entrenched fundamental rights in public administration activities. The task of placing such limitations is as a rule pursued through legislation. This is another aspect that public officials should possibly not be expected to comprehend without adequate guidance and information. The extent, to which public officials are conversant with the contents of the

Bill of Rights and the Constitution, is to be tested by means of the empirical survey in chapters 6 and 8 of this thesis.

Fundamental rights are seldom entrenched in such a way that the protected interests may never be restricted. The entrenching provisions will thus generally prescribe how and to what extent public institutions may limit the rights. Such provisions form part of the protection and enforcement of the fundamental rights entrenched. In this manner, the authority to limit rights itself is limited. Courts can use such provisions as tests to determine whether governmental infringements of fundamental rights are justifiable and constitutional. Such prescriptive provisions accordingly determine the effectiveness of the protection of the fundamental rights. For this reason, such provisions are often very contentious (Hosten 1995:987; Devenish 1998:91). The various limitations of fundamental rights encountered are hereafter examined in terms of **constitutional limitation clauses, limitation of rights by public institutions, legislation of general application, and reasonable and justifiable limitations.**

4.7.1. Constitutional limitation clauses

The limitation clauses in the 1993 Constitution and in the 1996 Constitution are freestanding and apply generally to the other constitutionally guaranteed fundamental rights. The clauses are thus not strictly individualised. Constitutional limitation clauses may be grouped into general and specific clauses. As to the relationship between general and specific limitation clauses, it may be that a general limitation clause applies in principle to all fundamental rights. A specific limitation clause is used in order to particularise one or more of the elements usually contained in a limitation clause, with regard to a particular right (Woolman 1994:61).

4.7.1.1 General limitation clauses

No constitutionally entrenched fundamental right is absolute and it may be limited provided the limitation complies with the requirements constitutionally stipulated. Just as in the case of the 1993 Constitution (section 33), the 1996 Constitution has a general limitation clause (section 36) which applies to all fundamental rights. It is important to note that limitation provisions not only contain an authorisation for the limitation of rights, but also restrict the capacity of the state authority to limit rights beyond such authorisation (Rautenbach 1995:84; Devenish 1998:90). I conclude thus that the authorising provisions in the 1996 Constitution

specify the boundaries within which particular fundamental rights may be limited. To my mind, this is an absolute cardinal rule that public officials have to be fully aware of as a right that is limited more than what it should be, can be to the disadvantage of an inhabitant. The constitutional limitation clause contains a mechanism for limiting fundamental rights and freedoms. The principle set out in section 33(1) of the 1993 Constitution is similarly contained in section 36(1) of the 1996 Constitution that reads:

"36(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose."*

After it has been established that the interests protected by the entrenched rights have factually been limited by law of general application (see *infra* 4.7.3), it has to be determined whether this factual limitation was authorised by the limitation provisions contained in the constitutional chapter on entrenched rights. Furthermore, the degree and intensity of the interventions in the protected interests should play no role in deciding whether there has been a factual limitation (Rautenbach 1995:81; Erasmus 1994:640). I agree with this statement, as public officials should always first ascertain whether a right has been limited, and then determine the extent of the limitation.

There are certain rights that have their own internal limitation. The basic structure nevertheless remains one of generally stated rights and freedoms on the one hand and a separate limitation clause on the other. An internal limitation can, for example, be found in the equality clause (1993 Constitution: section 8(2); 1996 Constitution: section 9(3)) where the word "unfair" is used. The equality clause contains the so-called equal treatment clause that there may be no distinction among persons upon unreasonable grounds. Naturally, mere differentiation between persons is not unlawful unless it amounts to unfair discrimination. An example of unfair discrimination would be when a certain standard is applied to a particular class of persons but a proportion of the group who qualify (for instance women) are excluded without justifiable cause.

4.7.1.2 Specific limitation clauses

A specific limitation clause usually applies to a particular right or a particular number of rights. For example, in connection with the limitation of rights during a state of emergency, section 34(5)(c) of the 1993 Constitution applied only to particular rights mentioned. The position was that no law which provided for a state of emergency, could have authorised the suspension of the 1993 Constitution's provisions relating to the application of rights (section 7), unfair discrimination (section 8(2)), the right to life (section 9), dignity (section 10), torture (section 11(2)), and further rights mentioned in six other sections. In effect, the administrative function, which declared a state of emergency, was limited and selected fundamental rights were, without exception, not to be suspended. These measures could be regarded as preventative of any arbitrary or uncontrolled public authoritative activity, which may have infringed on the fundamental rights such as, *inter alia*, those relating to torture, discrimination, and life, during a state of emergency (Basson 1995:23 and 25). My view is that such a specific limitation clause has an important function of preventing arbitrary actions by public officials and the misuse of the limitation of rights during an emergency.

The 1996 Constitution also contains a specific limitation clause (section 37(5)(c)). It does, however, differ from its predecessor to some extent. The position is that no law that authorises a state of emergency may permit any right mentioned in a Table of Non-Derogable Rights, to be limited more than to the extent indicated in the Table. What is new, is that only seven rights are mentioned in the Table whereas section 34(5)(c) of the 1993 Constitution listed eleven rights. Another difference is that only the right to human dignity (section 10) and the right to life (section 11) are protected entirely from further limitation during a state of emergency.

4.7.2 Limitation of rights by public institutions

The position regarding the limitation of fundamental rights by legislative public institutions in terms of the 1993 Constitution (section 33), remained the same in terms of the 1996 Constitution (section 36). The limitation of fundamental rights is not constitutionally reserved to specific legislatures because each legislature on the different spheres of government may only limit fundamental rights in connection with matters within its statutory authority. Furthermore, any limitation may only be contained in legislation of general application (see *infra* 4.7.3). Should such an institution limit any such rights beyond the prescribed

parameters, such a limitation will be invalid (Rautenbach 1995:88). I agree with this argument.

If an executive public institution is authorised by law to limit fundamental rights, the capacity of the relevant legislature to grant such authorisation is restricted. The public institution concerned may not be authorised to limit fundamental rights contrary to the general or specific limitation provisions (see *supra* 4.7.1). A legislature would thus, for example, not be able to exempt a public institution from the requirement that the limitation of fundamental rights has to be reasonable, or that a particular right may be limited only to the extent necessary to restore peace and order (state of emergency clause, see *supra* 4.7.1.2) (Rautenbach 1995:86-87). I agree.

4.7.3 Legislation of general application

A limitation of a person's fundamental rights will be constitutional only if it complies with the requirements of the limitation clause in section 36 of the 1996 Constitution. One of the requirements is that a right may be limited only in terms of law of general application. Law of general application can be found in legislation, common law or indigenous/customary law (see *supra* 2.3) which applies generally, that is, law which is not directed at a specific person or group of persons. For example, a municipal by-law would qualify as a law of general application if it dealt with access to the municipal library. The by-law is thus applicable to any person and not directed at a specific person or group of persons. If the by-law was applicable only to school children and dealt with access to the municipal library, it would not qualify as a law of general application because it is directed at a specific group of persons.

Another example is when a person applies for a social pension in terms of the relevant pensions Act. The pension will be granted to that person if certain prescribed conditions are complied with, such as that the person is unable to support him/herself and dependants (1996 Constitution: section 27(1)(c)). The relevant pensions Act is regarded as a law of general application because any person, after qualifying for social assistance, may at any time apply for such a pension. This general rule in connection with applications for pensions, applies to any person and not a specific person or group of persons. The relevant pensions Act will not be of general application if, for example, applications for social pensions may be submitted only by males of a certain racial group during a specified period each year. Such legislation of general application may also limit a fundamental right as illustrated in the example where the social pension is granted to the person subject to prescribed conditions

of being unable to support for him/herself (1996 Constitution: section 27(1)(c); Rautenbach 1995:91)).

The requirement in section 36(1) of the 1996 Constitution that fundamental rights may be limited only in terms of law of general application, excludes legislatures from applying such law to specific cases by means of provisions in the law itself. The application of such law to specific cases is subject to prescribed procedures of administrative or criminal procedural nature (1996 Constitution: sections 33 and 35). Such law has to be applied by executive public institutions and judicial institutions that have to comply with the procedural requirements (Rautenbach 1995:91).

To illustrate the point further, reference could be made to section 1(9) and (10) of the constitution of the United States of America that prohibits the adoption of "bills of attainder". In a matter which served before the supreme court of America, *United States v Lovett* (1946) 328 US 315-316, a budget Act which prohibited the remuneration of certain named individuals from state funds was declared invalid. The court stated:

"[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution ... No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd and Watson 'guilty' of the crime of engaging in 'subversive activities', defined that terms for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304 of the budget act, while it does not use that language, accomplished that result."

I conclude that the budget Act, which was to be of general application, was wrongly used for a specific purpose. The names of certain persons should not have been mentioned as that made the budget Act a specific Act. I conclude that, if no names were mentioned, the Act would have been a general Act and applied to all persons.

4.7.4 Reasonable and justifiable limitations

In terms of the 1993 Constitution (section 33(1)), the limitation of fundamental rights had to be reasonable and justifiable in an open and democratic society based on freedom and equality. A number of fundamental rights, of which the limitation had to be reasonable and

necessary, were singled out. The rights singled out concerned **human dignity** (section 10); **personal freedom** (section 11); the **prohibition on servitude and forced labour** (section 12); **religion, belief and opinion** (section 14); **political rights** (section 21); **detained, arrested and accused persons** (section 25); certain **children's rights** (section 30); and in so far as it relates to free political activity, also **freedom of expression** (section 15); **assembly and demonstration** (section 16); **association** (section 17); **freedom of movement** (section 18); **access to information** (section 23); and **administrative justice** (section 24).

In terms of the 1996 Constitution (section 36(1)), the limitation of fundamental rights has to be reasonable and justifiable in an open and democratic society. The democratic society must be based on human dignity, equality and freedom. Fundamental rights are not listed in order to be coupled to a reasonable and justifiable limitation. The limitation, when formulated, has to, however, take into account all relevant factors (unspecified in section 36(1)) including five other aspects relating to the limitation (see *supra* 4.7.1.1).

The concepts "reasonable" and "justifiable in an open and democratic society" are expressed in familiar wording. The concepts underscore a theme that a particular relationship has to exist between the factual limitation imposed and the individual's fundamental rights and interests which must be protected and promoted by the state authority. These concepts are also part of the Canadian Charter and the Canadian approach to the concepts could be referred to. In the Canadian case of *R v Oakes* (1986) 1SCR 103 on page 227, reasonableness was discussed in a way that linked it to the identification of those limitations which are justifiable in an open and democratic society:

"To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom":R v Big M Drug Mart Ltd. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum that an objective relates to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important."

I agree with the court's approach. My view is that from this discussion, emerge the balancing of, firstly, the rights and interest of an individual and, secondly, the interests of a democratic

society as represented by the state. The state may limit the exercise of entrenched fundamental rights only insofar as permitted by the constitutional limitation clause. It is for the Constitutional Court ultimately to weigh the two sets of interests in the light of all the factors provided for by the limitation clause.

The official ground or consideration for limitation invoked by the state must be compatible with democratic governance. This is the ultimate standard against which limitations must be measured. In the Oakes case (on page 225) the following was said in this regard:

"Inclusions of these words [free and democratic society] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis for the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

What this quotation makes quite clear is that the purpose of a limitation in this context is to further the basic objective of democratic governance (see *supra* 4.3). I concur with this approach.

Democracy can therefore in certain circumstances be compatible with restrictions on particular fundamental rights. Such restrictions are invoked in order to actually protect the rights and interests of the individual and to ultimately prevent arbitrary state infringement on those rights and interests (see *X v United Kingdom (7992/77) DR 14*). A limitation on one particular fundamental right could also give effect to another constitutional guarantee. The invoked objective will naturally have to be acceptable within the context of a democratic society (Erasmus 1994:646-7). I also see this as an important aspect to keep in mind.

A limitation clause usually contains a description of the purpose for which the limitation may be imposed, as well as the relationship between the purpose and the limitation. The purpose for which rights may be limited is often worded in terms of the protection or promotion of

specific community interests such as "national security", "public order", "good morals", "public health" and "administration of justice". In the 1996 Constitution, the limitation clause does not contain a definition of such community interests. In the limitation provisions of certain rights an indication does appear, for instance in section 25(2)(a), certain expropriations are permissible for a public purpose.

An example of a limitation on a fundamental right in order to serve another fundamental right is found in the case of *X v United Kingdom* (7992/77) DR 14. The accused was a Sikh who continuously wore a turban according to a religious requirement. The Sikh rode a motorcycle on a public road and did not wear a crash helmet. Although it was compulsory to wear a crash helmet when riding a motorcycle, the Sikh objected to having to remove his turban. The court held (on page 234) that it remained lawfully compulsory for the accused to wear a crash helmet even though the arrangement interfered with the Sikh's religious freedom. The limitation placed on the Sikh's religious freedom was justified for the protection of public health and safety.

I concur with the court's judgment in the case just mentioned. I believe this is precisely a limitation on one right in order to give effect to another constitutional guarantee. My view is that the protection of public health and safety covers the rights of more persons than the Sikh's right to wear his turban.

This brings me to the end of the discussion on the limitation of fundamental rights. I now intend to describe what public officials should take careful note of following the inception of the 1993 Constitution on 27 April 1994.

4.8 Constitutional obligation on public administration

I mentioned above (see *supra* 4.1) that on 27 April 1994 public administration entered a very turbulent period with a critical challenge to reshape itself and the manner in which it was to be exercised. This situation was brought about by the inception of a constitutionally protected Bill of Rights. This meant that constitutional prescriptions and public administrative practice would have to interface with each other and in time re-shape the manner in which public administration was exercised. My view is that a *constitutional obligation* on public administration was created and was here to stay.

Administrative law is concerned with the composition, procedures, authorities, duties, rights and liabilities of the different public institutions which are engaged in administering public policies. These policies are laid down and developed by the government of the day in exercising their executive authority. Public administrative institutions are created and equipped with statutory authority to carry out the public policies on behalf of the government. The activities of public officials in the administrative institutions executing statutorily prescribed functions, for example, in the office of the Commissioner of Inland Revenue, form the public administration of the state. When officials exercise public administration, individuals' fundamental rights may be acutely affected to their benefit or their detriment (Wade *et al* 1993:603-4; Van der Waldt *et al* 1995:2). I regard this as the primary reason why public officials must adhere to the constitutional obligation on public administration.

The primary aim of public administration is in actual fact to promote the general welfare of the inhabitants of South Africa by rendering a public service to them. The public officials, who execute statutorily prescribed functions, may not perform those prescribed functions autonomously. Officials are obliged to perform their functions within parameters/guidelines as set out in authorising legislation or regulations (Cloete 1989:122-123). These are *cardinal principles which public officials must keep in mind because they are responsible to the government for their actions*. The public is entitled to a service rendered in an unprejudiced and impartial manner (Van der Waldt *et al* 1995:76). These are all the more reasons why public officials, to my mind, are compelled to adhere to constitutional obligations.

The 1993 Constitution brought an abrupt end to the former parliamentary constitutional system by introducing a constitutional system based on a supreme constitution. Sections 4 and 7 of the 1993 Constitution introduced new principles affecting public administration. Section 4(2) provided that the 1993 Constitution bound legislative, executive, and judicial institutions. Section 7 provided that the 1993 Constitution's chapter 3 on fundamental rights bound all legislative and executive authorities, and applied to all law in force and all administrative decisions taken and acts performed. In the final analysis, the manner in which the government of the day ought to exercise public administrative functions, is constitutionally determined (Law Commission 1994:7). My view is exactly the same as these statements - the constitutional prescriptions dictate how public officials should perform their activities and this is the constitutional obligation on public officials.

4.9 Summary

The post-apartheid constitutional rules regulating public administration which the 1993 Constitution installed on 27 April 1994, were largely perpetuated in terms of the 1996 Constitution. This implies that contemporary public administration should be exercised in terms of constitutional provisions and limitations, and should adhere to constitutionally entrenched fundamental rights. This implication did not exist during constitutional dispensations prior to 27 April 1994. Public administration, accordingly, entered the post-apartheid era with an apparent challenge to reshape itself and its manner of being exercised. Public officials have to, when performing their functions, observe constitutional rules and reservations when applying the principles of the entrenched fundamental rights to their activities (see *supra* 4.1).

The 1993 Constitution contained many transitional provisions mainly aimed at bridging the apartheid era with the post-apartheid dispensation. These bridging provisions formed part of the challenge to public administration to adapt to the new environment (see *supra* 4.2.1). This challenge still faces all public institutions in the different divisions and in the different spheres of government (see *supra* 4.2.3), since the supreme 1996 Constitution now contains South Africa's contemporary constitutional rules (see *supra* 4.2.2). These rules are to be adhered to by public institutions in the legislative, executive and judicial divisions of government, as well as those at the national, provincial and local spheres (see *supra* 4.2.3) when exercising public administration.

Whereas all the provisions of a constitution may relate to public administration in some or other way, only certain provisions of the 1996 Constitution have a more direct bearing on the manner in which public administration is to be exercised. This is found primarily in section 195 of the 1996 Constitution, which contains basic values and principles, such as fairness and equality. Section 195 directs that public administration is governed by the values mentioned in its provisions. These constitutional parameters could serve as a constraint to state authority being exercised arbitrarily (see *supra* 4.2.4).

The mentioned values in the 1996 Constitution which govern public administration, form part of the concept of a democratic South Africa, with a democratic society, government and public administration. The concept of democracy appears to fulfil an important role in public administration. Following the descriptions of democracy given by Dworkin, Hirst, and March

and Olsen, South Africa's constitutional environment is a representative democracy (see *supra* 4.3) and ought to reflect public administration accordingly.

In the light of the fact that public officials are constitutionally obliged to apply the principles of the entrenched fundamental rights to their activities, particular fundamental rights were distinguished (see *supra* 4.4). Rights such as "equality" and "human dignity", which relate more closely to public administration, could probably have a major influence on the manner in which public administration is exercised (see *supra* 4.4).

Of immense importance is that public officials, when exercising public administration, have to be aware of important factors in connection with fundamental rights. Such factors include which people are the bearers of which fundamental rights under specific circumstances (see *supra* 4.5.1). It is also necessary to keep in mind that juristic persons are the bearers of particular fundamental rights (see *supra* 4.5.2). When applying such rights, certain statutory prescribed formalities regarding, for example, interpretation and application (see *supra* 4.6.1) also have to be followed, and requirements regarding, for example, the validity of activities performed in terms of certain legislation (see *supra* 4.6.2), have to be adhered to (see *supra* 4.6).

When public officials apply fundamental rights when exercising public administration, they also need to keep in mind that such rights may also be limited. The limitation has an influence on the extent the bearer of the fundamental right may exercise that right. In this regard an official ought to be aware of limitations contained in legislation of general application (see *supra* 4.7.3), limitations contained in the 1996 Constitution (see *supra* 4.7.1), and to which extent public institutions are authorised to place limitations on fundamental rights (see *supra* 4.7.2).

A comprehensive and non-racial set of fundamental rights constitutionally entrenched or otherwise protected from arbitrary governmental actions, was unknown to South Africa before 27 April 1994. Public administration was therefore exercised by public institutions without having to adhere to the principles contained in such a set of fundamental rights (see *supra* 4.1). On 27 April 1994, the inception of the 1993 Constitution with its comprehensive set of protected fundamental rights, brought with it a challenge for public administration to reshape itself and the manner in which it was exercised. This meant that constitutional prescriptions and public administrative practice would have to interface with each other in order to reshape the manner in which public administration was exercised. This was held to be a constitutional obligation placed on public administration (see *supra* 4.8).

Most of the many facets of constitutional requirements which public officials need to be aware of and adhere to when exercising public administration have been touched on in this chapter. The actual interface between the application of entrenched fundamental rights and public administration functions could shape the manner in which public administration is exercised in such circumstances. The actual steps taken by governmental authorities in this regard, and the envisaged impact fundamental rights could have on public administration, are analysed in chapter 5 of the thesis.



Chapter 5

Translating constitutional principles into reality

5.1 Introduction

Contemporary South Africa is a constitutional state with a supreme 1996 Constitution containing a Bill of Rights. South Africa is now putting entrenched fundamental rights to the test in public administration for the first time. The new constitutional environment, however, without any option, inherited the apartheid public administration environment on 27 April 1994. The principles of fundamental rights had to be applied immediately in public administration activities, but when applied, public officials probably encountered difficulties with still valid callous apartheid principles contained in legislation (see *infra* 5.4.2). Such apartheid principles remained in force until authoritatively repealed or amended (see *supra* 4.6.2). Public administration thus entered a bridging process between the apartheid-era and the post-apartheid-era.

The major challenge facing public institutions, and ultimately public officials, during the bridging process, is to assist in the transformation of the public administration environment from the apartheid system to the post-apartheid system. Relevant practical steps need to be taken by public officials in order to translate the principles in the 1996 Constitution and the Bill of Rights (Chapter 2 of 1996 Constitution) into reality. If public administration is to be transformed, it is imperative that due consideration be given to constitutional factors and principles which contribute meaningfully to public administration being exercised in terms of the requirements imposed by the 1996 Constitution. Constitutional principles in written format are possibly meaningless and obfuscated unless accompanied by a translation into practice.

In chapter 4 of the thesis, I touched on the majority of the constitutional requirements which public officials need to be aware of and adhere to when exercising contemporary public administration. In this chapter I intend to deal with the steps governmental authorities need to take and the expected effects and consequences in order to implement the prescriptions

in the 1996 Constitution relating to public administration. When the empirical survey is dealt with in chapters 6 and 8, the expectations touched on in this chapter will be referred to for purposes of comparison.

Accordingly, in this chapter of the thesis, an exposition is firstly given of the implementation of constitutional principles in practice and of the role-players in that process. Secondly, the concretisation of fundamental rights is described. Thirdly, factors that impede the implementation of the new constitutional principles are dealt with. Fourthly, an analysis is made of the impact entrenched fundamental rights have on public administration, as expected in South Africa, and a description is given of the expected effect entrenched fundamental rights will have on the manner in which public officials exercise public administration. Finally, a summary of the contents of chapter 5 is given.

5.2 Implementing constitutional principles

The 1996 Constitution, as the basic and supreme law of South Africa, establishes the structure, operation and authority of government. This Constitution also contains an abundance of guidelines and requirements which have to be observed by public officials when exercising public administration. This Constitution (section 1) quite prominently places democracy as a common denominator in all aspects of the constitutional dispensation. The ideal for a constitutionally and democratically based public administration is also clearly reflected in the preamble to the 1996 Constitution:

*“We, the people of South Africa ...
adopt this Constitution as the supreme law of the Republic so as to ...
establish a society based on democratic values,
social justice and fundamental human rights; ...”*

This results in officials having to implement the constitutional prescribed processes to assist in the completion of the above-mentioned bridging process (see *supra* 5.1). This framework of procedures and rules aims at regulating the relationship between the state authority and the inhabitants of South Africa (see *supra* 4.2.4). An exposition is now given of the state authority and their responsibility of implementing such constitutional principles in practice.

5.2.1 State authority

The state authority, when exercising public administration, has the obligation (see *supra* 4.8) to observe and adhere to the principles in the 1996 Constitution (sections 40(2) and 41(1)(d)). The state authority is made up of the three divisions of government authority (executive, legislative and judicial) (see *supra* 4.2.3) in the three spheres of government (national, provincial and local) (see *supra* 4.2.3.4). This state authority jointly governs the public administration of South Africa (1996 Constitution: section 41(1)).

Public institutions of the state authority such as state departments, and more specifically public officials, are vital role-players in implementing constitutional principles when exercising public administration. This includes implementing the principles of the constitutionally entrenched fundamental rights in the Bill of Rights (1996 Constitution: section 7(2)).

5.2.2 Constitutional principles and public administration

The implementation of constitutional principles in practice must, naturally, be done in order to avoid stagnation of those principles. McWhinney (1959:32-37) writes that the success or failure of implementing such principles effectively and efficiently depends to a large extent on the veneration and ability with which public institutions and officials comply with such constitutional provisions. I agree with what McWhinney writes. My opinion is that when the 1993 Constitution came into operation on 27 April 1994, public officials should have been officially informed of the objectives and contents of the constitutional environment that was installed, how the new environment differs from that of the former apartheid environment, the impact the new constitutional principles could have on public administration, and how the bridging process should be implemented. In this manner, public officials could possibly have been familiarised with the new environment and made aware of their role in the implementation of the new constitutional principles. Officials would probably have had a good understanding of what the bridging process entailed and developed the necessary veneration for it. I believe that the success or failure of implementing new constitutional principles also depends on early inculcation of public officials. Officials should be made aware of the fact that in order to be constitutionally and democratically orientated, all officials ought to function in a manner which constantly aims at harmonising the interests of the inhabitants of South Africa with the goals of the state authority. This could require that very significant emphasis be placed on a requirement that public officials, especially those serving from during the apartheid-era, should adapt hastily and more readily to the contemporary

constitutional format. Public officials, who commenced their service after 27 April 1994, should be made aware of the above-mentioned bridging process in order to ensure that they adhere to the contemporary constitutional requirements.

To be constitutionally and democratically orientated could furthermore require from public officials to exercise public administration in such a manner that the state's compliance with constitutional requirements can be seen. Such a manner of functioning could develop into a habitual process which in turn could become a culture of respect for fundamental rights. De Giorgi (1999:32) remarks that the inhabitants of South Africa are generally unfamiliar with holding government accountable. I endorse this remark, as public officials should be made aware of the fact that the inhabitants are entitled to effective and efficient compliance with constitutional prescriptions and may hold public officials accountable to ensure such compliance.

Cloete (1996:23,24) writes that public accountability means that public officials have to pursue objectives determined not by themselves, but by the inhabitants. Cloete then proceeds to state that the inhabitants have an indispensable role to play in exacting accountability. This, in effect, implies that public officials have to provide explanations to justify their performance of their daily activities. The inhabitants thus have a "surveillance" role to play to ensure that public officials comply with constitutional prescriptions. My view is also that it is the interests of the inhabitants that public administration has to serve, and that the inhabitants have to ensure that their interests are in fact served. In this regard Hilliard and Kemp (1999:51) write that the role of the inhabitant is to ensure that constitutional values and principles are achieved and/or sustained by public institutions. Inhabitants act as guardians to challenge the actions or inactions of public officials, to determine whether the public institution is operating within constitutional provisions, and to see whether it is actually promoting the inhabitants' general welfare. In other words, inhabitants have to ensure that as taxpayers they are getting value for money.

In addition hereto, the state authority should strive at developing a culture of being the facilitator and manager of the use of public resources rather than being a bureaucracy with a stranglehold on the lives and interests of the inhabitants of South Africa. Such an attitude could avoid dishonouring the ideals and principles in the 1996 Constitution for a democratic state which is intended to completely replace the callous apartheid system and state.

Paramount, however, to this constitutional ideal for a particular style of public administration, is the accompanying acknowledgement that with the realisation and manifestation of

constitutional principles, come the responsibilities of maintaining constitutionally set standards when exercising public administration. Hilliard and Kemp (1999:55) state that to maintain public service efficiency, officials should ensure that the general welfare of the inhabitants is served, the governmental machinery remains well lubricated, and that public institutions act in unison to attain their governmental and administrative goals. In other words, good co-operative governance ensures efficiency and effectiveness. I agree with this statement and must add that with such an aim, public officials could maintain constitutionally set standards and realise the constitutional principles in practice.

An example of a constitutional principle that has to be implemented in practice is found in section 195(2)(a) of the 1996 Constitution. In terms of section 195(2)(a), all public institutions must ensure the promotion of the basic democratic values governing sound public administration. Such values are, *inter alia*, efficiency, impartiality, equity, accountability and transparency. The contemporary constitutional dispensation is in its infancy but it ought to remain a priority with public institutions to execute constitutional obligations without undue delay. This would involve hastening to ensure that all public administration activities exercised complies with the requirement of section 195(2)(a). Prompt compliance with constitutional obligations could contribute to achieving the constitutional vision of a sovereign, democratic state founded on fundamental values such as, *inter alia*, human dignity and equality, non-racialism and democratic government (1996 Constitution: section 1).

Of more prominence for the purposes of the thesis, is the realisation of the constitutionally entrenched fundamental rights out of the realms of theory into practice, and the impact those rights may have on public administration (Madala 1996:3). Accordingly, the concretisation of such rights is described.

5.3 Concretisation of the entrenched fundamental rights

The concretisation of the entrenched fundamental rights by public officials is probably an important goal of public administration to be reached and experienced. When the stage is reached in which fundamental rights are experienced to their full extent, the actual impact fundamental rights may have on the manner in which public administration is exercised, could then become more evident.

The existence of constitutionally entrenched fundamental rights is practically worthless unless translated into reality. My intention with this statement is that such fundamental rights were included in the 1993 Constitution and are currently in the 1996 Constitution. In the event of public officials implementing these rights when exercising public administration, the principles of these rights will be translated into reality. Should public officials exercise public administration but fail to or only partly implement these rights, the rights will remain in abeyance and, to my mind, be practically worthless with regard to, by definition, public administration. This entails that public officials in all divisions and in all three spheres of government should fully implement and adhere to the rights in the Bill of Rights in their everyday exercising of public administration. The implication flowing from such actions by public officials could have a practical effect on the lives of the inhabitants of the country, for instance, all inhabitants could experience having access to all public services without the existence of unjustified discrimination. From such a situation a culture of promoting and implementing the current entrenched fundamental rights could develop and exist among all public institutions and officials. Once such a level of utilisation of fundamental rights has been reached in the public sector and by those who can exercise such rights (the inhabitants), concretisation of such rights will be a reality (Gila and Van Rensburg 1996:15). Concretisation, in this regard, thus refers to the harmonisation of the existence of entrenched fundamental rights, the implementation of the principles of such rights, and the exercising of those rights, in order to bring such rights into a meaningful reality.

The interim 1993 Constitution (epilogue after section 251) referred to the apartheid-era as having a divided society characterised by injustice. The future (post-apartheid era) was sketched as being founded on the recognition of fundamental rights, democracy and no unfair discrimination. The 1996 Constitution (preamble) envisages a future society based on democratic values, social justice and fundamental human rights. South Africa has already moved away from an apartheid constitutional dispensation and has now achieved, from a statutory point of view, a non-racial democratic dispensation. Madala (1996:3) remarks that the next step is to experience non-racialism and democracy in practice.

My opinion is that public officials should not regard the entrenched fundamental rights as ethereal guarantees on statute paper, nor as swords hanging tenuously and threateningly over their heads, but rather as the fundamental tenets of democracy. The constitutional aims can then be reached in practice. All public institutions have a constitutional obligation to promote fundamental rights and it is now for those (the inhabitants of South Africa) exercising such rights to experience, *inter alia*, democracy, general dignity and fair labour practices (Gila and Van Rensburg 1996:13). Public officials face a challenge to not frustrate

the ideals of the 1996 Constitution and its Bill of Rights when exercising public administration within the norms and spirit of the tenets of democracy, but to aim at hastily achieving the stage where concretisation of the entrenched fundamental rights can occur.

To my mind, all public officials ought to be vigilant as regards promoting and adhering to the fundamental rights in the Bill of Rights at every stage in exercising public administration. Constant assessment and appraisal of existing and future administrative procedures and policies appears to be more desirable and appropriate. Langa (1996:10-12) remarks that such an approach could serve as an important pre-emptive measure not only to avoid constitutional challenges but to ensure the vital success of the constitutional initiative for a transformed public administration. I support Langa's remark as public officials can ensure the success of the current constitutional initiative for a transformed public administration by hastily achieving familiarity with the constitutional obligation on officials regarding the implementation of constitutional principles (see *supra* 4.8).

The task of translating fundamental rights into reality remains a challenge to and an enormous task for officials (Matjila 1996:93-94). The implication is for officials to remain within constitutional parameters when performing any action or making any decision.

The commencement of the bridging process between the apartheid-era and the post-apartheid-era in South Africa is now accordingly described.

5.4 Implementation underway or stagnation?

Despite having to regard the implementation of new constitutional principles and procedures as part of a gradual process, it also ought to be regarded as a major priority to commence such a process without delay. The implementation of the 1993-constitutional principles relating to public administration could, however, only officially commence on 27 April 1994 when the 1993 Constitution came into operation. Public officials were constitutionally obliged to implement the rights in the Bill of Rights as from 27 April 1994. Difficulties would be encountered during the bridging process, but it would remain an aim and a challenge to complete the bridging process between the apartheid era and the post-apartheid era, in the shortest time possible.

Several factors had to be taken into consideration that would impede the speedy completion of the bridging process. Part of all such factors, are aspects such as public

officials in office and the legislation in force. These aspects would possibly emerge as responses to particular questions in the questionnaire used in the empirical research stage. These aspects are now dealt with.

5.4.1 Public officials in office

The public officials, who were in the service of public institutions on 27 April 1994, were apparently in an established routine of exercising public administration in terms of pre 27 April 1994 apartheid legislation. Officials were familiar with prescribed procedures and processes, and of being accountable to a political head of the relevant department. Officials were apparently accustomed to the idea that despite new constitutions - as in 1961 and 1983 - the political situation and, accordingly, the administrative procedures remained virtually the same in the day-to-day public administration (see *supra* 3.3.3 and 3.3.4) (Thornhill 1995:3; Skweyiya 1995:4). This situation could have led to officials being less aware of the actual effect the new post-apartheid constitutional prescriptions relating to public administration, would have once applied in practice. Furthermore, legislation authorising public officials' activities also remained virtually the same before and after 27 April 1994 and public officials were apparently under the impression that public administration procedures would once again, as during previous constitutional changes, also remain the same. Despite the fact that a new government took office on 27 April 1994, public officials continued to function on a day-to-day basis in terms of enabling legislation in force at that point in time.

While most of the public officials in office were familiar with the previous government's management style and policies, they may have been hesitant about implementing the new governmental policy in a democratised society (1993 Constitution: preamble). Ultimately, there remains an obligation (see *supra* 4.8) on public officials in office to adapt their manner of exercising public administration from the apartheid era to the new constitutional era. Thornhill (1995:2) writes that the manner in which public administration is exercised may only show a change when public officials finally adapt to the new constitutional situation. I agree with Thornhill's remark as a change will probably be evident once public officials have not only adapted to the new constitutional situation but also succeeded in maintaining to uphold and achieving all the laudable values and principles (for example in section 195 of the 1996 Constitution) when exercising public administration.

5.4.2 Legislation in force

When the 1993 Constitution came into operation on 27 April 1994, certain pre 1994 laws were repealed (1993 Constitution: section 230, read with Schedule 7). Schedule 7 contained a list of 53 Acts that were repealed and another 6 Acts of which certain provisions were repealed. The Acts so repealed were apparently the Acts that were earlier identified as being inconsistent with the 1993 Constitution. Other legislation had to probably still be scrutinised for inconsistencies with the 1993 Constitution.

Section 229 of the 1993 Constitution provided that all laws that were in force immediately before the commencement of the 1993 Constitution, would continue in force until repealed or amended by a competent authority. This meant that pre 1994 legislation, relating to public administration and possibly containing inconsistencies with the 1993 Constitution, continued in force on 27 April 1994. I believe that where inconsistencies existed in legislation, public officials did not apply the provisions or parts containing such inconsistencies as such activities would have been invalid (1993 Constitution: section 4(1)). This meant that where an Act or part of an Act had to be amended or repealed because of an inconsistency with the 1993 Constitution, a vacuum existed that had to be filled with appropriate legislation passed by a competent legislative authority. A vacuum only existed if a legislatively prescribed procedure could not be applied at all. This means that a vacuum did not exist if public officials could still apply a procedure by avoiding the part/s that contained the inconsistency. When a complete vacuum existed in an Act, it meant that officials did not have a procedure to apply until an alternative procedure was legislated. Officials could not apply an interim procedure as all public administration authority derives from legislation (see *supra* 1.1). Similarly, public service regulations and programmes issued in terms of legislation that continued in force, thus also continued in force (1993 Constitution: section 236).

The new political heads (ministers) of government departments had the task of reassigning functions, rationalising activities and determining spheres of responsibilities in their respective departments. This had to take place in terms of enabling legislation and was thus at first done in terms of the existing legislation. Only after such restructuring was underway, could redundant legislation and regulations be identified. At the same time, legislation inconsistent with 1994 constitutional principles had to be identified for amendment or repeal. This process to obtain more uniform procedures was initially followed as a primary task over a period of time. The process did not, however, result in an immediate implementation of the new constitutional principles regarding public administration. The process is still to be

followed over a period of time especially to identify legislation inconsistent with constitutional principles. The successful implementation of new principles furthermore relies to a large extent on the veneration felt by officials (Teffo 1995:5; Skweyiya 1995:4).

An example of a remnant of pre 1994 legislation that was still valid on 27 April 1994, but that was apparently inconsistent with the 1993 Constitution, was in the Aliens Control Act, 1991 (Act 96 of 1991). Section 47 (now amended), *inter alia*, contained a provision which restricted the jurisdiction of the court to review certain public administration actions. The section deals with non-South African citizens who perform some or other actions which make them liable for deportation from South Africa. The section stated that the Minister of Home Affairs could, if he considered it to be in the public interest, grant a warrant of arrest in order that a person, who is not a South African citizen, be detained and removed from South Africa. The decision of the Minister that the person be removed from South Africa, was not subject to appeal to or review by any court of law. No person was entitled to be furnished with reasons for the Minister's decision. The restriction on the jurisdiction of the court was thus unconstitutional. The absolute bar placed on persons obtaining reasons for the Minister's decision, was clearly inconsistent with the entrenched fundamental right to administrative justice (1993 Constitution: section 24). By means of the Aliens Control Amendment Act, 1995 (Act 76 of 1995), both the restriction on the jurisdiction of the court and the bar on obtaining reasons, were repealed with effect from 1 July 1996. Therefore, only from 1 July 1996 the public administration actions that were authorised in section 47 were prescribed to be exercised in a different manner than before, as they had to be transparent in every aspect. My view is that section 47 is now subject to the values and principles contained in the entrenched fundamental rights. I conclude that when public officials exercise public administration in terms of section 47, such public administration ought to be exercised in a manner that differs from the manner in which it was exercised before section 47 was amended.

The adapted legislation authorising particular public administration activities did not guarantee a substantive and equalised public service to all inhabitants of South Africa. Such legislation could however aim at a cohesive approach in service delivery and the indivisibility of fundamental rights of all people. Pitfalls such as differentiation between people, poor service, a lack of accountability and transparency, had to be avoided in order for it not to become a hindrance to the success of the democratic constitutional environment. This was necessary in order that the nature of public administration, and the manner in which it is exercised, should be perceived as acceptable by the very people affected by public administration activities (Skweyiya 1995:4-5). I assume that once public officials apply the

rights in the Bill of Rights in all public administration activities, a cohesive approach will be more evident.

The expected impact entrenched fundamental rights might have on public administration is described next.

5.5 Expected impact and effect of entrenched fundamental rights on public administration

My opinion is that the impact that the constitutionally entrenched fundamental rights may have on, among others, South Africa's public administration environment in practice, may differ in several respects from the impact which is intended in the provisions of the 1996 Constitution. It could be debated what effect such rights might have on public administration activities. I assume that only the actual occurrences experienced in public administrative practice could, though, bear evidence of any impact entrenched fundamental rights have on the public administration environment. This impact may, accordingly, be experienced and also have an effect on the manner in which public officials exercise public administration. This aspect is dealt with in the hypotheses in chapter 6 of the thesis.

South Africa's public administration does not have a history of being subject to entrenched fundamental rights for a long period. The constitutions prior to 1994 did not contain comprehensive provisions in that regard. The actual influence such rights may have on the manner in which public administration is exercised, could therefore not be identified with certainty as yet. Accordingly, it appears advisable to give an exposition of such an influence as could be expected in the South African context, and thereafter describe an expected effect such rights might have on the manner in which public administration is exercised.

5.5.1 Expected impact in South Africa

I presume that the impact of South Africa's constitutionally entrenched fundamental rights on public administration and the manner in which it is exercised, is possibly similar to that experienced in other countries where there are similarities in the governmental and constitutional structures of the countries. The fact remains, however, that every country's bill of rights is probably different to all others in the sense that it addresses different fundamental rights in circumstances unique to each country. The paradox is, however, that the underlying

and essential problems which give rise to the need to address particular rights, are not culture-specific to a country or group of people. The problems are the ubiquity of conflicts of peoples' interests and the unjustified limitation of resources.

The numerous court decisions regarding fundamental rights and public administration, that have been handed down in countries that have a bill of rights, could, *inter alia*, be consulted by South Africans to assist with the interpretation of the South African 1996 Constitution. Such an approach is prescribed in the 1996 Constitution (section 39(1)). South Africa's inhabitants and public officials should remain involved in the development of South Africa's entrenched fundamental rights. The ultimate goal is surely to ameliorate the manner in which public administration is exercised and reduce the perpetual distance between government authority and the inhabitants of the country. This may contribute to the rise and successful achievement of a fundamental rights culture in South Africa (Rautenbach 1995:10). Such a culture could develop amongst the inhabitants of the country in that inhabitants may become more acquainted with their fundamental rights and with the methods of enforcing such rights.

In this context it serves a comparative purpose to analyse an expected effect entrenched fundamental rights could have on the manner in which public administration is exercised.

5.5.2 Expected effect of entrenched fundamental rights on the manner in which public administration is exercised

In South Africa, public administration forms an inseparable part of the political-public administration process, by means of, *inter alia*, public officials' functions in implementing governmental policy programmes. When public officials implement such programmes, certain expectations regarding the nature, content and standard of public services are apparently created with the inhabitants of the country. To be publicly acceptable in this society-public administration relationship, public officials' activities need to be service-orientated administrative functions aimed at, and available to, all inhabitants of the country. In practice, public officials' activities need to evoke a positive response from the inhabitants' values, such as justice, fairness, equality, sensitivity and accountability. To achieve this, public officials have to orientate themselves and rediscover the willingness to be of service and to demonstrate the necessary attentiveness to the interests and requirements of the inhabitants. Officials may also have to co-operate consciously in attempts to serve the total population of South Africa, and for the first time in the country's history, be "South Africanised" as part of the total population (Terreblanche 1994:25; Gildenhuys 1994:193).

Terreblanche (1994:24) writes that public administration may only be able to fulfil this role in a post-apartheid South Africa, if it is in every way free from particular dominating factors unique to the apartheid political system. Such factors include, in national and provincial spheres of government, *inter alia*, the "White Afrikaner" character and culture, the White Afrikaner political subservience to the former ruling political party, and the ideological commitment to the social ideals of predominantly the White people in South Africa. My opinion is that the current political system is subject to the 1996 Constitution that contains values and principles which do not allow public administration to serve the interests of one group of persons based on skin colour. The constitutional prescriptions do in fact prescribe that public administration should be free from factors that are "unique to the apartheid system". I believe that after public officials have been officially informed of the nature of the current constitutional system and its expected effect on the manner in which public administration is exercised, public officials can orientate themselves to the current environment. The question whether such a change in the manner in which public officials exercise public administration has taken place since 27 April 1994, can be included in a questionnaire used in the empirical survey discussed in chapters 6 and 8 of this thesis.

Tötemeyer (1988:1-3) comments that the socio-political dispensation (which existed before 27 April 1994) lacked credibility in most aspects such as justice, fairness, equality, sensitivity and accountability in the eyes of the greater part of the inhabitants of the country (see *supra* 3.3.2.2). Tötemeyer adds that it may therefore be fair to expect that public administration, when accommodating fundamental rights, will have to play an active role - with the necessary compassion - in poverty relief, the upliftment of previously disadvantaged people and the maintenance of stability. Terreblanche (1994:25) argues that the official hand of public administration will have to be a sympathetic hand and in this way reshape the manner it is exercised to fully accommodate fundamental rights and not be similar to the manner it was exercised during constitutional dispensations prior to 27 April 1994. I agree with these arguments as they indicate that when public administration is subject to fundamental rights, the manner in which it is exercised will not be similar to the manner in which public administration was exercised prior to 27 April 1994.

De Beer (1987:111-113) as chairman of the then Commission for Administration, sketched the manner in which a public official exercised public administration functions. He indicated that every administrative decision taken by an official occurred within the framework of legislation approved by Parliament. Furthermore, it was the responsibility of the official to function in a pro-active manner in addressing the needs and requirements of the community served. The public official recognised the principle of political supremacy and that this

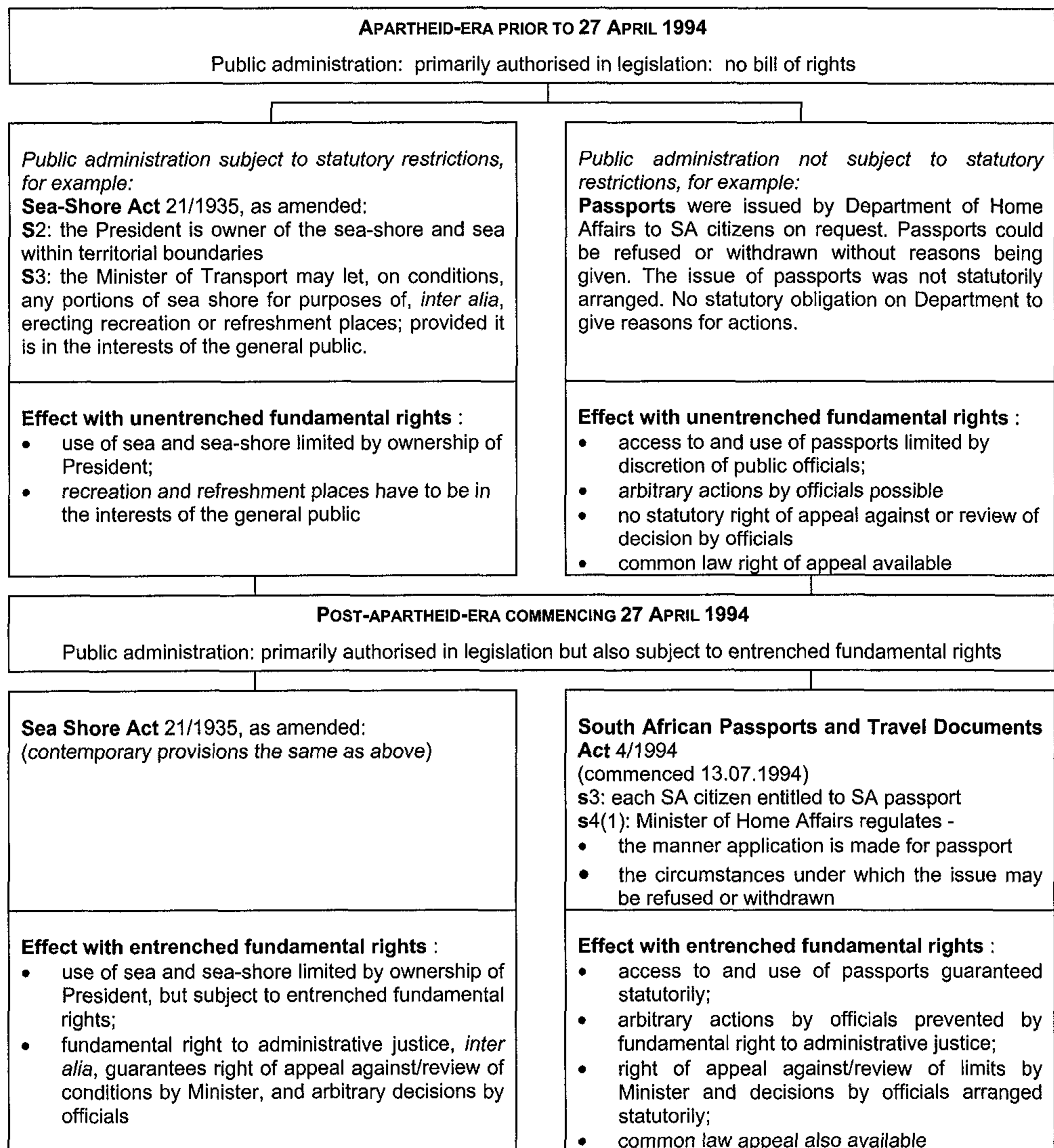
dictated his daily conduct. De Beer added that the broad body of public officials accepted being accountable and did not regard it as an obstacle to the effective and efficient execution of duties because they performed their tasks in such a manner that their activities withstood the test of public scrutiny. He also explained that democracy implies that the individual has certain rights and obligations and that public officials were aware of this principle in the execution of their day-to-day tasks. This implied that the public official exercised public administration functions within lawful authority and, when exercising a discretion, was balanced, honest and objective.

My opinion is that the sketch (excluding the aspect of political supremacy) by the mentioned chairman of the Commission may be regarded as a paradigm of the manner in which a public official could be expected to exercise public administration subject to entrenched fundamental rights. I regard it as ironic, though, that in 1987 the manner in which public officials apparently exercised public administration in terms of apartheid legislation without being subject to entrenched fundamental rights, broadly coincides with the manner in which public administration could be expected to be exercised in a post-apartheid era with entrenched fundamental rights. The sketch by De Beer, to my mind, makes Tötemeyer's (1988:1-3) comments questionable, or should it be the other way round? After all, there was no change in the political or constitutional dispensation between 1987 and 1988, and public administration was being exercised in the apartheid political environment (see *supra* 3.3.4). My conclusion as to De Beer's sketch is that he described a manner in which public administration was exercised during that period. Should, what he described, be correct in all respects, a change will not be evident or necessary when public administration is exercised subject to entrenched fundamental rights. I unfortunately cannot accept such a situation as being correct and thus doubt the accuracy of De Beer's statement.

The 1993 Constitution merely contained provisions relating to public administration and a provision (section 7) which stated that all public administration functions shall be subject to the 1993 Constitution's chapter 3 on fundamental rights. A definite nexus existed between section 7 and public administration functions but the prescriptions in section 7 had to be put to practice before any change in the manner in which public administration was exercised was likely to be measurable. Provisions similar to that in the mentioned section 7 are contained in section 8(1) of the 1996 Constitution. A nexus accordingly exists between section 8(1) and contemporary public administration functions. My view is thus that prior to any such measurement being attempted, any such change can only be anticipated.

The examples in Figure 5.1 serve to give a broad illustration of the effect entrenched fundamental rights could have on the manner in which public administration is exercised. In the top section of Figure 5.1, examples are given of public administration being subject to, and not subject to, statutory restrictions during the apartheid-era when no bill of rights existed. In the bottom section, the contemporary position is given of the same examples now being subject to entrenched fundamental rights.

FIGURE 5.1 THE EFFECT ENTRENCHED FUNDAMENTAL RIGHTS COULD HAVE ON PUBLIC ADMINISTRATION



Considering present bridging-developments in South Africa, the manner in which public administration is exercised should not be allowed to develop into something that would be disadvantageous to the effectiveness and efficiency envisaged for the entrenched fundamental rights. In my opinion, should public administration lag behind in the reshaping process, such failure would deepen conflict because the reason for discontent among the inhabitants of South Africa would still be ignored. It could be seen as a critical challenge to today's public administration to reshape itself around the image portrayed in section 8 of the 1996 Constitution. Tötemeyer (1988:11) as early as in 1988 referred to when South Africa would have a bill of rights and added that turbulence in the public administration environment would probably only then be overcome. Values such as transparency, legitimacy, credibility, efficiency and trust would then probably be encountered in South Africa's public administration environment and in the manner in which public administration is exercised. I agree with what Tötemeyer then wrote and regard it as relevant at this point in time.

Constitutional reshaping is underway and the effect of fundamental rights on the manner in which public administration is exercised is being experienced in South Africa. The practical consequences can be measured, if required.

It is imperative that public administration should conform to contemporary constitutional requirements as quickly as possible. Public officials will have to give due consideration to constitutional guidelines and exercise public administration accordingly. I presume that this will contribute to a modified manner of exercising public administration.

5.6 Summary

The 1993 Constitution created a new constitutional order in South Africa but the constitutional state necessarily inherited the apartheid public administration system on 27 April 1994. The 1993 Constitution repealed certain laws and provided that all laws that were in force immediately before the commencement of the 1993 Constitution, would continue in force until repealed or amended by a competent authority (1993 Constitution: section 229). This resulted in legislation continuing in force and containing callous principles from the apartheid-era. Only from 27 April 1994 could such principles be addressed in terms of the 1993 Constitution and the entrenched fundamental rights contained therein. Public administration thus entered a bridging process during which a transformation from the apartheid constitutional environment to the post-apartheid constitutional environment was undertaken. A major requirement is, however, that in order to be so transformed, public

administration is to be exercised in terms of the requirements and principles prescribed in the 1996 Constitution (see *supra* 5.1).

The 1996 Constitution, and earlier the 1993 Constitution, prescribed and introduced significant changes to the manner in which public administration has to be exercised in South Africa's contemporary constitutional state. It also appears that the entrenched fundamental rights will have a considerable effect on the manner in which public administration is exercised once the principles of such rights are fully applied in practice. This means that the current constitutional principles in written format need to be implemented in public administration in order to be translated into reality (see *supra* 5.1 and 5.2.2).

Public officials are constitutionally obliged to observe and adhere to the principles in the 1996 Constitution and its Bill of Rights when exercising public administration. Officials in all spheres of government are thus major role-players in the current restructuring process which has to take place in the public administration system, as part of the overall constitutional changes being brought about in South Africa (see *supra* 4.8 and 5.2).

There are many complex issues to overcome during the bridging process and public officials, especially those serving from during the apartheid constitutional era, face a challenge to adapt to a reshaped manner of exercising public administration. Obviously the answers may not be found in rhetoric-laden pledges or legislation alone. The indications are that a fundamental reconstruction of the public administration environment will ultimately "repeal" or "amend" all apartheid law and practices. Eventually, when the principles of the 1996 Constitution and its Bill of Rights are fully translated into practice, will it eradicate the racist basis underlining the manner in which public officials executed their functions in terms of apartheid laws (see *supra* 5.2.2).

The entire public administration reform process in South Africa is in its initial stages. A major aspect touched on is that the transformation process, during which the constitutional principles have to be translated into reality, is a gradual process (see *supra* 5.4.1). Therefore a reshaping of the manner in which public administration is exercised, is also expected to be subject to a gradual change over a period of time (see *supra* 5.4).

South Africa's public administration ought to therefore experience a reshaping of its character once the bridging process has reached an advanced stage. This will probably lead to a modified manner of exercising public administration which should conform to constitutional requirements (see *supra* 5.5.2). It should be appreciated and accepted that

such a change in the manner in which public administration is exercised, is a long-term and an ongoing process.

A few years have passed since the 1993 Constitution and its comprehensive set of entrenched fundamental rights came into operation and the bridging process from the apartheid-era to the post-apartheid-era commenced (see *supra* 5.1). The implementation of the 1993 and 1996 constitutional principles are underway (see *supra* 5.5 and Table 5.1) and changes in the manner in which public administration is exercised are, from a statutory point of view, evident (see example in Table 5.1).

The situation in practice now has to be tested and is done here by means of a questionnaire. This survey should reveal to what extent the implementation of the 1996 constitutional prescriptions has progressed and if there is any change in the manner in which public administration is exercised, brought about by such implementation.

The end of the first part of the thesis has now been reached. The second part consists of an empirical survey. In chapter 6 of the thesis the hypotheses, which are to be tested by means of a questionnaire in the survey, are delineated.



Chapter 6

Hypotheses tested by the empirical survey

6.1 Introduction

My intention with the survey study is to seek to establish by empirical means, the extent of public officials' knowledge of the Bill of Rights and the influence fundamental rights have on the manner in which public officials exercise their official functions. I am not aware of any empirical study on this topic that has been conducted in South Africa since 27 April 1994 when the first Constitution containing a comprehensive set of non-racial entrenched fundamental rights was introduced to South Africa.

The 1996 Constitution contains an abundance of directives as to the manner in which public officials must exercise public administration. Such directives are no more than *sonorous* if public officials are not adequately informed of the existence of such directives as well as the manner in which they must be implemented. When such constitutional directives are uniformly implemented by public officials, the manner in which public administration is constitutionally prescribed to be exercised, subject to a comprehensive set of constitutionally entrenched fundamental rights, should differ from the manner in which public administration was exercised during constitutional dispensations prior to 27 April 1994 when South Africa did not have a bill of rights.

In chapters 2, 3, 4 and 5 of this thesis I attempted to describe, *inter alia*, the extent and meaning of entrenched fundamental rights, the constitutional dispensations prior to 1994 without a bill of rights, the inception of a South African Bill of Rights in 1994, and the influence fundamental rights should have on the manner in which public administration is exercised. My descriptions also indicated that the contemporary constitutional prescriptions oblige public officials to exercise public administration in a manner which is subject to a comprehensive set of entrenched fundamental rights (see *supra* 4.8). This constitutionally prescribed manner of exercising public administration did not exist before 1994 and differs from the manner in which officials exercised public administration prior to 1994. Public

administration thus entered a bridging process between the apartheid-era and the post-apartheid-era (see *supra* 5.1). The descriptions then indicated the steps that the governmental authorities need to take to implement and realise the current 1996 constitutional prescriptions relating to the manner in which public administration must be exercised (see *supra* 5.5).

This brings me to the point where it is my intention to deal with the question as to the progress made with the actual implementation and realisation of the 1996 constitutional prescriptions. This is done by means of an empirical survey.

This situation led to the research questions, which are noted in chapter 1.4. These questions led to the creation of the hypotheses, which are to be tested by the empirical survey.

Accordingly, in this chapter an elucidation is given firstly of the hypotheses relevant to the study. Finally, a summary is given of the contents of this chapter.

6.2 Development of hypotheses

Before an empirical research on a matter can commence, the particular matter must be narrowed down into clearly defined, researchable terms. This process involves the formulation of testable hypotheses that flow logically from the matter stated and, as Christensen (1988:98) explains, are capable of being either refuted or confirmed.

Bailey (1987:41) defines a hypothesis as "a proposition stated in testable form that describes expected or predicted relationships between two or more variables". Dooley (1990:71) also defines a hypothesis as a testable proposition. He adds that a hypothesis is a prediction about the relationship among indicators (variables). The variables are factors that can change, for example they can increase or decrease. An important characteristic of hypotheses as far as scientific research is concerned, is that they must be couched as factual statements, capable of either confirmation or rejection through empirical testing (Mason & Bramble 1978:54). By implication, these definitions therefore exclude all statements that are value judgments, possibilities or normative in nature. Gay (1992:66-67) states that a hypothesis is a tentative description for certain behaviour, phenomena or events that have occurred or will occur. A hypothesis states what the researcher thinks the

outcome of the study will be. The researcher does not "prove" the hypothesis but collects data that either support it or do not support it.

Christensen (1988:98) provides an indication of where hypotheses for testing can be derived from. They can be a function of the literature review, formulated from theory, or be from reasoning based on casual or non-casual observations of events. All the hypotheses developed to achieve the objectives of this study have been derived from one or more of the above functions. The greater part of the contents of chapters 2, 3, 4 and 5 of this thesis is primarily based on a literature study. The information so gathered led to the reasoning of events relating to the manner in which public officials exercise public administration. The reasoning of the events prior to 1994 when South Africa did not have a bill of rights, and the events after the inception of a bill of rights in 1994, led to the formulation of research questions (see *supra* 1.4) and ultimately to the development of the hypotheses in this chapter of this thesis. Gay (1992:66-67) adds that hypotheses precede the research study because every aspect of the study is determined and affected by the hypotheses.

Hypotheses in this study have been expressed in the null form. Such a form of hypothesis represents a statement of no relationship between the variables being tested. In scientific research, Christensen (1988:388) explains that any statistical test represents a test of the null-hypothesis. The null-hypothesis must be rejected in order to obtain evidence for the scientific hypothesis. In other words, rejection of the null-hypothesis provides an indication that a relationship does in fact exist between the variables being tested.

In view of the dearth of knowledge on the influence of fundamental rights on the manner in which public officials perform their official duties, I decided that authoritative results on this topic would be appropriate. By providing empirical evidence of public officials' attitude to the influence of fundamental rights on public administration, certain null-hypotheses relating to the topic are identified. The rationale for the development of each individual null-hypothesis is provided below.

6.2.1 Hypothesis 1

More than half of the public officials on the different levels of management in the Department of Home Affairs do not know of the Bill of Rights in chapter 2 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and not all of those who do know of the Bill of Rights have much knowledge of the contents of the said Bill

The proposition is that public officials do not, in general know of the Bill of Rights, and those who do know of it do not have much knowledge of its contents. The proposition will be tested by means of questions 8 and 9 of the questionnaire (see Appendix 3). The variables are "public officials" and "knowledge" of the Bill of Rights. The variables are capable of change. For example should the number or percentage of public officials who do have knowledge of the Bill of Rights be indicated, by means of the empirical test, to be higher than those who do not have much knowledge, the variables will have changed. The variables in the proposition refer to the officials who do and who do not have knowledge of the Bill of Rights. A result will either confirm or reject the hypothesis.

Rationale:

The purpose of this study is to establish whether public officials, when exercising public administration, apply the principles contained in the Bill of Rights, and whether such application has an influence on the manner in which public administration is exercised. The literature study led to the development of hypothesis 1. When the 1993 Constitution came into operation on 27 April 1994, its aim was to serve as a bridge between the apartheid constitutional/political-era and the post-apartheid constitutional/political-era (see *supra* 3.4.1). The 1993 Constitution brought an abrupt end to the former parliamentary constitutional system and introduced a new constitutional system based on constitutional supremacy that impacted directly on public administration (see *supra* 4.2.2 and 4.8). Section 4 of the 1993 Constitution provided that any law or act that was inconsistent with its provisions was of no force or effect. However, when the 1993 Constitution came into operation, it only repealed a certain number of laws (1993 Constitution: Schedule 7). This meant that all other laws that were in force on 27 April 1994, continued to be in force (1993 Constitution: section 229). Public administration thus entered a turbulent bridging period. Public officials were expected to apply the 1993 constitutional prescriptions relating to public administration but were no doubt at the same time uninformed and uncertain of how to accomplish their task. The entrenched fundamental rights in the 1993 Constitution had

to be applied to public administration activities that were prescribed in legislation still containing remnants of apartheid policies. Such legislation thus possibly had provisions that were inconsistent with the 1993 Constitution (see *supra* 4.6.2). Officials therefore had to avoid the inconsistencies in order to ensure that their activities were in conformity with constitutional prescriptions. I accordingly conclude that the implementation of the fundamental rights in the 1993 Constitution was part of a gradual process (see *supra* 4.2.1).

It is my assumption that due to the circumstances sketched above, the gradual process of implementing the rights in the 1996 Bill of Rights into public administration has made no significant progress. Accordingly, the manner in which public administration is exercised today, does not differ dramatically from the manner in which public administration was exercised before the 1993 Constitution came into operation on 27 April 1994. My assertion is that a dramatic difference ought to be visible as public administration is now, in terms of section 2 of the 1996 Constitution, subject to the Bill of Rights. The absence of a visible difference – should it be found - is probably because the principles in the Bill of Rights are not applied comprehensively.

Question 8 of the questionnaire is aimed at establishing if public officials know of the Bill of Rights. I am aware that officials may respond positively to question 8 in an effort to not express ignorance. To counter this possibility, respondents who answer "yes" to question 8 have to indicate in question 9 whether the Bill of Rights grants protection against arbitrary activities by government institutions and has an influence on the manner in which they exercise their functions. In order to be able to answer question 9 appropriately, respondents must have knowledge of at least sections 7 and 8 of the 1996 Constitution. Section 7(2) compels the state to respect and promote the rights in the Bill and section 8(1) provides that the state is bound by the principles in the Bill. Respondents who answer "yes" to question 8 and do not have sufficient or any knowledge of the Bill will probably not be able to respond adequately to question 9. The responses to question 9 will thus provide an indication as to whether officials only "know" of the Bill of Rights or "know something" of the Bill.

I consider the responses of public officials to the questions constituting hypothesis 1 as central to the study. I base this consideration on the fact that public officials are currently obliged to apply the principles of the 1996 Constitution to public administration activities (see *supra* 4.8). Should officials have been officially informed of this constitutional obligation and adhere thereto as from 27 April 1994 in terms of the 1993 Constitution, contemporary public administration will be exercised in a constitutionally prescribed manner

which differs from the manner in which it was exercised prior to 1994. The mentioned constitutional prescriptions and obligation did not exist before 1994 (see *supra* 5.5). Should officials not have been officially informed and their knowledge of the Bill of Rights is insufficient to comply with the mentioned obligation, their responses to other questions of the questionnaire will probably be affected negatively and they will probably not have sufficient knowledge to respond to other questions adequately.

6.2.2 Hypothesis 2

More than half of the public officials on the different levels of management in the Department of Home Affairs are not aware of section 195 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), which states that public administration must be governed by the democratic values and principles enshrined in the 1996 Constitution, and not all of the officials who are aware of section 195, know how to apply the section

This proposition entails that public officials are generally not aware of section 195 of the 1996 Constitution, and the officials who are aware of it do not know how to implement the principles in the mentioned section. This proposition will be tested by means of questions 10 and 11 of the questionnaire. The variables are "public officials" and "knowledge of section 195". The variables are capable of change. For example, should the result of the empirical test show that the number of respondents who answered "no" to the relevant questions is higher than those who answered "yes", the hypothesis will be confirmed. The opposite result will reject the hypothesis and the variables will have changed.

Rationale:

It is my assumption that when the 1996 Constitution came into operation on 4 February 1997, public officials did not in general become acquainted with and apply the provisions of section 195 that were laden with democratic values and principles relating to public administration (see *supra* 4.4). My assumption is also that public officials would have been equipped to apply the principles of section 195 when exercising public administration, should they have been adequately officially informed and given guidelines beforehand (see *supra* 4.4) and adapted their manner of exercising public administration accordingly (see *supra* 5.4.1).

My view is that public officials' apparent lack of knowledge of the mentioned section 195 – should it be found - is probably one of the reasons as to why the manner in which public administration is exercised today does not differ radically from the manner in which it was exercised prior to 27 April 1994.

I am aware that officials may, as with question 8, also respond positively to question 10 in an effort not to express ignorance. To counter this possibility, respondents who answer "yes" to question 10 have to indicate in question 11 whether they perform their functions with adherence to the prescriptions in section 195. This means that respondents need to be acquainted with the provisions in section 195 in order to know what is required of them when they exercise public administration. Only with such knowledge the respondents will be able to respond to question 11 appropriately. The responses to question 11 will provide an indication as to the extent of officials' knowledge of the provisions of section 195.

Respondents, who answer "yes" to question 10, can therefore either be truly acquainted with the contents of section 195, or pretend to be so. Those who pretend will find it difficult to respond to question 11. Those who are acquainted with section 195 can respond in a positive or negative manner to question 11. A negative response could be an indication that officials are reluctant to adhere to the principles in section 195 when exercising public administration. Such a sign of reluctance is possibly attributed to the respondents being unwilling to bring about a change in the manner of functioning that they are familiar with.

The possible reluctance to participate in the process leading to an adaptation of the manner in which public officials exercise their official functions, brought about the necessity to develop hypothesis 3.

The responses of public officials to the questions constituting hypothesis 2 are also considered central to the study. This consideration is based on the same explanation given above regarding hypothesis 1 (see *supra* 6.2.1).

6.2.3 Hypothesis 3

Public officials, who were employed in the Department of Home Affairs before 27 April 1994, are reluctant to participate in a process that could lead to a change in the manner in which public administration is exercised

The proposition is that public officials are reluctant to participate in a process that could change the manner in which public administration is exercised. This proposition will be tested by means of questions 13 and 14 of the questionnaire. The variables are "public officials" and their "reluctance to participate" in a process. The variables are capable of change. The illustration explained above regarding the "change" (see *supra* 6.2.1 and 6.2.2) also applies here.

Rationale:

Public officials, who were in the Department of Home Affairs before 27 April 1994, are familiar with their employment environment and the manner in which they exercise their functions. Such officials have in many instances received merit awards and have been promoted to higher ranks due to the commendable manner in which they have performed their functions. The constitutional prescriptions in the 1993 Constitution brought about a *de iure* radical change in the manner in which public administration must be exercised. The consequence is that the mentioned officials' familiarity with their employment environment does not necessarily exist in all respects anymore. The mentioned officials are also the "instruments" by means of which the so-called "new manner" in which public administration must be exercised, should be implemented.

I hypothesise that the mentioned officials still perform their official functions in a similar manner as before 27 April 1994. The inception of the 1993 Constitution on 27 April 1994 apparently did not and still does not have an influence on the manner in which they perform their functions. It will probably require some effort to entice such officials to actually change the manner in which they exercise their functions. This state of affairs places such officials on par in certain respects with inexperienced colleagues. This situation is tantamount to a hurdle that long-serving officials are not prepared to face. It is similar to a step taken backward that will result in their not qualifying for their next promotion or merit award. All such thoughts perhaps act as deterrents against such officials involving themselves in the

process of implementing the constitutional prescriptions relating to the manner in which public administration must be exercised.

It is hypothesised that the mere existence of the Bill of Rights is not likely to move or motivate public officials to change the manner in which they exercise their official functions in order to adhere to the instructions contained in the above-mentioned section 195. The mere existence of the Bill of Rights is likely to be insufficient grounds to motivate all long-serving public officials to adapt their manner of functioning. Officials should be officially informed that they are obliged to apply the principles in the Bill of Rights when exercising public administration as their activities need to be consistent with the provisions of the 1996 Constitution (section 2) and need to respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2)). These provisions should assist officials to participate in a process that leads to a change in the manner in which they exercise public administration. The principles in the 1996 Constitution and the Bill of Rights serve as guidelines to officials to adapt their manner of exercising official functions in order that such functions are subject to the principles in the Bill of Rights. Public officials should also be motivated and encouraged to assist each other in the process of adapting to the contemporary constitutional requirements. It is imperative that long-serving officials be assured that they will not be considered inexperienced but rather that they are part of a large team of public officials of whom it is expected to work together to adapt the manner they exercise their contemporary official functions

The responses to question 13 will provide an indication as to whether such officials have adhered to the post 1994 constitutional prescriptions and have changed the manner in which they perform. A negative response will be a reflection of such officials' reluctance to bring about a change in their manner of functioning.

Such officials' response to question 14 will support the hypothesis that no significant change can be observed in the manner in which public services are rendered today if compared with the manner in which services were rendered prior to 27 April 1994. Officials responding positively to question 14 have to give an example of the change experienced or observed. Such an example will be a further indication of whether the change observed is favourable or not.

6.2.4 Hypothesis 4

Public officials in the Department of Home Affairs have not been adequately informed through official channels of the significance of the Bill of Rights and its role in connection with the manner in which public officials must exercise their official functions

The proposition is that public officials have not been adequately informed of the Bill of Rights. This proposition will be tested by means of question 15 of the questionnaire. The variables are "public officials" and "informed". These variables are capable of change. For example, should public officials have been adequately informed through official channels of the significance of the 1993 and 1996 constitutionally entrenched fundamental rights, and the empirical test indicates that such informed officials are more than those not so informed, the variables will have changed. This result will reject the hypothesis. The opposite result will confirm the hypothesis.

Rationale:

The inception of the first comprehensive set of entrenched fundamental rights in the 1993 Constitution (see *supra* 3.4), brought with it the intention that a change was at hand in the manner in which public administration is to be exercised. The only way that such an intention could be implemented was to officially inform public officials thereof. Officials adequately informed should have been aware of the obligation that the constitutional prescriptions placed on them regarding the manner in which public administration must be exercised (see *supra* 4.8). Such informative documents could serve as instructive guidelines and ensure that participation by public officials is uniform and enforced. Should officials have been adequately informed, the expectations as to the realisation of the constitutional principles in practice (see *supra* 5.5) will possibly have been widely observed. Such a step will also have served as a prevention of the scenario sketched under hypothesis 3 – should it be found to be so.

The responses to question 15 will provide an indication as to the extent to which officials were or were not adequately informed through official channels. Officials responding positively to question 15 have to state the manner in which they were informed. Should they state that they were informed, for example, by means of an official memorandum or workshop, such a manner can be regarded as an appropriate manner. Should they state that they were informed, for example, when watching the television news or by reading a

newspaper report, such a manner cannot necessarily be regarded as being sufficiently or appropriately informed. The manner in which they were informed, if not through official channels in the office where they are employed, could therefore be a further indication that they were not informed in the appropriate manner.

It is my conclusion that the constitutional prescriptions relating to the manner in which public administration must be exercised, are new to all public officials (see *supra* 5.2.2). I believe that public officials do not, as a rule, implement any new prescriptions without an accompanying instruction from a more senior source. Such an instruction usually contains guidelines as to the manner in which the new prescriptions are to be implemented. The guidelines ensure uniform implementation. Whatever problems are encountered during implementation, are dealt with as they occur. In this way a transition from the "old manner" to the "new manner" in which public services are to be rendered in terms of the requirements of the 1996 Constitution, can be put into operation. This situation can only be realised by, firstly, adequately informing public officials of the constitutional mandate to enable, or rather oblige them to adhere to the principles in the Bill of Rights and the mentioned section 195 when exercising public administration. Secondly, by adequately training public officials to apply the mentioned principles appropriately when performing their functions.

6.2.5 Hypothesis 5

Public officials in the Department of Home Affairs do not of their own accord study the Bill of Rights in order to apply the principles and expand their basic knowledge of rendering public services subject to the principles of such rights

This proposition entails that public officials do not of their own accord study the Bill of Rights. The proposition will be tested by means of questions 16 and 19 of the questionnaire. The variables are "public officials" and "study the Bill of Rights". The variables are capable of change. The explanation given above regarding the change in the variables of hypothesis 4 (see *supra* 6.2.4) is also applicable in this case.

Rationale:

The responses to question 16 of the questionnaire will provide an indication as to whether officials have of their own accord studied the contents of the Bill of Rights. The responses

to question 19 will be indicative of the opinion of officials as to the necessity that the Bill of Rights be kept in mind when public services are rendered. Any response less than "always" can be taken as a negative answer. Uninformed officials will not realise the necessity required and will not be motivated to do the necessary self-study.

In chapter 5 of this thesis I wrote that the concretisation of the principles of the entrenched fundamental rights is probably an important goal of public administration to be reached and experienced (see *supra* 5.3). Should public officials be fully aware of their role in this process and have the veneration and ability to comply, the stagnation of those principles will be avoided. Officials should thus hastily achieve familiarity with the current constitutional principles (Langa 1996:10-12; see *supra* 5.3). My view is that officials should be enticed to of their own accord study the Bill of Rights and the 1996 Constitution. Such an exercise will be of much benefit when officials exercise their functions.

6.2.6 Hypothesis 6

Public officials in the Department of Home Affairs have mixed perceptions as to whether the interests of the inhabitants of the country warrant priority above the political objectives of the government of the day when public services are rendered

This proposition is that public officials have mixed perceptions as to whether inhabitants' interests warrant priority above the government's political objectives. The proposition will be tested by means of question 18 of the questionnaire. The variables are "public officials" and "perceptions of interests". The variables are capable of change. For example, should the respondents answer question 18 by indicating that the interests of the inhabitants do warrant priority above the government's political objectives, and the results of the empirical test indicate that the number of such respondents is higher than those who chose other answers, the variables will have changed. The hypothesis will be rejected.

Rationale:

Question 18 seeks to establish whether public officials recognise that in terms of the 1996 Constitution, the interests of the inhabitants of the country warrant priority above the party political objectives of the government of the day. Public officials may be wrongly of the conception that the interests of the government of the day should be served above the interests of the inhabitants of the country. The provisions of section 195 of the 1996

Constitution envisage that the rights and interests of the inhabitants of the country should be served adequately. This should be familiar to public officials. Public officials should thus adapt their manner of exercising public administration in such a way so as to adhere to the requirements of section 195. In this way public services could be rendered subject to fundamental rights.

The 1993 Constitution ended parliamentary supremacy and installed constitutional supremacy in South Africa (see *supra* 4.2.4). This situation was kept in place by the 1996 Constitution. Public administration and all public institutions are subordinate to the contemporary 1996 Constitution (see *supra* 4.2.2). South Africa is now a democratic constitutional state with a democratic system of government (see *supra* 4.3). I conclude that this means that the government's party political objectives will never warrant priority above the interests of the inhabitants.

The question also comes to the fore whether public officials view themselves as fulfilling a central role in the rendering of public services and applying the rights in the Bill of Rights. A negative response to question 18 may be an indication that officials consider their functions as mere routine activities or as functions primarily to adhere to the instructions of the government of the day. When officials follow the instructions of the government, they are obliged to execute such instructions in terms of constitutional requirements. This in itself confirms that the interests of the inhabitants of the country warrant priority above the party political objectives of the government of the day.

6.2.7 Hypothesis 7

When public officials in the Department of Home Affairs render public services, the rights in the Bill of Rights do not enjoy the necessary recognition

This proposition is that the rights in the Bill of Rights do not enjoy recognition. This proposition will be tested by means of question 17 of the questionnaire. The variables are "rights" and "enjoy recognition". The variables are capable of change. The example given above regarding the change in the variables of hypothesis 4 (see *supra* 6.2.4) is also applicable in this case.

Rationale:

The failure to adequately inform public officials of the significance of the Bill of Rights and provide training on how to apply the rights in the Bill, leads to the situation where officials render public services without such activities necessarily being subject to the Bill of Rights. Such a situation serves as a caution against an expectation that the manner in which public officials exercise public administration is in terms of constitutional prescriptions.

The responses to question 17 will provide an indication as to whether officials apply the rights in the Bill of Rights when rendering public services. The responses will also be indicative as to whether officials recognise that officials, other than themselves, apply the rights in the Bill of Rights.

In view of this statement I considered it essential to establish what public officials considered should be done to inform public officials of the significance of the Bill of Rights and how to apply the rights when exercising public administration. This step was contained in question 21 of the questionnaire. Question 21 is an open-ended question and the comments by respondents will be reflected with reference to any hypothesis that may be supported or disregarded. I expect officials to respond with proposals of how they would appreciate being informed.

6.3 Summary

In this chapter of the thesis the development of the individual hypotheses were described. I indicated that before research on a matter could commence, the matter had to be clearly defined in researchable terms. This involved formulating testable hypotheses that were capable of being refuted or confirmed (see *supra* 6.2).

Hypothesis 1 inferred that public officials do not, in general, know of the Bill of Rights, and those who do know of the Bill, do not have much knowledge of the contents of the Bill. This hypothesis would be tested by means of questions 8 and 9 of the questionnaire (see *supra* 6.2.1).

Hypothesis 2 inferred that public officials on the different levels of management are generally not aware of section 195 of the 1996 Constitution, and that the officials who are aware of section 195 do not, in general, know how to implement the principles in the

section. This hypothesis would be tested by means of questions 10 and 11 of the questionnaire (see *supra* 6.2.2).

Hypothesis 3 inferred that public officials, who were employed in the Department of Home Affairs before 27 April 1994, are reluctant to participate in a process that could lead to a change in the manner in which public administration is exercised. This hypothesis would be tested by means of questions 13 and 14 of the questionnaire (see *supra* 6.2.3).

Hypothesis 4 inferred that public officials have not been adequately informed through official channels of the significance of the Bill of Rights and its role in connection with the manner in which public officials exercise their official functions. This hypothesis would be tested by means of question 15 of the questionnaire (see *supra* 6.2.4).

Hypothesis 5 inferred that public officials do not, of their own accord, study the Bill of Rights in order to apply the rights when rendering public services. This hypothesis would be tested by means of questions 16 and 19 of the questionnaire (see *supra* 6.2.5).

Hypothesis 6 inferred that public officials have mixed perceptions as to whether the interests of the inhabitants of the country warrant priority above the political objectives of the government of the day when public services are rendered. This hypothesis would be tested by means of question 18 of the questionnaire (see *supra* 6.2.6).

Hypothesis 7 inferred that the rights contained in the Bill of Rights do not enjoy the necessary recognition when officials in the Department of Home Affairs render public services. This hypothesis would be tested by means of question 17 of the questionnaire (see *supra* 6.2.7).

The rationale for stating each hypothesis was given primarily as derived from the literature study.

In the next chapter, the survey design and techniques used in surveying the opinions of public officials as to the influence of fundamental rights on public administration is described. The description includes the development and structure of the questionnaire used.



Chapter 7

Survey design and techniques used

7.1 Introduction

This chapter deals with the survey design and techniques used in surveying the opinions and other facts of public officials in the Department of Home Affairs as to the influence of fundamental rights on public administration. I used a questionnaire (see Appendix 3) as the measuring instrument. The questions in the questionnaire are primarily aimed at gathering data regarding the knowledge public officials in the Department of Home Affairs have on the 1996 Constitution, the contemporary (post 1994) fashion in which such mentioned officials exercise public administration, the extent to which such mentioned officials apply the rights in the Bill of Rights when exercising their official functions, and if such mentioned officials who have been employed in the public sector prior to 1994, have since the inception of the 1993 Constitution on 27 April 1994, changed the manner in which they exercise public administration.

In the first part of the study I discussed different constitutional periods primarily in order to describe the extent to which fundamental rights were constitutionally, or by other law, protected and the manner in which public administration was exercised or constitutionally prescribed to be exercised in the different constitutional states covered (see *supra* 3.2 and 3.3). My aim was to illustrate the extent to which officials recognised fundamental rights when exercising public administration. I then discussed the constitutional prescriptions that oblige public officials to apply the rights in the Bill of Rights when exercising public administration (see *supra* 4.8). I also discussed the role of the expected effect entrenched fundamental rights will have on the manner in which public officials exercise their public functions (see *supra* 5.5). These discussions led to the creation of the hypotheses in chapter 6 of this thesis. The hypotheses were tested by the empirical survey.

Accordingly, in this chapter the use of surveys is firstly examined in order to select an appropriate method for the purposes of the thesis. Secondly, the meaning of "population"

as used in this thesis is explained. Thirdly, a description is given of the designing of the samples and the drawing of the samples. This description covers the geographical aspects, the localisation of the sample and the relevant respondents used. Fourthly, an exposition is given of the measuring instrument used in the survey. The exposition includes the development and structure of the questionnaire. The procedure followed in order to commence the survey is portrayed fifthly. This introductory procedure included obtaining authority to conduct the survey and pre-testing the research instrument. Sixthly, an elucidation of the techniques to collect data is done. Seventhly, a description is given of the procedure followed during the empirical investigation. Eighthly, an illustration of the completion of the fieldwork is given. Finally, a summary is given of the contents of this chapter.

7.2 Use of surveys

The purpose of a survey is, according to Neale and Liebert (1986:49), to determine the frequency of some characteristics in a "population" (see *infra* 7.3). On the basis of the results of the survey, generalisations can be made about the population as a whole. Neale and Liebert (1986:49) however, caution against the use of generalisations:

"They involve an inference and can only be made according to a series of assumptions and rules that tend to assure their legitimacy within certain bounds".

Based on the results of the empirical survey of this thesis, I intend to make generalisations about the population as a whole.

Two types of surveys can be identified. Oppenheim (1992:12) describes these as:

" ... the descriptive, enumerative, census-type of survey; and the analytic, relational type of survey".

A "descriptive survey", firstly, can be considered as a fact-finding survey. A researcher gathers information from a proportion of a population that reflects a certain characteristic, or how often certain events occur together. A descriptive survey should not, however, reflect relationships that seldom occur between one variable and another. The sample being surveyed must be fully representative of the population as a whole before meaningful

conclusions can be drawn from the information gathered. Secondly, an "analytic survey" examines group differences from which relationships between variables can be inferred.

For the purposes of this thesis, I considered a descriptive survey as appropriate to canvass the opinions and other facts of public officials as to the influence of fundamental rights on public administration. Information gathered from public officials would, *inter alia* reflect their knowledge of the Bill of Rights and the manner in which they exercise public administration. A proportion of the officials of the population (the Department of Home Affairs, see *supra* 7.3) represented the population (Department) as a whole, and meaningful conclusions can be drawn from the information so gathered that describes the actions of the population as a whole. The information so gathered was also used to test the "expected or predicted relationships between variables" in order to reject or confirm each hypothesis (see *supra* 6.2).

7.3 Population

The term "population" is used in this survey research, as it is understood for research purposes. Neale and Liebert (1986:31) describe a population as a well-defined collection of objects. Christensen (1988:48) describes a population as all events, things or individuals to be represented. Gay (1992:124) writes that a population is the group of interest to the researcher, the group to which he/she would like the results of the study to be generalizable. In view of these descriptions, I will describe a population, for the purposes of the study, as the group of public officials employed in the Department of Home Affairs.

The primary objective of this thesis is to obtain an understanding of the influence of fundamental rights on public administration. Public officials perform public administration and render public services to the inhabitants of South Africa. It follows thus that all public officials employed in all the categories of public offices, are involved. It is not my intention to involve all such officials in this research and therefore I have narrowed the population down to include only the public officials employed in the Department of Home Affairs (see *infra* 7.4.3). It is furthermore impossible for me to involve all the public officials in a large department such as the Department of Home Affairs in this research. Accordingly, from the population I have drawn a sample to represent the population.

7.4 Selection of the sample

Selection of the sample refers to the technique I applied in drawing a sample from a population or selecting items for the sample. Usually the sample is considerably smaller than the population. An adequate sample must be large enough to provide fairly accurate estimates of the parameters of interest. It should also be representative of the population being studied and not of some atypical or biased part of it. A biased sample will lead to inappropriate conclusions about the population (Mason & Bramble 1978:171).

Drawing a sample can be done in a number of ways.

7.4.1 Drawing a sample

Random sampling, stratified random sampling and cluster sampling are now described.

7.4.1.1 Random sampling

Drawing a sample at random from a population can be done in different ways. The units can be chosen by simply demarcating the first group encountered. Another way is for the researcher to select units known to him/her. Both of these methods are not entirely satisfactory as they contain the potential for biasing the results of the study. The best way to avoid systematic bias in choosing a random sample is to follow particular steps (Gay 1992:126; Mason & Bramble 1978:172):

- Carefully define the population to be studied.
- Each member of the population must have an equal chance of being chosen for the sample.
- The selection of one member of the population must not affect the chances of any other member to be chosen.
- A number of units must be selected that is sufficient for the desired size of the sample.

A random sample can reasonably be expected to be representative of the population but there is no guarantee that this will be true. In the ultimate selection of a sample, random samples will tend to represent the population rather accurately and fluctuations among sample estimates can be understood fairly well (Gay 1992:127; Mason & Bramble 1978:173).

7.4.1.2 Stratified random sampling

A particular population may often be more usefully studied by considering its parts rather than the population as a whole. The parts of the population will have a common characteristic, for example one part consisting of males and another part consisting of females. Such parts of the population are known as the "strata" of the population. When the research requires gathering information for each of the strata in a population, a sample of sufficient size must be obtained from each stratum. This is known as stratified random sampling (Mason & Bramble 1978:173-4; Dooley 1990:140).

7.4.1.3 Cluster sampling

When cluster sampling is used, the individuals in a population are grouped together into clusters rather than strata. The number of clusters makes up the samples. It then often happens that the number of individuals in each of the clusters differs. Cluster samples do not provide random samples as all the individuals in the cluster make up the cluster in the sample (Mason & Bramble 1978:174). For example, the individuals in a population to be interviewed are college students. The students are a group of elements of a college. Within a certain area several groups of elements (colleges of students) are called a cluster. The whole population of college students is divided into clusters of groups of elements. The students in different colleges are seldom similar in number and therefore one cluster will have more elements to interview than another cluster (Dooley 1990:140).

7.4.2 Sampling technique selected

The population, for the purposes of the study, is all the public officials in the Department of Home Affairs. From the population a sample needs to be drawn as a representative of the population. I decided to use the technique of random sampling to draw a sample from the population concerned. I consider the aspects that are mentioned in paragraph 7.4.1.1 as the most appropriate to this study.

The technique followed to select the sample is accordingly explained.

7.4.3 Geographical sample

The study can involve public officials employed in central government departments in the public service of South Africa. The study does not though include officials employed in other public offices even though such officials could also be included in the sphere of the subject covered by the study. It is not my intention to involve all the officials in all the government departments because of time and financial constraints. Therefore I demarcated only officials employed in the offices of the Department of Home Affairs situated in the vicinity of Pretoria and Centurion. Several offices of the Department situated in Pretoria and Centurion are within my reasonable reach. I deemed this demarcation appropriate as the mentioned Department deals with a wide variety of public services and the officials deliver many such services to the public on a person-to-person basis.

The demarcation of the Department of Home Affairs does not mean that I deem this Department to be representative of all other departments. Each department apparently has a unique method of performing its allocated functions and I do not intend placing all departments on an equal functional basis and generalising the concept: "the manner in which public administration is exercised".

7.4.4 Localisation of sample

I wished to make this field of study as broad as possible within the Department of Home Affairs. The strategy I followed was to use officials from four different offices. The sample was thus located in the Department's head office in Pretoria, the Pretoria regional office, the Marabastad district office and the Centurion district office.

The mentioned offices were chosen taking into account factors such as distance of location, availability of officials and willingness among officials to participate in the exercise. Saslow (1992:86) and McBurney (1993:65) postulate that simple random sampling is the basic technique of probability sampling. An aspect of a random sample is that every element has an equal chance of being included. All the officials on the different levels of management in the chosen offices who were available to participate, had an equal chance of being selected.

7.4.5 Relevant respondents

In order to obtain from the officials, information that is directly relevant to the hypotheses set, I decided to exclude particular officials as possible respondents. I kept in mind to ensure that the selection of the sample was not too narrow and would lead to a manipulation of the results of the test. Hence only one relevant condition was attached.

The condition I set was that officials would only be considered for inclusion as respondents if their official functions involved primarily administrative duties rendering public services. This condition excluded officials employed in the Department's personnel and finance sections. This also means that officials, who were employed in any other than in a strict administrative sense, for example as cleaners and drivers, were excluded. No distinction was, however, drawn between level of management, race or sex.

7.4.6 Sample drawn

The actual sample drawn consists of 261 respondents. Figure 7.1 reflects the percentage of respondents located in the Department's head office in Pretoria, the Pretoria regional office, the Marabastad district office and the Centurion district office. These data originate from question 1 of the questionnaire (see Appendix 3). The regional and district offices are grouped together as external offices of the Department's head office. Figure 7.1 also reflects the percentage of respondents on each of the different levels of management. The three levels of management, as used in question 2 of the questionnaire, are the upper level (director and above), middle level (assistant and deputy director), and junior level (all levels under assistant director).

FIGURE 7.1 SAMPLE DISTRIBUTION

RESPONDENTS DRAWN FROM -	% RESPONDENTS
Head office	43.3
Regional and district offices	56.7

LEVELS OF MANAGEMENT	% RESPONDENTS
Upper level	2.7
Middle level	6.9
Junior level	90.4

The figure reveals that the sample contains a larger number of officials on the junior level of management than on the other levels combined. I regard the difference in the ratio of officials on the three different levels of management as being fairly in line with the hierarchical structure of the Department. There are fewer officials on the upper level of management as on the middle level, whereas the majority of officials are on the junior level.

Figure 7.2 reflects the percentage of officials on the three different levels of management.

FIGURE 7.2 RATIO OF OFFICIALS ON MANAGEMENT LEVELS

LEVELS OF MANAGEMENT	% OF OFFICIALS
Upper level	1.2
Middle level	5.3
Junior level	93.5

7.4.7 Validity of a sample

In any population, according to Christensen (1988:400), there must be sample validity. Sample validity allows generalisations to be made about the total population based on the sample on which the study was conducted. The results obtained from the sample are likely to be valid indicators of the population by comparing characteristics of the sample with those of the population. Such characteristics can be those obtained by the survey conducted and those used to draw the sample (Mason & Bramble 1978:174).

As I mentioned above (see *supra* 7.3) public officials in all public institutions exercise public administration and render public services to the inhabitants of South Africa. It is impossible to involve all such officials in this research and therefore I narrowed the population down to public officials in the Department of Home Affairs. I selected this Department as it deals with a wide variety of public services of which many are of a personal nature, for example the registration of births, marriages and deaths; the issue of identity and other documents regarding an individual's status; the arrangement of citizenship and passports; and the registration of political parties. This indicates that officials in this Department deliver many public services on a person-to-person basis (see *supra* 7.4.3 and Figure 7.2). The majority of the services that this Department delivers are associated with fundamental rights listed in the Bill of Rights, for example the right to human dignity, citizenship, freedom of movement and political rights. I regard the Department of Home Affairs as a typical public institution which renders typical public services to clients - the inhabitants.

The sample I demarcated from the total population for the purposes of this thesis, are officials employed in the offices of the Department of Home Affairs situated in the vicinity of Pretoria and Centurion. The sample excludes officials who do not comply with the condition set for participation, and those who are not available or are not interested to participate. The sample was involved directly in the exercise as representatives of the population. The demarcated officials are on all levels of management that exercise public administration.

Figure 7.3 reflects the characteristics of the sample selected for the purposes of the empirical survey. The data originate from questions 3 to 7 of the questionnaire (see Appendix 3).

FIGURE 7.3 CHARACTERISTICS OF SAMPLE SELECTED

Officials employed in the public service prior to 1994		Officials employed in the public service after 1994	
59.5%		40.5%	
Earlier employed in the public service of a self-governing or independent TBVC state		Earlier, but after 1994, employed in the public service of a self-governing or independent TBVC state	
Yes	No	Yes	No
23.4%	76.6%	9.5%	90.5%

Employed in the Department of Home Affairs prior to 1994	Employed in the Department of Home Affairs after 1994
55.6%	44.4%
All the officials included in the sample work on a person-to-person basis when exercising public administration	

Figure 7.3 reveals that more than half of the sample selected is officials who are employed in the public service prior to 1994. Of these mentioned officials about a quarter were, and three quarters were not, formerly employed in the public service of a self-governing or independent TBVC state. Of the portion (less than half) of the selected sample that are employed in the public service after 1994, a very large group of officials were not, and a

small group were, formerly employed in the public service of a self-governing or independent TBVC state. More than half of the officials of the selected sample are employed in the Department of Home Affairs prior to 1994, whereas the rest are employed in the mentioned Department after 1994. All the officials selected for the sample work on a person-to-person basis when exercising public administration.

It would not be unreasonable for me to conclude that sample validity exists in this survey.

7.5 Collection of data

Data can be described as the information that is obtained during an investigation, but not processed yet (Royse 1991:20). The collection of data is the root of purposeful research, and conclusions and recommendations are only as good as the accuracy and usefulness of the data (Putt & Springer 1989:141). The following methods of data collection can be distinguished: observation, interviews, questionnaires and the use of available data (Murphy 1981:55).

7.5.1 Observation

Observation as a method of collecting data is time consuming and requires the researcher to be present at the location at all times. The researcher usually does observation by observing the actions of another person or persons. The other person usually does not take part in the research except for being observed. An important advantage of observation is that it is possible for the researcher to note conduct or occurrences as they take place. It is though not always possible to predict the appearance of occurrences in order that the researcher can be present to do observation. The obvious reason for not making use of observation to collect data is the time factor (Murphy 1981:55; Collins 1999: 2-3). This method is less effective when data are required regarding the perceptions, convictions, attitudes or future prospects of individuals. This method cannot be used to collect data in connection with conduct or occurrences in the past or concerning private conduct (Murphy 1981:56).

I did not consider observation as being appropriate, as this would have to be done during official office hours and routine. I did not have the necessary permission to do such observation during official hours (see *infra* 7.7.1). My decision not to do observation does

not mean that I completely excluded that observation could have been useful if the circumstances permitted the use thereof.

7.5.2 Interviews

Interviews are used to measure some of the less observable characteristics of people, such as values, goals, opinions, attitudes, preferences, and so on. An interview can be defined as a verbal discussion conducted by one person with another for the purposes of obtaining information. The interview method of data collection is quite flexible and can be easily adapted to a variety of situations. The interviewer can ask additional questions to clarify points and in general tailor the interview to the situation (Mason & Bramble 1978:298).

A distinction can be drawn between personal and telephone interviews. The fundamental difference between the two is that personal interviews require the physical presence of the interviewer, whereas in telephone interviews the respondent only makes contact with the voice of the interviewer (Putt & Springer 1989:199).

7.5.2.1 Personal interviews

An important advantage of personal interviews is that of the quantitative and qualitative value of the data. This manner of interview offers the opportunity to obtain detailed and clear responses by means of clarification and directing further questions. A disadvantage is the high cost attached to this method and also requires the interviewer to have exceptional skills (Putt & Springer 1989:202; Royse 1991:109).

7.5.2.2 Telephone interviews

A distinct advantage of telephone interviews is that data can be collected in a short space of time over a wide geographical area at a lower cost than travelling to the area. This method offers entrance to individuals who cannot or do not want to open their doors to strangers for the purpose of interviews (Babbie 1986:230; Royse 1991:107).

The problem with the practical exercise of telephone interviews is that all individuals do not have a telephone and the selection of telephone numbers can be problematic. Such interviews are usually shorter than personal interviews. A major problem is that the

interviewer cannot see the respondent (Babbie 1986:229; Putt & Springer 1989:204; Royse 1991:108-110).

As the sample included respondents from different offices of the Department of Home Affairs that were within easy travelling distance, I considered the use of personal and telephone interviews as inappropriate. Personal interviews would interfere with the officials' office routine and I did not have permission to conduct interviews during official hours (see *infra* 7.7.1).

7.5.3 Questionnaires

The questionnaire, as a method of collecting data, is made up of a number of questions that the respondent must answer personally. Questionnaires are constructed in such a way so as to be completed by respondents without any help from someone else. An interviewer is not necessarily present to motivate the respondent to take part or to guide the respondent through the questionnaire (Putt & Springer 1989:204).

The advantages of using a questionnaire in the collection of data are that the questionnaire is easy to administrate, it is a cheaper method of collecting data, and a large number of people can be involved in the investigation at the same time. The questionnaire gives the respondent the opportunity to answer the questions as it suites him/her. The respondent can first consider the questions before answering, something that has the potential of ensuring more correct and complete data. Questionnaires ensure a more uniform measurement of data and respondents are more secure as regards anonymity (Murphy 1981:57; Putt & Springer 1989:205; Royse 1991:104).

The two main methods of distributing the questionnaire are by mail and personally.

7.5.3.1 Mail distribution

Questionnaires distributed by mail provide little control in securing a reply from the respondent, even if an appeal for co-operation in the completion of the questionnaire is enclosed. Oppenheim (1992:105), in considering response rates to questionnaires, states that it is the topic and the degree of interest the respondents have in the topic that will determine the response rate:

“questionnaires will often be completed successfully if the topic is of interest to respondents (for example, if it is about their children), or if they believe that their response will have a direct influence on policy”.

Disadvantages experienced with mail questionnaires include the general low response rate and consequent bias associated with this. Another problem associated with mail questionnaires is sequence bias. It is not possible for the researcher to control the order in which the questions are answered. Respondents will be able to study the entire questionnaire and make responses based on the entire questionnaire. Furthermore, the researcher is unable to monitor incomplete questionnaires or prevent the passing on of the questionnaire to others. Mail questionnaires do not normally provide the researcher with any opportunity to clarify any questions that are not fully understood.

The possibility of a very low response rate prompted my decision to not undertake a mail survey.

7.5.3.2 Personal distribution

Administering questionnaires by personal distribution has certain advantages. It provides respondents with the opportunity to answer the questionnaire in their own time and at their own pace. Such a situation appeared ideal in the light of the fact that I did not have permission to request officials to complete the questionnaire during official hours. Other advantages identified by Oppenheim (1992:102) include the low cost of data collection and processing, the avoidance of interview bias, and the ability to reach respondents at widely dispersed locations. In addition, a distributed questionnaire allows the respondent to be more frank on what can be considered sensitive issues.

As different offices of the Department of Home Affairs selected to participate in the exercise are within easy travelling distance, I decided to use the personal distribution method.

7.5.4 Use of available data

The use of the variety and numerous numbers of available sources of data can only be limited by the imagination of the researcher. Written sources include published statistics, newspapers, reports by other researchers, periodicals and diaries (Philliber, Schwab & Sloss 1980:110-112).

The advantage of using available data is that it is cheaper and quicker to collect than new data. The disadvantage is that because the researcher did not control the collection of such data, he/she is not certain of the validity of the data. In general it remains a purposeful strategy for any researcher to undertake a search for available data that are useful before beginning to collect new data (Philliber et al 1980:116).

7.5.5 Selection of method to collect data

I decided that a questionnaire, distributed personally, would be the most appropriate method to collect data in connection with the manner in which public administration is exercised for this survey research. The following criteria, as stated by Murphy (1981:59), would be met:

- Data can be collected in a satisfactory manner by means of a questionnaire that can be completed easily and quickly.
- The persons who have the data available are available, willing and competent to complete a questionnaire.
- The research area is made up of a relatively homogeneous group of people.
- Sufficient time can be given to the respondents to complete the questionnaire.

I am not aware of any study done that is similar to this study and that has taken into account all the variables mentioned. As a result, I am not aware of the existence of any questionnaire containing all these variables.

7.6 Measuring instrument used in the survey

I decided to develop an appropriate questionnaire to be used as a measuring instrument. I considered particular aspects regarding the contents of the questionnaire, namely initial considerations, development of the questionnaire and structure of the questionnaire.

7.6.1 Initial considerations

Firstly, the instrument should not be too time-consuming. The questionnaire should be as brief as possible so that it requires a minimum of the respondent's time. Lengthy questionnaires take a great deal of time and effort and the respondent could develop an

unfavourable attitude toward the questionnaire. This will most likely influence his/her response.

Secondly, I should personally administer the questionnaire so as to establish any concerns, explain the purpose of the study, and explain the meaning of items that may not be clear.

Thirdly, the questionnaire should be administered to a large group at the same time as this makes possible an economy of time and expense and provides a high proportion of usable responses.

Fourthly, since the questionnaire was to be administered in a government department, the permission of the Director-General of the Department had to be sought beforehand. Officials were told that their participation was voluntary.

7.6.2 Development of the questionnaire

When an attempt is made to develop a questionnaire, certain aspects warrant consideration beforehand as concerns the type of questions to be used. Consideration must be given to closed-ended questions and open-ended questions.

7.6.2.1 Closed-ended questions

The wording of a question is not the only consideration when drafting a questionnaire. A decision must be made as to what response categories to use. The two usual forms of response are either closed-ended and open-ended questions, or a combination of the two.

A closed-ended question is a question in which response categories are given. The respondent then chooses from the responses supplied and makes that choice his/her own response. The closed-ended question is easier and quicker for the respondent to respond to. It also ensures that all respondents would have the same frame of reference in responding. It may also make it easier for respondents to respond to questions dealing with topics of a sensitive nature.

The questionnaire contains primarily closed-ended questions but does also contain two open-ended questions.

Closed-ended questions, explains Baily (1987:120), should be used when the answer categories are discrete, distinct and relatively few in number. Closed-ended questions are generally self-contained, can be answered quickly, and require few instructions. They are appropriate for survey questionnaires. Like open-ended questions, fixed alternative questions also have advantages and disadvantages. These are described by Baily (1987:118-119) with Oppenheim (1992:115) in substantial agreement, as follows:

Advantages

- The answers are standard and can be compared from person to person.
- The answers are easier to code directly from the questionnaire.
- The respondent is often clearer about the meaning of the question.
- The answers are relatively complete.
- Respondents will often respond to sensitive topics more readily than with an open-ended question.
- Closed-ended questions are more easily answered, as the respondent merely has to choose an alternative from the responses given rather than formulate a response.

Disadvantages

- A respondent who does not know the answer or has no opinion may try to guess the appropriate answer or answer randomly.
- The respondent may feel frustrated because the appropriate category for his answer is not provided.
- Too many answer categories may be provided.
- Differences in interpretation of what was meant by the question may go undetected.
- Variations in answers among the different respondents may be eliminated artificially by forced-choice responses.
- There is the likelihood of clerical errors where the respondent selects a choice that differs from their thoughts.

I decided that the disadvantages would not outweigh the advantages. The closed-ended questions remained appropriate.

7.6.2.2 Open-ended questions

An open-ended question is a question in which response categories are not given. As Bailey (1987:121) explains, open-ended questions are usually used for complex questions

that cannot be answered in a few simple categories. Normally questions of this sort are used to elicit the views, philosophy or goals of a respondent, and are used when accuracy, detail and exhaustiveness are important. Baily (1987:120) with Oppenheim (1992:115) in agreement, described the advantages and disadvantages of open-ended questions as follows:

Advantages

- They can be used when all the possible answer categories are not known, or when the investigator wishes to see what the respondent views as appropriate answer categories.
- They allow the respondent to answer adequately, in all the detail he or she likes, and to clarify and qualify the answer.
- They can be used when there are too many potential answer categories to list on the questionnaire.
- They are preferable for complex issues that cannot be condensed into a few small categories.
- They allow more opportunity for creativity or self-expression by the respondent.

Disadvantages

- They may lead to the collection of worthless and irrelevant information.
- Data are often not standardised from person to person, making comparison or statistical analysis difficult.
- Coding is difficult and subjective.
- Require superior writing skills, better ability to express one's feelings verbally, and generally a higher educational level than do closed-ended questions.
- They may be too general for the respondent to understand what is meant.
- May require more of the respondent's time and effort.
- Require more paper and make the questionnaire look longer, possibly discouraging certain respondents.

The questionnaire contains only two open-ended questions. The disadvantages of open-ended questions were not of cardinal concern.

7.6.2.3 Responses to questions

The possible responses to closed-ended questions are dichotomous and multichotomous and are described below.

Dichotomous questions

A dichotomous question is one that allows for only two alternative responses. Certain of the questions in the questionnaire limited the respondent's choice to YES and NO. Question 8: "Do you know of the Bill of Rights in chapter 2 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)?", taken from the questionnaire, provides an example of this form of question.

Multichotomous questions

A multichotomous question is one that has a fixed number of alternative responses. The respondent is required to select the alternative that most closely corresponds with his/her opinion on the subject. This type of multiple-choice questions does not usually permit the respondent to elaborate on his/her position although it does allow for more alternatives and finer distinction between viewpoints than the dichotomous question.

Only five questions in the questionnaire are dichotomous. The majority of the questions are multichotomous as the information sought are related to opinions on the application and influence of fundamental rights on public administration in various situations.

7.6.2.4 *Scaling*

Scaling techniques are used to measure attitudes, judgments, opinions and other traits not easily measured by tests or other measurement techniques. My intention of using a scale was to be able to test the respondents' opinion and other facts and strength of opinion on various issues. A questionnaire that makes use of a scale would appear to be the most appropriate instrument in this instance. It would be possible to use it in a group situation and the administering and interpretation would not be too difficult. This is advantageous in that less pressure is placed upon respondents to provide an immediate response and it encourages open responses to sensitive questions (Judd, Smith & Kidder 1991:216).

For the purposes of this questionnaire, I considered the Likert scaling technique as appropriate. Likert-scale items consist of a statement or characteristic toward which the respondent indicates degrees of intensity. The respondent is required to choose an answer between alternatives that best suites his/her opinion. The respondent is allowed to express his/her feelings in response to a particular statement made in the questionnaire (Mason &

Bramble 1978:293). The diagrammatic rating scale based on the Likert approach is, for example, as follows:

Always	Mostly	Sometimes	Never
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The use of primarily multichotomous questions in the questionnaire suited the adoption of a Likert scale. I considered a modified Likert scale to be appropriate for the different questions with different choices of responses. In each of the questions the respondents would be able to select an alternative response that best corresponded with their opinion.

7.6.3 Structure of the questionnaire

I drew up a self-administered Questionnaire (see Appendix 3) for respondents to complete to yield the following data:

- *Section 1*

This section comprises seven questions (questions 1 to 7). Personal and general details of the respondent are requested so as to elicit information regarding the respondent's position on the levels of management, period of employment as a public official and present work situation with regard to working with the public.

- *Section 2*

This section comprises four questions (questions 8 to 11) relating to the contemporary influence of the Bill of Rights on the manner the respondent performs official functions.

Question 8 is intended to reveal the number of respondents that know of the Bill of Rights during the completion of the questionnaire.

Question 9 is to be responded to by only those respondents who answered yes to question 8. Question 9, with its subsections, is intended to yield information concerning the influence of the Bill of Rights on the manner in which the respondent exercises official functions.

Question 10 is intended to reveal the number of respondents that know of section 195 of the 1996 Constitution which provides that public administration must be governed by the democratic values and principles enshrined in the Constitution.

Question 11 is to be responded to by only those respondents who answered yes to question 10. Question 11 is intended to examine whether the respondent performs official functions with adherence to the prescriptions contained in section 195.

- *Section 3*

This section comprises three questions (questions 12 to 14) aimed at respondents who were public officials prior to 27 April 1994.

Question 12 elicits whether the respondent, before 27 April 1994, performed official functions in favour of the government of the day or in favour of the interests of the inhabitants of the country.

Question 13 is intended to yield information as to whether the inception of the Bill of Rights on 27 April 1994 had an influence on the manner the respondent exercises official functions and whether the respondent changed that manner of functioning since 27 April 1994.

Question 14 examines whether the respondent has experienced any change in the manner public services are rendered today if compared to the manner public services were rendered prior to 27 April 1994. The question contains an open end in which the respondent is required to give an example if the response to the question is yes.

- *Section 4*

This section comprises eight questions (questions 15 to 22) of a general nature aimed at respondents' knowledge of the application of the Bill of Rights.

Question 15 is intended to reveal the number of respondents that have been officially informed of the Bill of Rights during the completion of the questionnaire. The question contains an open end in which respondent is required to state the manner in which he/she was informed if the response to the question is yes.

Question 16 is intended to reveal the number of respondents that have studied the Bill of Rights on their own accord.

Questions 17 to 20 examine whether the respondent has basic knowledge regarding the application of the Bill of Rights.

Question 21 is an open-ended question inviting respondents to comment on how public officials should be informed of the Bill of Rights and how to apply the principles when exercising public administration.

Question 22 is an open-ended question inviting respondents to add any comments regarding any issue in the questionnaire.

7.7 Commencing the research

I commenced the research by obtaining authority from the Department of Home Affairs to involve the officials of the Department and by pre-testing the questionnaire.

7.7.1 Obtaining authority

Authority had to be obtained from the Department of Home Affairs before proceeding with this research. To obtain permission to carry out this research and to involve the Department's public officials as respondents to complete questionnaires, I prepared and delivered a letter to the Director-General of the Department (see Appendix 1). The letter contained an explanation as to the purpose of the exercise and a copy of the questionnaire was attached.

After several weeks had passed without any response from the Director-General, I approached the Director General's office and requested a reply. The Director-General's reaction was that he did not want public officials to utilise official time for non-official purposes. The Department was in the process of applying a new policy aimed at the maximum application of official hours. I then sent a facsimile (see Appendix 2) to the Director-General enquiring whether he would have any objection to officials taking part in the exercise during their lunch interval and in the morning before official hours commence. The Director-General indicated that the matter would then be out of his jurisdiction.

The original request was thus not refused and I proceeded with the necessary arrangements to put the investigation into operation.

7.7.2 Pre-testing the questionnaire

The final stage of the questionnaire construction was the pre-testing of the questionnaire. Pre-testing is aimed at detecting weaknesses in the questionnaire. Babbie (1973:211) writes that such a pre-test should be similar to the actual survey itself. The only difference should be that the pre-test should be smaller in size. The pre-test should include a sample of the population to be tested. I decided to follow this course.

I requested two public officials employed in the Department of Home Affairs' head office to assist in the pre-testing of the questionnaire. Both officials had a long period of service and worked directly with the public.

The questionnaire for the pre-test contained the same wording, format and sequence of the final questionnaire. During the pre-test, the two officials were required to:

- Indicate the period of time needed to complete the entire questionnaire;
- Identify whether any of the questions were ambiguous;
- Ensure that all the questions were comprehensible;
- Indicate whether the questionnaire was too long;
- Indicate whether all possible aspects of the research topic were covered; and
- Indicate whether the instructions to respondents were clearly understood.

7.7.3 Results of the pre-test

The two officials, who pre-tested the questionnaire, completed it in less than 12 minutes. Both officials understood all the questions and experienced no other difficulties. As a result of the pre-test I did not deem any modifications to the questionnaire necessary. The questionnaire delivered data in connection with public administration needed to test the hypothesis in chapter 6.

7.8 Procedure followed during the empirical investigation

Due to the situation being as described in paragraph 7.7.1, I had to follow two different procedures to collect data at the Department's head office and at the regional and district offices. These procedures are now described.

7.8.1 Method of data collection at the regional and two district offices

At each of the regional and two district offices selected to be involved (see *supra* 7.4), I approached the person at the head of the office and requested permission to involve the officials of that particular office during some time outside of official hours. At all the offices an agreement was reached that in the morning before official hours commence and during the lunch break would be the ideal periods of time to conduct the exercise. All the officials, who were considered for inclusion in the sample, were informed on a particular day that a survey was to be conducted on the morning and during the lunch break of the following day. The survey would be held at a particular venue. Officials were informed that participation was voluntary as it wasn't an official exercise and therefore not compulsory. At the pre-arranged times on the following day, all the officials who arrived at the venue were included in the sample.

I used the pre-arranged day at each of the regional and district offices to administer the questionnaire. I handed a questionnaire to each of the officials present. I then gave a short explanation as to the contents and purpose of the survey. The instructions on how the questionnaire was to be completed were explained. Officials were informed that participation was voluntary and that the questionnaire could be completed within 12 minutes on average. Officials were reassured about the confidentiality of the questionnaire. Officials were given the opportunity to ask questions in order to clarify problematic issues and if difficulty arose in comprehending the questions in English. I remained present at each of the venues until all the officials had completed their questionnaires. At one district office, five officials handed in uncompleted questionnaires and explained that they did not want to participate and had used the opportunity to be out of their offices.

A total of 173 questionnaires were distributed at such venues. I collected all the completed questionnaires. The response rate at such sessions was 100%.

In a few instances officials did not arrive at the pre-arranged locality but indicated their willingness to participate in the survey. I then handed a questionnaire to such officials and requested them to complete the questionnaire in their own time. A date was also arranged for the questionnaires to be collected. In such instances I had little control in securing a reply from the respondents. A total of 38 questionnaires were distributed in this manner and only 26 were returned. The response rate in these circumstances was 77%.

7.8.2 Method of data collection at the Department's head office

At the Department's head office I followed a slightly different approach. Not all of the officials could have been included in the sample as the number employed was too great. I selected six different sections or directorates that were involved with administrative duties rendering public services. I then informed the person at the head of each of the selected directorates as to the contents and purpose of the survey. Permission was then requested to involve the officials in that directorate. I reached an agreement with all the mentioned persons that they would distribute a copy of the questionnaire to each official in that directorate who was available to participate. Such officials were also to be requested to complete the questionnaire at a time that did not form part of official hours. Officials were requested not to discuss the questionnaire with each other.

The instructions on how the questionnaire was to be completed were explained. The possibility that the questionnaire could be completed in 12 minutes on average was made clear. These persons were given the opportunity to ask questions in order to clarify problematic issues and if any difficulty arose in comprehending the questions. The persons so informed were requested to collect the completed questionnaires. I was not present when the questionnaires were distributed and completed.

On a pre-arranged day, I collected the completed questionnaires from each of the persons so arranged with. In this part of the survey I had little control in securing a reply from the respondents. The response rate in these circumstances was 77%. A total of 75 questionnaires were distributed in this manner and only 62 were returned.

7.9 Procedure followed after the administration of the questionnaire

After the respondents completed the questionnaire at the venues where I was present, I checked each questionnaire to ascertain whether every question was answered. Fortunately the majority of the respondents had answered all the questions. This was perhaps due to the fact that the respondents did not experience difficulty in comprehending the questions.

At the directorates of the Department's head office where I had not been present during the completion of the questionnaires, I, on a pre-arranged day, collected the questionnaires that had been returned. Thereafter I checked each questionnaire to ascertain whether every question was answered. Of the questionnaires that had been returned, only six questionnaires had a few questions unanswered. This was perhaps due to the fact that the respondents did experience uncertainty or difficulty in comprehending the questions and could not receive an appropriate reply for their concerns. Fortunately the six questionnaires were otherwise usable.

I then handed the questionnaires to Unisa's Computer Section to capture the data on computer.

7.10 Summary

In this chapter the survey design and techniques used in surveying the opinions of public officials in the Department of Home Affairs, as respondents, as to the influence of fundamental rights on public administration were investigated.

The use of surveys was examined in order to select an appropriate method for use in the survey research of this thesis (see *supra* 7.2). I considered a descriptive survey as appropriate to canvass the opinions of public officials in the Department of Home Affairs as to the influence of fundamental rights on public administration.

The meaning of "population" as used in this thesis for research purposes was described (see *supra* 7.3). I described a population as the group of individuals to be represented in its entirety. All public officials employed in all the categories of public offices perform public

administration and render public services. It was, however, impossible to involve all such officials in this research. The population for this study was thus narrowed down to include only the public officials employed in the Department of Home Affairs. I selected the Department of Home Affairs as it deals with a wide variety of public services that public officials deliver on a person-to-person basis. I regarded this Department as a typical public institution for the purposes of the survey (see *supra* 7.4.7).

From the population a sample was drawn to represent the population. I gave a description of the methods by which a sample can be drawn (see *supra* 7.4.1). The methods described are random sampling, stratified random sampling and cluster sampling. The method selected as most appropriate to use in this thesis was primarily random sampling. I also gave a description of how the sample for the survey research was considered by random sampling. This description covered the geographical aspects (see *supra* 7.4.2), the localisation of the sample (see *supra* 7.4.3) and the relevant respondents used (see *supra* 7.4.4). The actual sample drawn was then described (see *supra* 7.4.5). As it was impossible to involve all the officials in all the government departments because of time and financial constraints, I demarcated only officials employed in the offices of the Department of Home Affairs situated in the vicinity of Pretoria and Centurion.

An elucidation of the techniques to collect data was done (see *supra* 7.5). The techniques of observation (see *supra* 7.5.1), interviews (see *supra* 7.5.2) by telephone and in person, use of a questionnaire (see *supra* 7.5.3) distributed by mail and in person, and the use of available data (see *supra* 7.5.4), were distinguished. I did not have permission to do observation or conduct interviews during official hours. This led to these methods of collecting data not being considered for use. The use of a questionnaire sent to respondents by mail contained the aspect of a low response rate. This made such a technique unattractive. I decided to use a questionnaire to collect data and to distribute the questionnaire personally to respondents.

An exposition was given of the measuring instrument used in the survey (see *supra* 7.6). The exposition included the initial considerations (see *supra* 7.6.1), the development (see *supra* 7.6.2) and structure of the questionnaire (see *supra* 7.6.3). As part of the development of a questionnaire, consideration was given to closed-ended and open-ended questions, and the use of Likert method of scaling. The description of the structure of the questionnaire included the division of the questionnaire into four divisions and the different types of questions.

The procedure followed in order to commence the survey was portrayed (see *supra* 7.7). A description was given of the procedure followed to obtain permission from the Department of Home Affairs to conduct the survey using officials as respondents. The pre-test of the research instrument was described as part of the final preparation of the questionnaire.

A description was given of the procedure followed during the empirical investigation (see *supra* 7.8). The sample was selected and the questionnaire was constructed and administered. Due to the situation being that I did not have permission to conduct the survey during official hours (see *supra* 7.7.1), two different procedures had to be followed to collect data at the Department's head office and at the regional and district offices. The description of these procedures illustrated how data was collected at the different venues. The response rate at the venues where I was present was 100%. A total of 173 questionnaires were distributed at these venues and all were returned to me. At the venues where I could not be present, the response rate was 77%. A total of 113 questionnaires were distributed and only 88 were returned.

An illustration was given of the procedure followed after the administration of the questionnaire (see *supra* 7.8). After the respondents completed the questionnaire at all the venues, I delivered the questionnaires to Unisa's Department of Computer Services to be captured on computer.

The results from the investigation are explained in chapter 8 of the thesis. I anticipated that the results yielded detailed information that can be used to make generalisations about the population in the Department of Home Affairs. The contributions of the results will probably discover new knowledge about the influence the inception of fundamental rights has on the manner in which public officials in the Department of Home Affairs perform their official functions.

In the next chapter an analysis and interpretation of the data collected is provided.



Chapter 8

Empirical findings and evaluation

8.1 Introduction

In order to fulfil the purpose of the study, as presented in Chapter 1.2, the findings of the empirical research are discussed in this chapter. Chapters two to seven showed how various hypotheses for this study were derived from theory, past findings and rational arguments. Seven hypotheses were formulated and elucidated in Chapter 6. In this chapter, accordingly, the results obtained from data collected from the completed questionnaires used in the empirical research, are presented and analysed.

8.2 Questionnaires

The Department of Computer Services at the University of South Africa captured the data in the completed questionnaires on computer. The results obtained from the questionnaires are analysed in terms of the hypotheses drafted in Chapter 6. Each of the seven hypotheses is dealt with separately.

Questionnaires that were partly completed, and those in which respondents did not answer any questions but did write a general comment, were included in the computer analysis. Only questionnaires that were returned but had no information on were excluded. Questions that were not answered by respondents were entered into the computer as "missing cases". Under each such question the computer gave a total of "missing cases". Where relevant, percentages of such numbers are mentioned in each analysis.

8.3 Findings

The hypotheses are dealt with in numerical order in this chapter, and a pattern of relations between variables is also shown here. Various related findings of this study are thus pulled together in this chapter to show a pattern that allows one to come to some general conclusions.

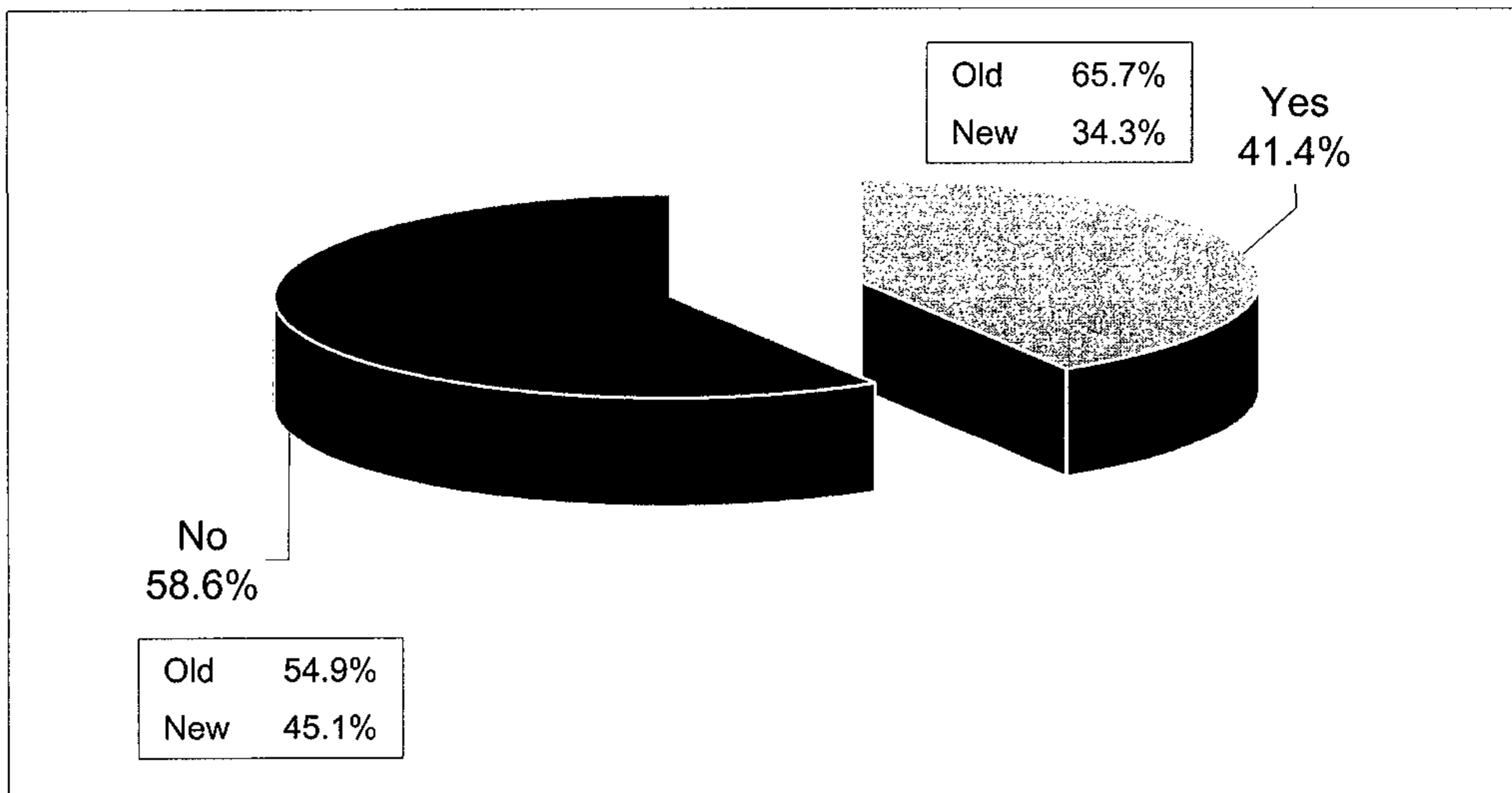
The hypotheses from chapter 6 are now dealt with.

8.3.1 Officials in the Department of Home Affairs' knowledge of the Bill of Rights

The first hypothesis is the following:

More than half of the public officials on the different levels of management in the Department of Home Affairs do not know of the Bill of Rights in chapter 2 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and not all of those who do know of the Bill of Rights have much knowledge of the contents of the Bill

This hypothesis was tested by means of questions 8 and 9 of the questionnaire. In question 8 respondents were requested to indicate whether they know of the Bill of Rights in the 1996 Constitution by merely answering "yes" or "no" to the question. All the respondents answered this question and Figure 8.1 reflects the results obtained. Figure 8.1 also shows which part of the respondents that were employed in the public service prior to 1994, replied "yes" or "no", respectively. Question 3 of the questionnaire dealt with the length of time respondents were employed in the public service and the results are discussed in paragraph 7.4.7 of this thesis. For the purposes of this chapter of this thesis and for the sake of brevity, I will refer to the respondents and officials that were employed in the public service prior to 1994 as "old" (meaning longer serving respondents / officials) and to those that were employed since 1994 as "new" (meaning shorter serving respondents / officials) officials.

FIGURE 8.1 PUBLIC OFFICIALS WHO KNOW OF THE BILL OF RIGHTS

The results show that more than half of all the respondents noted that they do not know of the Bill of Rights. Of these mentioned respondents, just over half are old and the rest are new officials. The results also show that less than half of all the respondents noted that they do know of the Bill of Rights. Of these mentioned respondents, one third are new and two thirds are old officials. The ratio of the sample of respondents (see *supra* 7.3) is about 60% old officials and 40% new officials. The size of the groups of old and new officials that answered "yes" or "no" are thus close to the ratio. I find it interesting that slightly more old officials than the ratio know of the Bill of Rights. I expected the opposite result as I expected new officials to be more familiar with contemporary constitutional matters. It is encouraging that old officials appear to be willing to become familiar with the new constitutional instruments such as the Bill of Rights.

The respondents who answered "no" to question 8 were requested to proceed to question 10 of the questionnaire. The respondents who answered "yes" to question 8 were requested to respond to question 9 of the questionnaire.

The respondents who answered "yes" to question 8 then formed a separate group for the purposes of answering question 9. The purpose of this was because I expected some respondents to know of the Bill of Rights but that certain respondents would answer "yes" to question 8 in order not to appear ignorant. The purpose of question 9 was therefore to

establish the extent of the knowledge that respondents have of the contents of the Bill of Rights. This means that the respondents who answered "yes" to question 8 had to apply what knowledge they had of the contents of the Bill of Rights to appropriately answer question 9. The relevant respondents then made their knowledge, or lack thereof, apparent when indicating their opinion regarding three statements contained in question 9.

Not all of the respondents of this particular group did in fact respond to question 9. There were missing cases in each of the 3 statements. This, I believe, could be attributed to the respondents having indicated that they do know of the Bill of Rights but not having sufficient knowledge of the contents of the Bill of Rights in order to choose the correct answer and then deciding not to answer one or more of the statements. The percentage that did not respond to any of the three statements is very small (see Tables 8.1, 8.2 and 8.3) and did not attenuate the validity of the results of question 9.

In question 9 the respondents forming this particular group were requested to indicate their opinion regarding three statements. The statements related to the protection that the Bill of Rights grants against arbitrary activities by government institutions, and whether the Bill of Rights has an influence on the manner in which public officials exercise their functions. Each one of the three statements had a number of responses from which the respondents had to choose an appropriate answer.

I assumed that respondents who noted in response to question 8 that they know of the Bill of Rights, would hence have knowledge of the provisions of section 7 and 8, read with section 2, of the 1996 Constitution relating to the application of the Bill of Rights. Sections 7 and 8 are part of the provisions of the Bill of Rights and section 2 explains the non-compliance with those provisions. My view was that respondents should be aware of the constitutional instruction that the state must respect, protect, promote and fulfil the rights in the Bill of Rights (section 7(2)) that the Bill of Rights enshrines the rights of all people in South Africa (section 7 (1)). I considered these mentioned respondents to also be aware of the confirmation that the Bill of Rights applies to all law and binds government institutions (section 8(1)) to the extent that any conduct inconsistent with the Constitution is invalid (section 2). My opinion is thus that the Bill of Rights prescribes effective protection to the public against arbitrary activities by government institutions. This is as far as I expected the respondents' knowledge of this aspect to stretch, as question 9 of the questionnaire does not deal with the effectiveness of the Bill of Rights in practice.

I believed that should respondents be aware of the provisions of the mentioned sections 2, 7 and 8, they should be able to identify the most appropriate answer among the choice of responses. I regarded only one response as the "positive" response. All the other responses were thus "negative" as they were not supportive of the aims and objectives of the provisions in the mentioned sections 2, 7 and 8.

I regarded the missing cases as negative answers as the respondents apparently could not identify the positive answer. Tables 8.1, 8.2 and 8.3 reflect the results obtained from question 9 of the questionnaire. The results also show how the "old" and "new" officials responded to the different statements.

TABLE 8.1 PUBLIC PROTECTED FROM ARBITRARY GOVERNMENT ACTS

First statement (question 9)	Choice of responses	Response %	Each response	
			Old %	New %
The Bill of Rights grants protection to the public against arbitrary activities by government institutions	To a large extent	57.4	61.3	38.7
	To a lesser extent	20.4	40.9	59.1
	Uncertain	13.9	73.3	26.7
	Not at all	0.9	100	0
	Missing cases	7.4	62.5	37.5

The results reflected in Table 8.1 show that more than half of the respondents of this particular group are of the opinion that the Bill of Rights grants protection to the public against arbitrary government activities. Almost two thirds of these mentioned respondents are old and the rest are new officials. This answer is the only response that I regarded as a positive answer among the choice of responses. This implies that almost half (all the other responses added together) of the respondents in this group appear not to have sufficient knowledge of the nature and extent of the Bill of Rights to know that the Bill protects the public against arbitrary acts by government.

TABLE 8.2 THE BILL'S INFLUENCE ON THE MANNER OFFICIALS EXERCISE THEIR FUNCTIONS

Second statement (question 9)	Choice of responses	Response %	Each response	
			Old %	New %
The Bill of Rights has an influence on the manner I exercise my official functions because I have to keep the principles of the Bill of Rights in mind when exercising my official functions	Always	62.0	58.2	41.8
	Sometimes	24.0	57.7	42.3
	Uncertain	6.5	71.4	28.6
	Never	1.9	0	100
	Missing cases	7.4	64.7	35.3

The results reflected in Table 8.2 show that almost two thirds of the respondents in this particular group are of the opinion that the Bill of Rights always has an influence on the manner in which public officials exercise their official functions. Of these mentioned respondents more than half are old and the rest are new officials. This reaction suggests that these mentioned respondents are apparently aware of the provisions of sections 2, 7 and 8 of the 1996 Constitution. With such knowledge I believe that these mentioned respondents understand that they are obliged to always keep the rights in the Bill of Rights in mind when exercising their official functions (see *supra* 4.8). I regard this response as the only positive answer. The provisions of sections 2, 7 and 8 do not contain exceptions to the obligation on public officials and therefore I regard the other responses to the second statement as "negative". The implication in this instance is that more than one third of all the respondents in this group did not know that the Bill of Rights always should have an influence on the manner in which they exercise their official functions. Despite the fact that these mentioned respondents answered that they do know of the Bill of Rights, they apparently are not aware of the provisions of sections 7 and 8 regarding the application of the rights in the Bill of Rights.

TABLE 8.3 THE BILL'S EFFECT ON THE MANNER PUBLIC OFFICIALS WORK

Third statement (question 9)	Choice of responses	Response %	Each response	
			Old %	New %
The manner in which I perform my official functions would not differ if there were no Bill of Rights because the Bill of Rights does not affect my manner of working	Agree	45.4	73.5	26.5
	Uncertain	15.7	58.8	41.2
	Disagree	33.3	41.7	58.3
	Missing cases	5.6	50	50

The data from Table 8.3 reveal that only one third of the respondents in this group disagree with the statement that the Bill of Rights does not affect the manner in which public officials work. I regarded this response as the only "positive" answer. As in the case of the second statement, I expected respondents to be aware of the provisions of sections 7 and 8 of the 1996 Constitution in order to respond to the third statement appropriately. Due to the fact that less than half of the respondents in this group agree with the statement, the statement was apparently not misunderstood. The rather large percentage of the respondents who were uncertain of the correct answer together with the missing cases (a total of one fifth of the respondents of this group), is suggestive of a lack of knowledge among the respondents as to the prescribed influence that the Bill of Rights has on the manner in which public officials work. The results reflected in Table 8.3 indicate therefore that two

thirds of the respondents in this group, did not know that it is constitutionally prescribed that the Bill of Rights always affects the manner in which public officials work.

The data obtained from questions 8 and 9 distinctly divide the original total of all the respondents into two groups, namely one group that knows of the Bill of Rights and another group that does not know of or knows very little about the Bill of Rights. In Figure 8.2 a summative illustration is given of the results obtained from questions 8 and 9.

FIGURE 8.2 PUBLIC OFFICIALS' KNOWLEDGE OF THE BILL OF RIGHTS

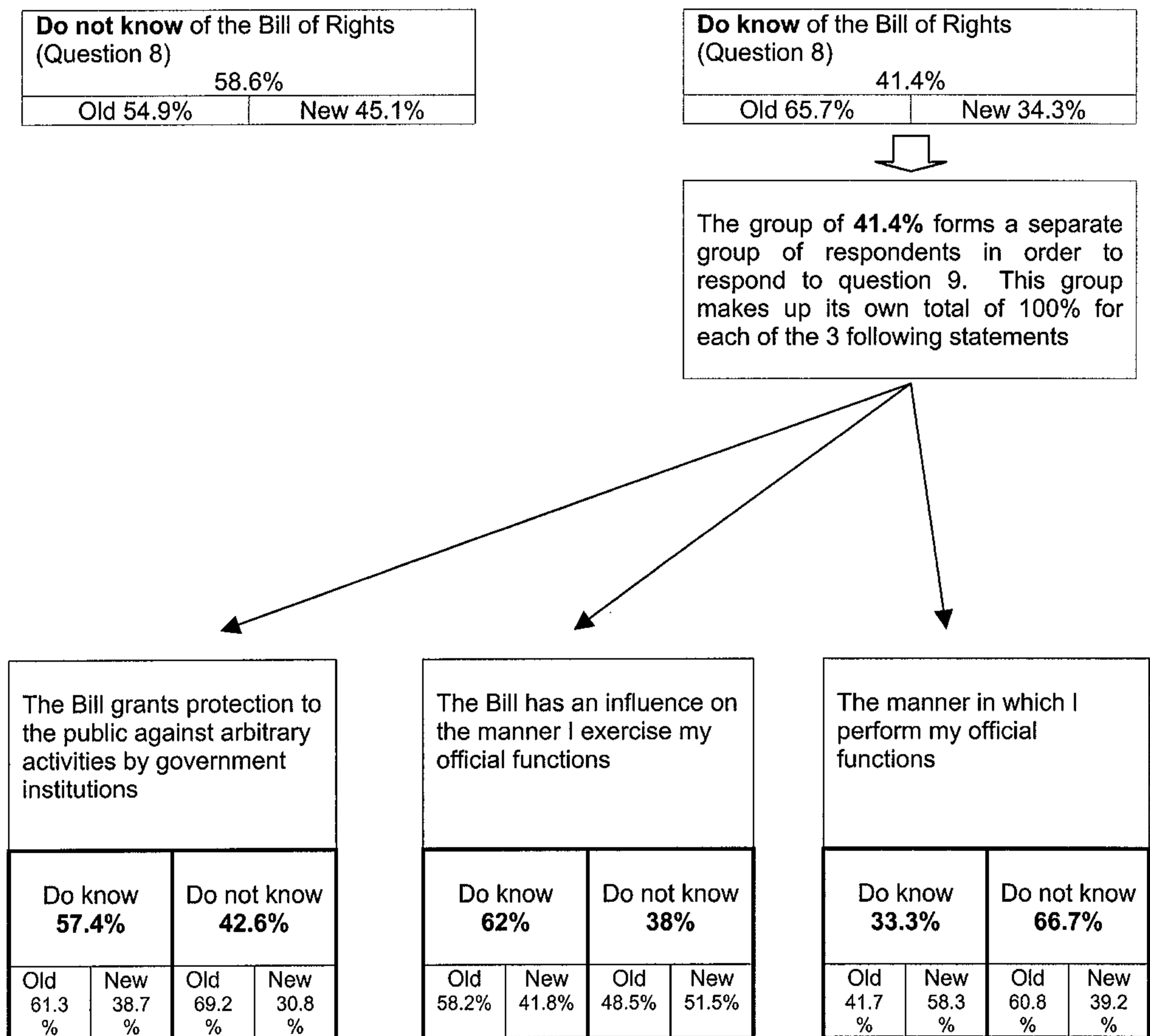


Figure 8.2 reveals that in respect of each of the statements in question 9, a large percentage of the respondents who indicated that they know of the Bill of Rights, apparently do not have sufficient knowledge of the contents of the Bill of Rights in order to be able to respond appropriately to a few basic statements that relate to the manner in which public

administration is prescribed to be exercised. I attribute this to the possibility of respondents only knowing of the Bill of Rights but not necessarily having much or any knowledge of the contents of the Bill. I presume that the purpose of question 9, has been successfully achieved.

Based on the results of the survey with regard to questions 8 and 9 of the questionnaire, I intend to make generalisations about the public officials of the Department of Home Affairs as a whole (see *supra* 7.2).

In summary, almost sixty percent of respondents indicated in question 8 that they do not know of the Bill of Rights. Only a small difference exists between those respondents that are old officials and those that are new officials. Just over half of the other respondents that indicated that they do know of the Bill of Rights do not, however, have sufficient knowledge of the contents of the Bill for the purposes of being efficient in their workplace. These results imply that a very large portion of all the officials in the Department of Home Affairs do not know of the Bill of Rights or lack sufficient knowledge of the provisions in the Bill.

South Africa did not have a Bill of Rights or a non-racial comprehensive set of entrenched fundamental rights prior to 1994 (see *supra* 3.4.1). The inception of the 1993 Constitution on 27 April 1994 with such a set of entrenched rights had a direct impact on public administration. Public administration entered a period with a critical challenge to reshape itself and the manner in which it was exercised (see *supra* 4.1). A constitutional obligation existed in terms of which constitutional prescriptions and public administrative practice would have to interface with each other to reshape the manner in which public administration was exercised (see *supra* 4.8). Public administration thus on 27 April 1994 entered a bridging process between the apartheid-era and the post-apartheid-era (see *supra* 5.1). My opinion is that it is imperative that public officials and public administration should conform to the contemporary constitutional principles in order to complete the bridging process as quickly as possible. If the bridging process lags behind, it would be disadvantageous to the effectiveness and efficiency constitutionally envisaged for the entrenched fundamental rights (see *supra* 5.5). My view is that the bridging process can be speedily completed if all public officials are aware of the Bill of Rights and have sufficient knowledge of at least relevant provisions (for example sections 2, 7 and 8) of the 1996 Constitution in order to successfully apply the rights in the Bill of Rights when exercising public administration.

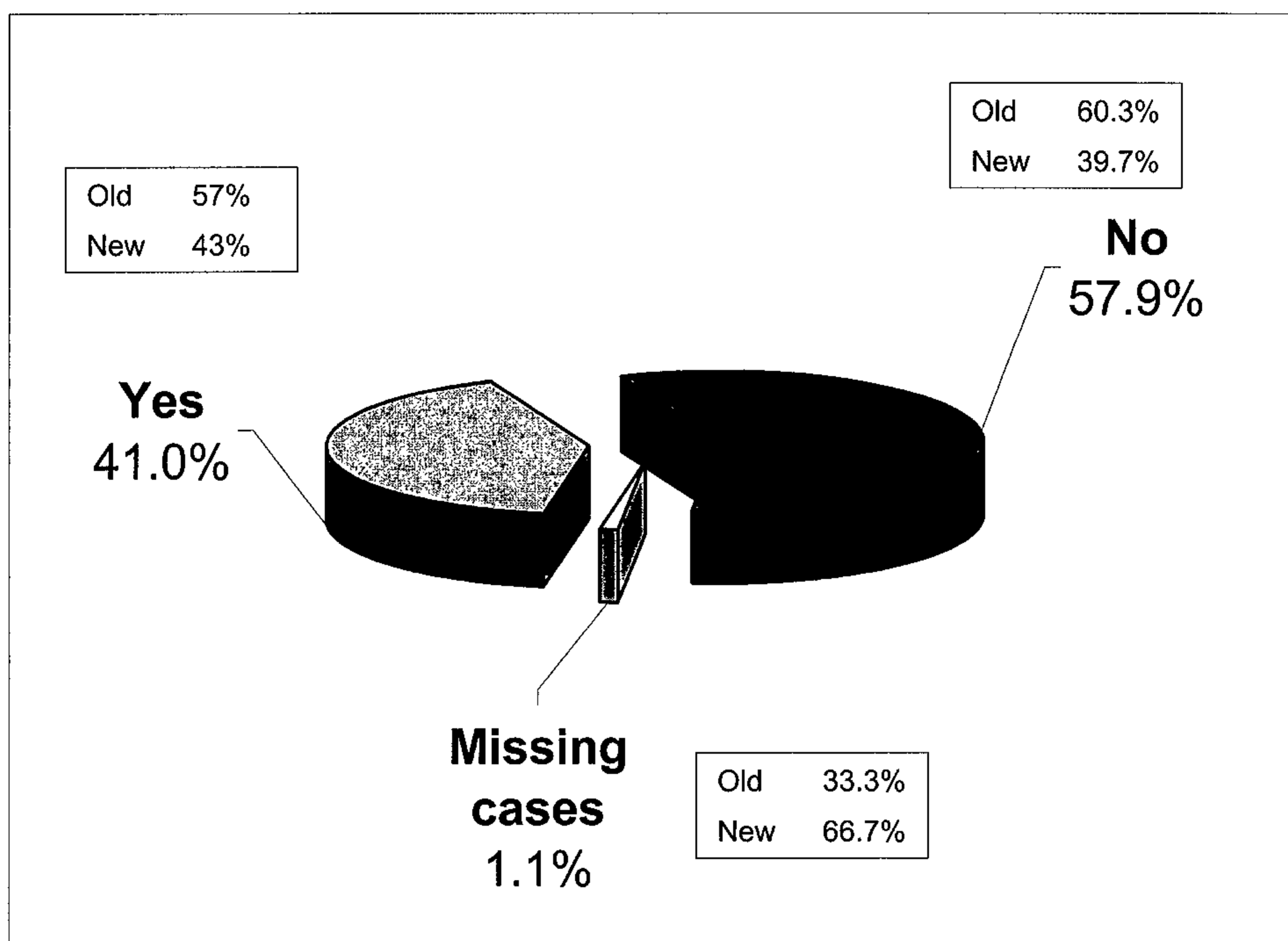
I can now state that the findings relating to questions 8 and 9 support the first hypothesis on public officials' knowledge of the Bill of Rights.

8.3.2 Officials in the Department of Home Affairs' awareness of section 195 of the 1996 Constitution

The second hypothesis is the following:

More than half of the public officials on the different levels of management in the Department of Home Affairs are not aware of section 195 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), which states that public administration must be governed by the democratic values and principles enshrined in the 1996 Constitution, and not all of the officials who are aware of section 195, know how to apply the section

This hypothesis was tested by means of questions 10 and 11 of the questionnaire. In question 10 respondents were requested to indicate whether they know of section 195 of the 1996 Constitution by merely answering "yes" or "no" to the question. Only a small number of respondents did not answer this question and in Figure 8.3, they are reflected as missing cases. Figure 8.3 shows the results obtained. Figure 8.3 also shows which part of the respondents consists of "old" and which part consists of "new" officials, as explained above (see *supra* 8.3.1).

FIGURE 8.3 PUBLIC OFFICIALS' AWARENESS OF SECTION 195 OF THE 1996 CONSTITUTION

The results show that more than half of all the respondents noted that they are not aware of section 195 of the 1996 Constitution. Of these mentioned respondents, almost two thirds are old and the rest are new officials. The results also show that less than half of all the respondents noted that they are aware of section 195. Of these mentioned respondents, just more than half are old and the rest are new officials. The size of the different groups of old and new officials that answered "yes" or "no" are relatively near to the ratio of the sample of respondents (see *supra* 7.3).

All the respondents who did not answer "yes" to question 10 were required to proceed to question 12. The respondents who answered "yes" to question 10 then formed a separate group. This group was requested to respond to question 11. The purpose for this was because, as in the case of question 8, I expected that particular respondents would answer "yes" to question 10 in order not to appear ignorant. The purpose of question 11 was to establish the extent of the knowledge that respondents have of the contents of section 195. This means that the respondents who answered "yes" to question 10 had to apply their

knowledge of the contents of section 195 in order to appropriately answer question 11. The relevant respondents then made their knowledge apparent when answering question 11.

Not all of the respondents of this particular group responded to question 11. I attributed this to the respondents possibly not having actual knowledge of the provisions of section 195 in order to choose the positive answer, and then deciding not to answer question 11. The percentage that did not respond is very small (see Table 8.4) and did not attenuate the validity of the results of question 11.

Respondents were requested to answer question 11 relating to whether they perform their functions in adherence to the prescriptions contained in section 195. I assumed that respondents, who noted in response to question 10 that they are aware of section 195 of the 1996 Constitution, would hence be familiar with the provisions of section 195. After all, question 10 included briefly what section 195 prescribes. I believed that should respondents be familiar with the contents of section 195, they would know that section 195 prescribes that public administration must be governed by the democratic values and principles enshrined in the 1996 Constitution. Section 195 does not include any exceptions to the stated rule and therefore all public administration activities must be governed in such a manner. My view was that respondents would then apparently identify the most appropriate response to the statement in question 11. I regarded only one response as the "positive" response. This means that all the other responses were "negative" as the aim of section 195 applied to all public administration. I also regarded the missing cases as negative as the respondents apparently could not identify the positive answer. Table 8.4 reflects the results obtained from question 11 of the questionnaire. The results also show how the old and the new officials responded to the different statements.

TABLE 8.4 OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS PERFORM THEIR FUNCTIONS IN ADHERENCE TO SECTION 195

Question 11	Choice of responses	Response %	Each response	
			Old %	New %
If you answered "yes" to the previous question, do you perform all your official functions in adherence to the prescriptions contained in section 195?	To a large extent	62.6	59.7	40.3
	To a lesser extent	17.8	47.4	52.6
	Uncertain	15.0	50.0	50.0
	Not at all	0.9	100	0
	Missing cases	3.7	75.0	25.0

Table 8.4 reflects that almost two thirds of the respondents who indicated that they know of section 195 of the 1996 Constitution, appear to have sufficient knowledge of the contents of section 195. Granted, respondents could have guessed the correct answer as well. This apparent knowledge enables them to acknowledge that they perform their official functions, to a large extent, in adherence to the provisions of section 195. Well over half of these mentioned respondents are old and the rest are new officials. As I mentioned above (see *supra* 8.3.1) the ratio of the sample of respondents (see *supra* 7.3) is about 60% old officials and 40% new officials. The group of respondents that answered “to a large extent” is made up of old and new officials that is very close to the ratio. More than a third of the respondents did not answer question 11 positively. I attributed this to the officials possibly only being aware of section 195 but not necessarily having much or any knowledge of the contents of the section or not adhering to the prescribed obligation. I regarded the purpose of question 11, as stated above, to have been successfully achieved.

In view of the results of the survey relating to questions 10 and 11 of the questionnaire, my intention is to make generalisations about the officials in the Department of Home Affairs as a whole (see *supra* 7.2).

In summary, almost sixty percent of all the respondents indicated in question 10 that they do not know of section 195 of the 1996 Constitution. Of these mentioned respondents almost two thirds are old and the rest are new officials. A very small number of respondents did not answer the question. The other respondents noted that they do know of section 195. Barely more than half of these mentioned respondents are old and the rest are new officials. Almost two thirds of these mentioned respondents appear to have sufficient knowledge of the contents of section 195 to know that they must perform their official functions in adherence to the provisions of section 195. This situation implies that a very large percentage of all the public officials in the Department of Home Affairs are not aware that section 195 of the 1996 Constitution obliges public officials to exercise public administration in a constitutionally prescribed manner. This suggests that public officials in the Department of Home Affairs are not aware that section 195(1) states that when public administration is exercised, it is subject to the principles in the 1996 Constitution relating to, among others, democratic values, ethics, etc.

In my discussion under the first hypothesis (see *supra* 8.3.1), I wrote that a constitutional obligation existed in terms of which public administration entered a bridging process on 27 April 1994 with a challenge to reshape itself and the manner in which it was exercised. The primary aim of public administration is to promote the general welfare of the inhabitants of

South Africa by rendering a public service to them. Officials are thus obliged to perform their functions within parameters as set out in the 1996 Constitution and other authorising legislation (see *supra* 4.8). As I mentioned above, it is imperative that public officials and public administration should conform to the contemporary constitutional principles in order to complete the bridging process as quickly as possible (see *supra* 5.3). If this process lags behind, it might be disadvantageous to the effectiveness and efficiency constitutionally envisaged for public administration (see *supra* 5.5). My opinion is that the results of the empirical test relating to questions 10 and 11 of the questionnaire, is, as under the first hypothesis (see *supra* 8.3.1), a matter that needs to be taken careful note of by the relevant officials as a very large percentage of the officials in the Department of Home Affairs are not familiar with the current constitutional prescriptions and obligation as to how they are required to exercise public administration. These constitutional prescriptions or similar prescriptions did not exist prior to 1994 (see *supra* 5.2) when public administration was exercised primarily in terms of apartheid legislation, which was dominated by a callous lack of values (see *supra* 4.1). This suggests that the extent, to which public officials in the Department of Home Affairs adhere to the constitutional instructions in section 195, can rightfully be questioned.

I can therefore state that the findings relating to questions 10 and 11 support the second hypothesis on public officials' lack of awareness of section 195 of the 1996 Constitution.

8.3.3 Officials in the Department of Home Affairs' reluctance to change the manner in which they exercise public administration

The third hypothesis is the following:

Public officials in the Department of Home Affairs who were employed in the Public Service before 27 April 1994, are reluctant to participate in a process that could lead to a change in the manner public administration is exercised

This hypothesis was tested by means of only those respondents who were employed in the public service prior to 27 April 1994 (the "old" officials). The question was constructed in such a manner that it would be relevant to only old officials. In question 3 of the questionnaire respondents were requested to indicate how long they had been employed in the public service. All the respondents answered the question and more than half indicated

that they were employed in the public service prior to 27 April 1994 (see *supra* 7.4.7). These respondents (old officials) were requested to respond to questions 13 and 14.

This hypothesis was thus tested by means of questions 13 and 14 of the questionnaire. In question 13 respondents were requested to indicate whether the inception of the Bill of Rights on 27 April 1994 did or did not have an influence on the manner in which they performed their official functions prior to the inception of the Bill of Rights. I assumed that the respondents would note that question 13 suggested that, upon the inception of the Bill of Rights on 27 April 1994, the rights in the Bill of Rights either prompted them to change the manner in which they exercised their official functions, or had no influence in this regard. I also assumed that respondents employed in the public service prior to 27 April 1994 would recall that previous South African constitutions contained practically no protection of fundamental rights whereas the 1993 Constitution contained an abundance of such rights and that public administration would be subject to these rights (see *supra* 3.4.1). I kept in mind that the 1993 Constitution prescribed that public administration must be exercised within constitutional parameters in order to avoid encroaching upon the fundamental rights of any person. Similar constitutional prescriptions did not exist prior to 1994 and therefore the constitutionally prescribed manner in which public administration had to be exercised, changed abruptly on 27 April 1994 (see *supra* 4.1). In reality, however, the public administration environment still contained the remnants of apartheid legislation that could only be constitutionally addressed and systematically eradicated from that point in time (see *supra* 5.4.2). Public administration thus entered a bridging period between the apartheid-era and the post-apartheid-era (see *supra* 5.1). I presumed that these respondents were familiar with and accustomed to an established routine of exercising public administration in terms of pre-1994 apartheid legislation. This could have led to these respondents being less aware of what the actual effect the new post-apartheid constitutional prescriptions regarding public administration entailed (see *supra* 5.4.1). This led me to believe that public officials probably will not have orientated themselves or are hesitant to comprehend and apply the new post-apartheid constitutional principles as from 27 April 1994. My expectations were that such a process would be a gradual one (see *supra* 5.5.2). I thus expected a low percentage of responses indicating that respondents changed the manner in which they exercised their official functions as from 27 April 1994. I kept in mind that some officials probably already, prior to 1994, exercised public administration in a manner that was similar to the constitutionally prescribed manner that came into effect on 27 April 1994.

Respondents had to indicate their response by choosing an appropriate answer to two statements contained in question 13. Not all of the respondents responded to question 13. There were missing cases in each of the 2 statements. The results obtained are revealed in Tables 8.5 and 8.6.

TABLE 8.5 PUBLIC OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS STILL PERFORM THEIR FUNCTIONS IN A SIMILAR MANNER AS BEFORE

First statement (question 13)	Choice of responses	Response %
The inception of the Bill of Rights on 27 April 1994 did not have an influence on the manner in which I performed my official functions and I still to a large extent perform my official functions in a similar manner as before	True	55.8
	Uncertain	22.1
	Untrue	12.3
	Missing cases	9.8

The results obtained and reflected in Table 8.5 suggest that a very small percentage of the respondents were certain that they did not still perform their official functions in a similar manner as before 27 April 1994. I regarded this as the only "positive" response to question 13. More than half of the respondents indicated that the inception of the Bill of Rights did not affect the manner in which they perform their official functions. The respondents who were uncertain and those who did not reply, made up almost one third of the respondents who have apparently not experienced any change in the manner they perform their official functions. This means that a very large percentage of respondents gave a "negative" response and did not or could not indicate that they do not still perform their official functions in a similar manner as before 27 April 1994.

I need to note that the respondents that indicated that the inception of the Bill of Rights did not affect the manner in which they perform their functions are not isolated. The percentage of these respondents correlates with the percentage of respondents who indicated in question 8 that they do not know of the Bill of Rights (see Figure 8.1). This indicates that if a particular number of respondents say that they do not know of the Bill of Rights, then it correlates if an almost similar number of respondents say that they still perform their functions in a similar manner as before 27 April 1994. I must add that I do not mean that the groups of respondents that answered the different questions are made up of the same persons.

TABLE 8.6 OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS HAVE CHANGED THE MANNER IN WHICH THEY PERFORM THEIR FUNCTIONS

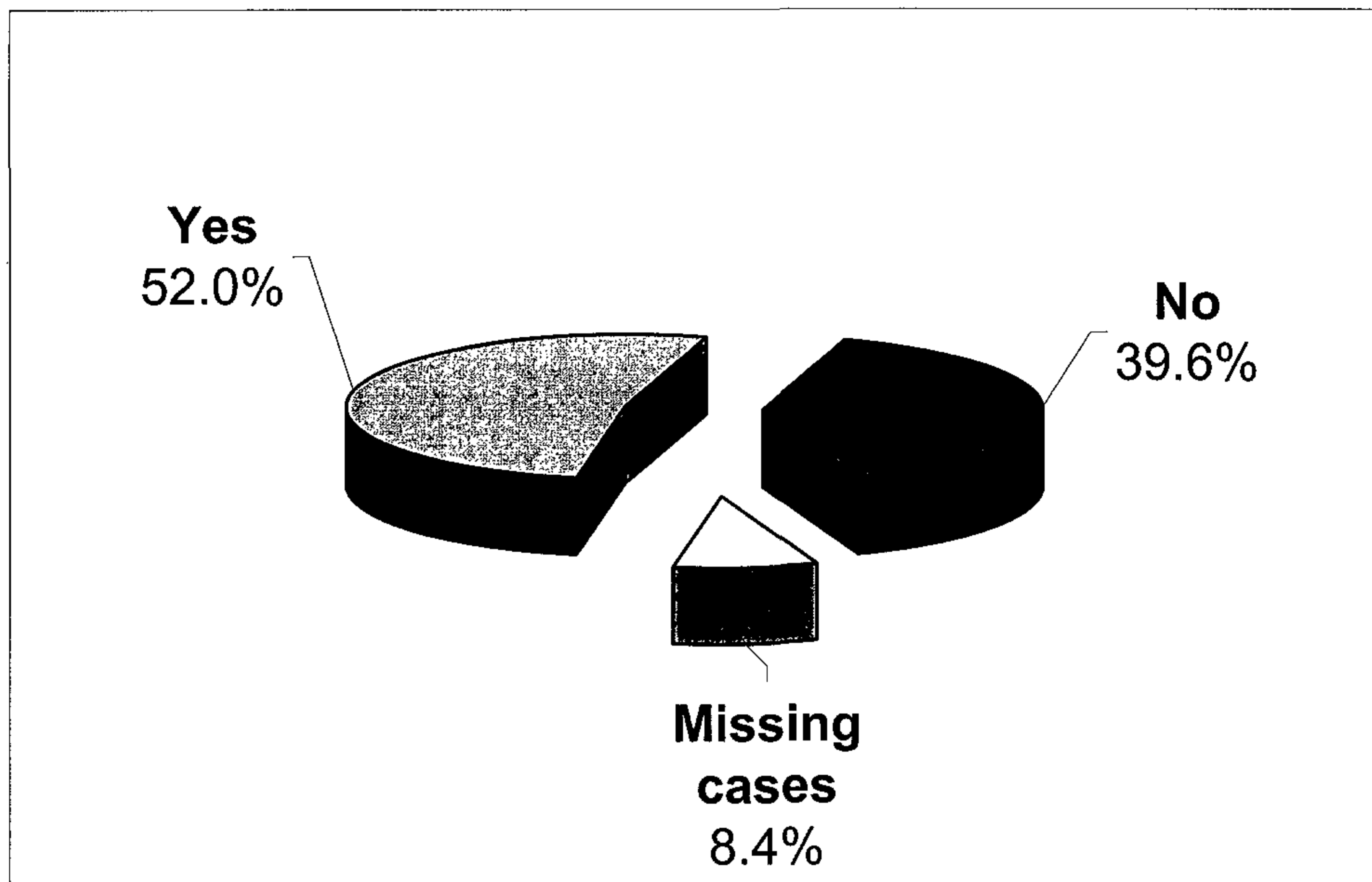
Second statement (question 13)	Choice of responses	Response %
The inception of the Bill of Rights did have an influence on the manner in which I performed my official functions and I have now to a large extent changed the manner in which I perform my official functions	True	29.9
	Uncertain	26.6
	Untrue	26.6
	Missing cases	16.9

The results reflected in Table 8.6 indicate that less than a third of respondents were certain that the Bill of Rights did have an influence on the manner in which they performed their functions.

The findings also indicate that the mere existence of the Bill of Rights is not sufficient cause for public officials to change the manner in which they perform their functions. This possibly means that officials are either reluctant to bring about such change, or ignorant about how the principles contained in the Bill of Rights are to be applied. Such ignorance is possible in the light of the large percentage of respondents who were uncertain of an appropriate answer or did not reply to the first statement in question 13.

My intention with question 14 was to establish whether the respondents personally experienced or observed any significant change in the manner public services are rendered today, if compared to the manner in which such services were rendered prior to 27 April 1994. Respondents had to merely answer "yes" or "no" to question 14. The results obtained are showed in Figure 8.4.

FIGURE 8.4 OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS WHO EXPERIENCED CHANGE IN THE MANNER PUBLIC SERVICES ARE RENDERED



Respondents answering "yes" to question 14 were requested to give an example of the change observed. I requested an example in order to establish whether the change so observed is favourable or not. The respondents who answered "yes" did not all give an example. I grouped the examples given into positive and negative responses. The examples that were regarded as positive are quite evident in that regard. The examples that were taken to be a negative response included statements similar to the following:

- "Officials are more careless and irresponsible than before"
- "Services now take longer to render"
- Officials are still resisting change"
- "Chaos"
- "Discrimination against certain officials"
- "Worse than before"

In Table 8.7 the results obtained from the examples given in question 14 as to the type of change observed are revealed. I kept in mind that each respondent probably has a particular perception of the public administration environment and that he / she has probably expressed that perception as an example. The examples given cannot therefore

in totality be deduced to reluctance on the part of the official to participate in the process of change.

TABLE 8.7 OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS WHO EXPERIENCED CHANGE IN THE MANNER PUBLIC SERVICES ARE RENDERED

Positive change	Negative change	Missing cases
41.6%	39.6%	18.8%

From the results obtained and reflected in Figure 8.4, barely more than half of the respondents personally experienced or observed any significant change in the manner in which public services are rendered today, if compared to the manner in which such services were rendered prior to 27 April 1994. Of these respondents, just less than half experienced a positive change.

In view of the results of the survey regarding questions 13 and 14 of the questionnaire, I intend to make generalisations about all the officials in the Department of Home Affairs (see *supra* 7.2).

In summary, only a small percentage of the respondents (Table 8.5) answered that they were certain that they did not still perform their official functions in a similar manner as before 27 April 1994. Less than a third of the respondents (Table 8.6) noted that they were certain that the Bill of Rights did have an influence on the manner in which they performed their functions. More than half of the respondents (Figure 8.4) experienced any significant change in the manner public services are rendered today and of these less than half (Table 8.7) experienced a positive change.

It appears thus that the inception of the Bill of Rights did not, and still does not, have an effective influence on the manner in which public administration is exercised in the Department of Home Affairs. The Bill of Rights and its prescribed influence on public administration should have been negotiated with public officials as soon as the Bill of rights came into operation. Such a situation will apparently also not likely have moved or motivated public officials in the Department of Home Affairs to change the manner in which they exercise public administration. The results obtained and reflected in Tables 8.5, 8.6 and 8.7 and in Figure 8.4, are indicative of a largely negative response to question 13 and accordingly question 14.

I attribute this scenario to the possibility that officials in the Department of Home Affairs are not fully aware of the actual effect the post-apartheid constitutional prescriptions regarding public administration entail (see *supra* 5.4.1). The results obtained from the tests in this matter are possibly due to reluctance or ignorance on the part of the respondents. The possibility of reluctance on the part of the respondents has not been dismissed by the results of the test and therefore my view is that this hypothesis has not been rejected.

I can therefore state that the findings support the third hypothesis that the officials in the Department of Home Affairs who were employed in the public service prior to 1994 are reluctant to participate in a process of change in the manner in which public administration is exercised.

8.3.4 Officials in the Department of Home Affairs inadequately informed of the Bill of Rights

The fourth hypothesis is the following:

Public officials in the Department of Home Affairs have not been adequately informed through official channels of the significance of the Bill of Rights and its role in connection with the manner in which public officials must exercise their official functions

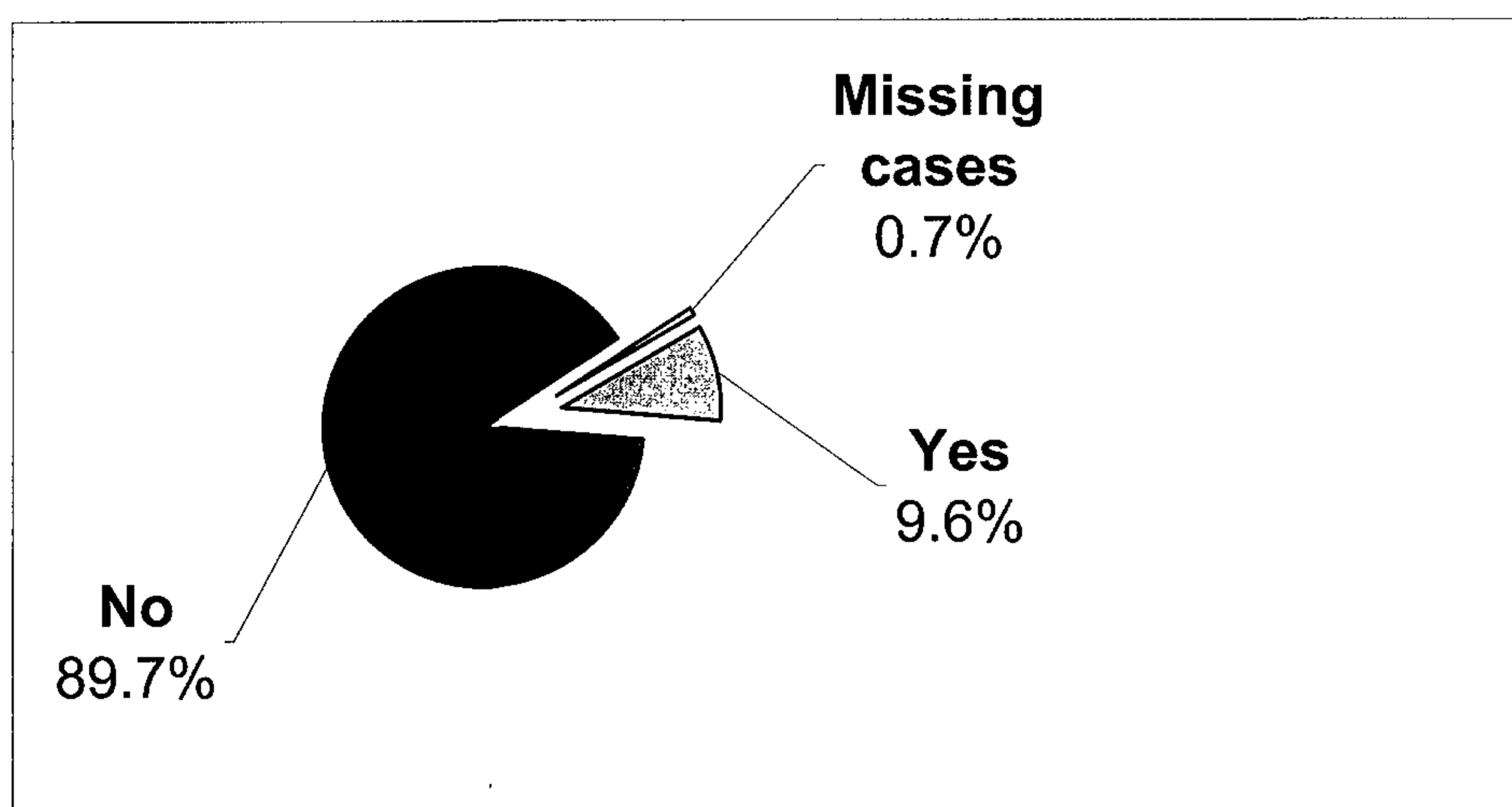
This hypothesis was tested by means of question 15 of the questionnaire. Question 15 requested respondents to indicate whether they had been adequately informed through official channels of the significance of the Bill of Rights and its role regarding the manner in which official functions must be exercised. My intention with this question was to determine whether all the respondents were adequately informed through official channels. My idea was that the Department of Home Affairs would circulate a document to officials containing adequate information and explanations of the significance of the Bill of Rights and the manner in which to apply the rights when exercising public administration. In this manner public officials might possibly have been made aware of and more familiar with the principles in the Bill of Rights and the effect the Bill of Rights has on the manner in which public administration is exercised.

The inception of the 1993 Constitution on 27 April 1994 brought with it a new concept of entrenched fundamental rights. Public officials were apparently not familiar with this new

concept and had to be informed of the significance of such rights and the effect such rights have on public administration (see *supra* 3.4.1). Public officials probably found themselves with a constitutionally prescribed obligation to apply the rights in the Bill of Rights in public administration as from 27 April 1994 (see *supra* 4.8). This meant that public officials should have been adequately informed of the Bill of Rights and the manner in which public administration was constitutionally prescribed to be exercised (see *supra* 5.5). Such an informative exercise might possibly have contributed to the speedy completion of the bridging process from the apartheid-era to the post-apartheid-era (see *supra* 5.3).

Respondents had to merely answer "yes" or "no" to question 15. The results obtained are reflected in Figure 8.5.

FIGURE 8.5 OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS WHO HAD BEEN INFORMED OF THE BILL OF RIGHTS



The data from Figure 8.5 suggest that barely one tenth of the respondents in this group were adequately informed through official channels of the significance of the Bill of Rights. The fact that a very large percentage of the respondents were not adequately informed, possibly serves to explain the lack of adequate knowledge among the respondents as to the actual role and influence that the Bill of Rights has on the manner in which public officials must exercise their official functions. In my opinion the results reflected in Figure 8.5 are overwhelming. Despite the large percentage of respondents that noted that they were not adequately informed through official channels, does not, in my opinion, mean that

all these respondents are necessarily totally ignorant of the provisions in the Bill of Rights. My view is that respondents were possibly informed of particular aspects of the Bill of Rights through other channels hence the response by a large group of respondents to question 8 that they know of the Bill of Rights. Question 15 only mentioned through official channels and respondents no doubt responded correctly to the question by answering "no" in the event of their being informed through other than an official channel.

Respondents who answered "yes" to question 15 were also requested to state how they had been informed of the Bill of Rights. The purpose of this request is to establish whether the respondent was in fact "officially informed" or not. The respondents who answered "yes" did not however all state how they were informed. The statements that were given were all similar to the following:

- "Informed at a meeting"
- "Informed by seniors but I am not sure what it is about"
- "By radio"
- "By letter / circular"
- "By Trade Union"

These statements suggest that not all of the respondents who answered "yes" to question 15 were in fact adequately informed through official channels. The low percentage of respondents who answered "yes" does not require a discussion to determine what percentage was actually informed through official channels.

Based on the results of the survey regarding question 15 of the questionnaire, I intend to make generalisations about the public officials of the Department of Home Affairs as a whole (see *supra* 7.2).

In summary, only a small percentage of the respondents were adequately informed through official channels of the significance of the Bill of Rights and its role regarding the manner in which official functions must be exercised. A large percentage of the respondents were not informed. This implies that a large percentage of all the officials in the Department of Home Affairs are not adequately informed. My opinion is that this is a matter of concern as the extent to which public officials in the Department of Home Affairs adhere to and apply the principles in the Bill of Rights, can rightfully be questioned.

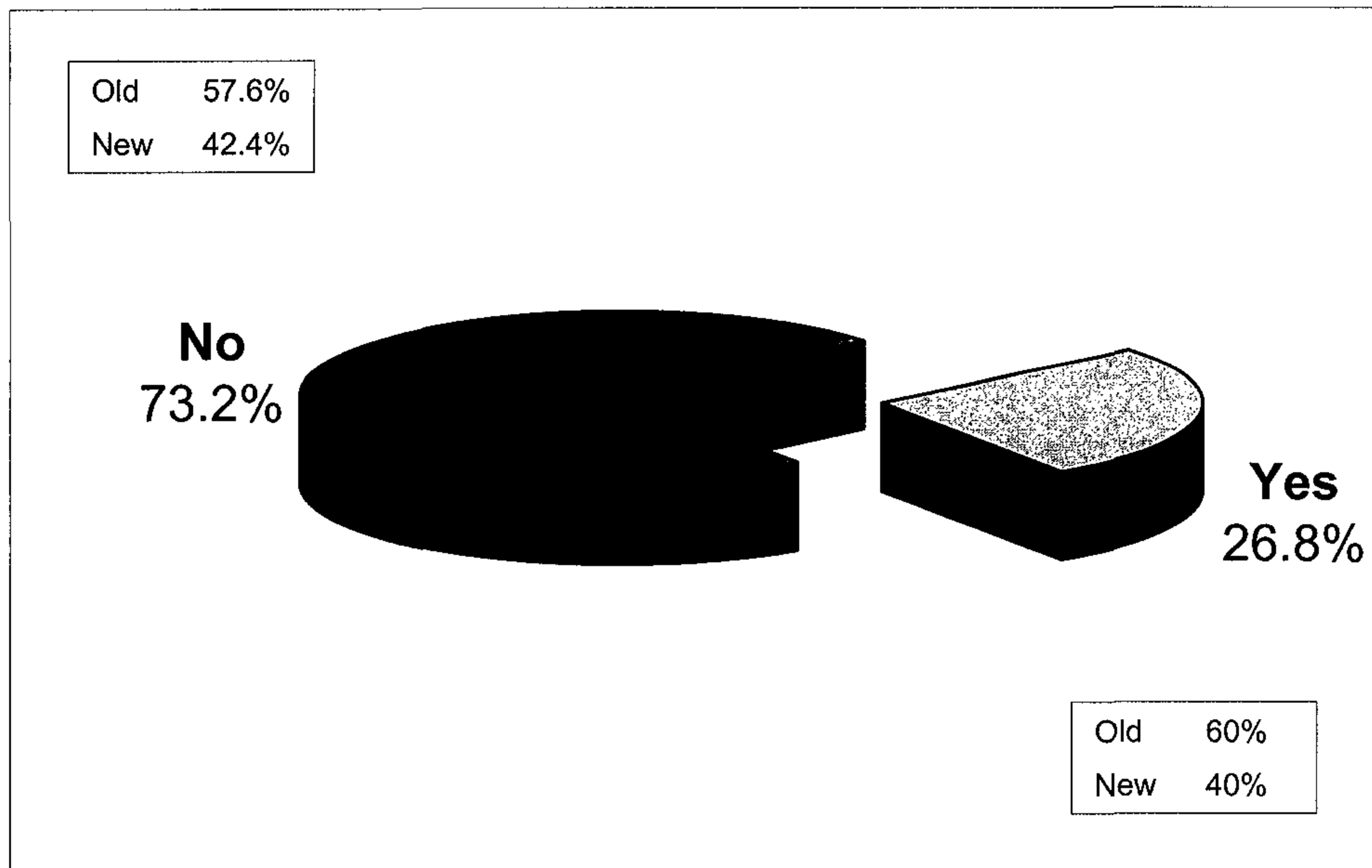
I can therefore state that the findings support the fourth hypothesis that public officials in the Department of Home Affairs are not adequately informed through official channels of the significance of the Bill of Rights and its role in connection with the manner in which public officials must exercise their official functions.

8.3.5 Officials in the Department of Home Affairs do not study the Bill of Rights

The fifth hypothesis is the following:

Public officials in the Department of Home Affairs do not of their own accord study the Bill of Rights in order to apply the principles and expand their basic knowledge of rendering public services subject to the principles of such rights

This hypothesis was tested by means of questions 16 and 19 of the questionnaire. Question 16 requested respondents to indicate whether they have of their own accord studied the contents of the Bill of Rights. Figure 8.6 shows the results obtained. The results show how the old and the new officials answered question 16.

FIGURE 8.6 PUBLIC OFFICIALS WHO HAVE STUDIED THE BILL OF RIGHTS

The results obtained from Figure 8.6 reveal that only one quarter of the respondents in this group has of their own accord studied the Bill of Rights. Of these respondents, more than half are old and the rest are new officials. I regard it as encouraging that old officials are willing, and do not show reluctance, to study the Bill of Rights of their own accord. I mention this, as I believe that there could be those who wish to remark that old officials will be less inclined to react in this way. Almost three-quarters of the respondents did not study the Bill of Rights. In Figure 8.1 it was reflected that less than half of respondents know of the Bill of Rights. It correlates thus that a low percentage of respondents have of their own accord studied the Bill of Rights.

Question 19 requested respondents to give their opinion as to whether it is necessary that public officials keep the principles of the Bill of Rights in mind when rendering public services. The purpose of question 19 was to determine whether officials are aware of the importance of being familiar with the contents of the Bill of Rights. Public administration regulates or has an influence on every aspect of a person's life and therefore inhabitants are inclined to insist on a human rights culture, transparency and fairness in public administration. Public officials are obliged to respect, fulfil and protect all fundamental rights as this shields the inhabitants against the abuse of government authority (see *supra*

4.4). Table 8.8 reflects the results obtained from question 19 and how the old and the new officials responded to question 19.

TABLE 8.8 OFFICIALS IN THE DEPARTMENT OF HOME AFFAIRS RENDER PUBLIC SERVICES SUBJECT TO THE BILL OF RIGHTS

Statement (question 19)	Choice of responses	Response %	Each response	
			Old %	New %
To what extent, in your opinion, is it necessary that public officials keep the principles of the Bill of Rights in mind when rendering public services?	Always	55.9	54.9	45.2
	Mostly	17.2	60.0	40.0
	Sometimes	13.4	54.3	45.7
	Never	2.3	100	0
	Missing cases	11.1	72.4	27.6

The results obtained and shown in Table 8.8 suggest that more than half of the respondents responded with a positive answer. Of these respondents just more than half are old and the other are new officials. Once again I need to add that it is encouraging that such a large number of old officials are aware of a cardinal requirement and responded with a positive answer. I regarded this as the only positive response to question 19. Public officials must apply the principles of all the entrenched fundamental rights and are bound by the provisions and rights in the Bill of Rights when exercising public administration (see *supra* 4.8). Any activity that is inconsistent with the Constitution is invalid (1996 Constitution: sections 2, 7(2), 8(1)). This implies that officials need to always keep the rights in the Bill of Rights in mind when rendering public services. The remainder of the respondents apparently do not know that the Bill of Rights always has a statutory influence on and affects the manner in which they perform their functions.

Based on the results of the survey relating to questions 16 and 19 of the questionnaire, I intend making generalisations about the officials in the Department of Home Affairs as a whole (see *supra* 7.2).

In summary, these results mean that almost three-quarters of all the respondents have not of their own accord studied the Bill of Rights. The rest of the respondents answered that they have of their own accord studied the Bill of Rights. Of these last-mentioned respondents more than half answered questions 19 indicating that they always keep the principles of the Bill of Rights in mind when rendering public services. In my view, these mentioned respondents are apparently aware of the important role of the Bill of Rights with regard to the manner in which public services are rendered. In my view such awareness will assist in ensuring that public services are effectively and efficiently rendered. These

results point to a possible attitude among public officials in the Department of Home Affairs of not having enough reason or not realising the importance, to study the Bill of Rights of their own accord. My opinion is that public officials should, through official channels, be encouraged to study the whole of the 1996 Constitution for the purposes of rendering effective and efficient public services.

I can therefore state that the findings support the fifth hypothesis that public officials in the Department of Home Affairs do not of their own accord study the Bill of Rights.

8.3.6 Officials in the Department of Home Affairs' mixed perception as regards the priority of protected interests

The sixth hypothesis is the following:

Public officials in the Department of Home Affairs have mixed perceptions as to whether the interests of the inhabitants of the country warrant priority above the political objectives of the government of the day when public services are rendered

This hypothesis was tested by means of question 18 of the questionnaire. Question 18 requested all the respondents to indicate their opinion regarding two statements. The first statement covers the aspect whether the interests of the inhabitants of the country warrant priority and should be served above the political objectives of the government of the day when public services are rendered. The meaning of the second statement is exactly the opposite of the first and covers the aspect of whether the political objectives of the government should be served above the interests of the inhabitants of the country.

In chapter 3 (see *supra* 3.4), I wrote that South Africa's public administrative environment would, on 27 April 1994, constitutionally transform to one being subject to a comprehensive non-racial set of fundamental rights. South Africa was at that point in time moving from an authoritarian to a constitutional form of government. Since Union in 1910, South Africa's constitutional environment consisted of a sovereign Parliament with a subordinate constitution (see *supra* 3.3.1.1, 3.3.3.1 and 3.3.4.2). The 1910, 1961 and 1983 Constitutions did not grant protection to a comprehensive set of fundamental rights and Parliament could adopt any law, no matter how unfair or discriminatory (see *supra* 3.3.4.2). The ruling political party (National Party) thus legislated on matters affecting every aspect

of the lives of the inhabitants of South Africa and passed legislation through Parliament with very little fear of judicial obstruction as to the reasonableness of the provisions thereof (see *supra* 4.2.2). Public institutions applied the laws and public administration was exercised in a manner to primarily give effect to the policies of the government of the day (see *supra* 3.3.3.1). On 27 April 1994, the 1993 Constitution ended the system of Parliamentary supremacy and installed a post-apartheid constitutional dispensation (see *supra* 4.2). The 1996 Constitution maintains constitutional supremacy and contains specific provisions as to the manner in which public administration is to be exercised promoting basic values such as impartiality, fairness and equality. In my opinion, the implication is that, in terms of current constitutional prescriptions, public administration cannot be performed autonomously by public officials but must be performed within the parameters laid out in authorising legislation and in the 1996 Constitution (see *supra* 4.2.4). The governing authority has political supremacy but public officials are obliged to respect, protect and fulfil all fundamental rights when exercising public administration as this shields the inhabitants against the abuse of government authority (see *supra* 4.4 and 4.8). Public officials are thus constitutionally obliged to exercise public administration in a manner that serves the interests of the inhabitants of South Africa (see *supra* 5.2.2). All law and governmental conduct, *inter alia*, are subject to the 1996 Constitution and the Bill of Rights (sections 2, 7 and 8). My conclusion is that the interests of the inhabitants of South Africa warrant priority and must be served above the political objectives of the government of the day.

Respondents had to indicate their opinion by choosing an appropriate answer to each of the two statements contained in question 18. Not all of the respondents responded to the question. The results obtained are reflected in Table 8.9 and Table 8.10. The results also show how the old and the new officials responded to the different statements.

TABLE 8.9 PUBLIC SERVICES RENDERED IN THE INTERESTS OF THE INHABITANTS OF THE COUNTRY

First statement (question 18)	Choice of responses	Response %	Each response	
			Old %	New %
When public services are rendered by public officials, the interests of the inhabitants of the country should be served above the political objectives of the government of the day	Agree	62.5	65.0	35.0
	Uncertain	21.1	54.5	45.5
	Disagree	11.1	41.3	58.7
	Missing cases	5.3	85.7	14.3

The results obtained and showed in Table 8.9 indicate that almost two thirds of the respondents are of the opinion that when they render public services, the interests of the

inhabitants of the country warrant priority and should be served above the political objectives of the government. I regarded this as the only "positive" response to the first statement. Almost two thirds of these mentioned respondents are old and the rest are new officials. I was quite impressed with the large number of old officials that supported the positive response as I expected old officials to have gained the necessary experience to choose the appropriate answer. A small percentage of the respondents disagreed with the statement and a larger percentage of respondents were uncertain. I regarded the responses that disagreed with the statement, those that were uncertain and the missing cases, as negative answers as the respondents apparently could not identify the positive answer. This means more than a third of the respondents gave a negative response to the first statement.

TABLE 8.10 PUBLIC SERVICES RENDERED IN THE INTERESTS OF THE GOVERNMENT

Second statement (question 18)	Choice of responses	Response %	Each response	
			Old %	New %
When public services are rendered by public officials, the political objectives of the government of the day should be served above the interests of the inhabitants of the country	Agree	26.8	57.1	42.9
	Uncertain	20.0	51.9	48.1
	Disagree	42.9	60.7	39.3
	Missing cases	10.3	74.1	25.9

The results showed in Table 8.10 indicate that almost half of the respondents disagreed with the statement. Of these mentioned respondents, just more than half are old and the rest are new officials. This means that these respondents are of the opinion that when they render public services, the political objectives of the government do not warrant priority above the interests of the inhabitants of the country. I regarded this as the only "positive" response to the second statement. This response correlated sufficiently with the positive response to the first statement. This furthermore means that the responses that agreed with the statement, those that were uncertain and the missing cases, are regarded as "negative" answers as the respondents apparently could not identify the relevant positive answer. This means that more than half of the respondents gave a negative response to the second statement. Of these mentioned respondents, about two thirds (on average) are old and the rest are new officials.

In view of the results of the survey regarding question 18 of the questionnaire, I intend to make generalisations about the officials in the Department of Home Affairs as a whole (see *supra* 7.2).

In summary, almost two thirds of the respondents responded positively to the first statement. The ideal would have been if a similar response were received to the second statement. However, less than half of the respondents responded positively to the second statement. I noted that the positive responses to both statements were higher among the old officials than the new officials. The negative response to the first statement is about half of the negative response to the second statement. I attribute this to the possibility that respondents displayed a tendency to agree with the first statement and then had second thoughts about the second statement as it amounts to taking a stand against their employer. I regarded this as apparent among long-serving officials in view of the fact that in reply to question 3 of the questionnaire, more than half of the respondents indicated that they had been employed in the public service prior to 27 April 1994 (see *supra* 8.3.3). The percentages of uncertain respondents are very similar but the number of missing cases to the first statement rose to double to the second statement.

The results reflected in Table 8.9 and Table 8.10 do not indicate that the majority of the respondents know that the interests of the inhabitants should be served above the political objectives of the government of the day. In fact my view is that it is quite apparent that the respondents, and accordingly the officials in the Department of Home Affairs, have mixed perceptions as to whether the interests of the inhabitants of the country warrant priority above the political objectives of the government of the day when public services are rendered. Such a situation is possible in view of the fact that, as touched on in paragraph 8.3.4, public officials are not adequately aware of the provisions of sections 2, 7(1), 8(1) and 195(1) of the 1996 Constitution. These sections contain the basic instructions as to the manner in which public administration must be exercised.

I can therefore state that the findings support the sixth hypothesis that the officials in the Department of Home Affairs have mixed perceptions as to the priority of protected interests.

8.3.7 Insufficient recognition of the Bill of Rights

The seventh hypothesis is the following:

The rights in the Bill of Rights do not enjoy the necessary recognition when public officials in the Department of Home Affairs render public services

This hypothesis was tested by means of questions 17 and 20 of the questionnaire. Question 17 requested respondents to indicate whether the rights in the Bill of Rights enjoy the necessary recognition when public officials render public services. Almost all the respondents answered this question. The results obtained are reflected in Table 8.11.

TABLE 8.11 PUBLIC SERVICES RENDERED IN TERMS OF PRINCIPLES IN THE BILL OF RIGHTS

Question	Choice of responses	Response %
Do the principles in the Bill of Rights enjoy the necessary recognition when public officials in the Department of Home Affairs render public services?	Yes	23.4
	Don't know	55.9
	No	16.1
	Missing cases	4.6

I expected the responses of the respondents to be based on the manner in which they personally render public services and whether they render such services subject to the Bill of Rights. Their responses could also be based on their observations of whether their colleagues render such services subject to the Bill of Rights. I therefore expected almost all the respondents to have answered with a "yes" or a "no". Instead, more than half of the respondents were uncertain and marked "don't know". I regarded the missing cases as also being uncertain. This means that almost two thirds of the respondents were uncertain. I viewed this as indicative of a lack of knowledge among the respondents as to the contents and the purpose of the Bill of Rights or that public officials were not familiar with the constitutional obligation to apply the Bill of Rights when exercising public administration. Furthermore, in Figure 8.3 it was reflected that more than half of the respondents did not know of section 195 of the 1996 Constitution. It correlates thus that almost the same percentage of the respondents does not know that public services must be rendered subject to the rights in the Bill of Rights. It can, therefore, not be expected that these respondents will necessarily recognise when public services are rendered subject to the Bill of Rights. These respondents apparently also do not have sufficient knowledge of the Bill of Rights in order to apply the rights when rendering public services. This correlates with the fact that almost ninety percent of the respondents were not adequately informed through official channels of the role of the Bill of Rights when public services are rendered (see *supra* 8.3.4)

The results obtained from Table 8.11 reflect that less than a quarter of the respondents in this group answered "yes" and indicated that public services are rendered in terms of the principles contained in the Bill of Rights. Again I expected the responses of the respondents to be based on whether they personally and their colleagues render such

services subject to the Bill of Rights. Table 8.11 also reflects that only a small percentage of the respondents in this group answered that the rights in the Bill of Rights do not enjoy the necessary recognition when public officials render public services. This is a possible indication that only small numbers of officials can possibly recognise when public services are rendered in terms of the Bill of Rights or not.

In question 20 a statement was made that all the fundamental rights granted in the Bill are unconditional. Respondents were requested to indicate their opinion by choosing an appropriate answer to the statement. The results obtained are reflected in Table 8.12.

TABLE 8.12 ALL RIGHTS IN THE BILL ARE UNCONDITIONAL

Question	Choice of responses	Response %
All the fundamental rights granted in the Bill of Rights are unconditional.	Agree	25.3
	Uncertain	53.3
	Disagree	14.2
	Missing cases	7.2

The results obtained from Table 8.12 reveal that only a small percentage of the respondents disagreed with the statement and indicated that all such rights are not unconditional. This is the only correct response. Table 8.12 thus also reflects that a very high percentage of the respondents do not have sufficient knowledge of the rights in the Bill of Rights. My opinion is that this suggests that the rights in the Bill of Rights do not enjoy the necessary recognition when public officials render public services, due to public officials not knowing much about the nature of the Bill of Rights or its practical applications. This aspect has been touched on in several discussions above.

Based on the results of the survey regarding questions 17 and 20 of the questionnaire, I intend to make generalisations about the public officials of the Department of Home Affairs as a whole (see *supra* 7.2).

In summary, less than a quarter of the respondents indicated that the Bill of Rights does enjoy the necessary recognition when public services are rendered (Table 8.11). The other respondents either said "no" or were uncertain due to not being able to recognise the fact that all rights in the Bill of Rights are conditional. I attribute these answers to the possibility that the respondents had little knowledge of the Bill of Rights, or even did not understand the question. My assumption is that a very large percentage of officials in the Department of Home Affairs have little knowledge of the Bill of Rights. This is an indication that should

the Bill of Rights enjoy the necessary recognition in practice, it should be quite apparent to public officials. In this instance all indications do not point to that being true in practice, as public officials in the Department of Home Affairs apparently do not have much knowledge of how the rights in the Bill of Rights should be applied in public administration.

I can therefore state that the findings support the seventh hypothesis that the principles in the Bill of Rights do not enjoy the necessary recognition when government institutions render public services.

8.4 Summary

The results obtained from data collected from the completed questionnaires used in the empirical research, were presented and discussed in this chapter. The results obtained were analysed in view of the hypotheses drafted in Chapter 6.

Unisa's Department of Computer Services captured the data in the completed questionnaires on computer.

The seven hypotheses were dealt with in numerical order. Various related findings of this study were pulled together in this chapter to show a pattern which allows one to come to some general conclusions.

The *first hypothesis* was tested by means of questions 8 and 9 of the questionnaire (see *supra* 8.3.1). In question 8 respondents had to indicate whether they know of the Bill of Rights in the 1996 Constitution. In Figure 8.1 the results showed that more than half of the respondents answered "no" and that the rest of the respondents answered "yes" to question 8. More than half of the respondents that answered "no" were old officials and the rest were new officials. Almost two thirds of the respondents that answered "yes" were old officials and the rest were new officials. Those who answered "yes" to question 8 had to respond to question 9 of the questionnaire. The purpose of question 9 was to establish the extent of the knowledge that respondents have of the contents of the Bill of Rights.

In question 9 the respondents in this particular group had to indicate their opinion regarding three statements relating to the protection that the Bill of Rights grants against arbitrary activities by government institutions, and whether the Bill of Rights has an influence on the manner in which they exercise their functions. The results in Table 8.1 showed that more

than half of the respondents in this particular group were of the opinion that the Bill of Rights effectively protects the public against arbitrary government activities. Of these mentioned respondents, a little less than two thirds were old and the rest were new officials. This indicates that just less than half (all the other responses added together) of the respondents in this group appeared not to have sufficient knowledge of the Bill of Rights in order to know that the primary purpose of the Bill is to protect the public against arbitrary acts by government. Of this mentioned group less than one third were new and more than two thirds were old officials.

The results in Table 8.2 showed that almost two thirds of the respondents in this particular group were of the opinion that the Bill of Rights has an influence on the manner in which public officials exercise their official functions. This means that more than one third of these respondents did not know that the provisions of the Bill of Rights are prescribed to always have an influence on the manner in which they exercise their official functions.

The data from Table 8.3 revealed that only one third of the respondents in this group disagreed with the statement that the Bill of Rights does not affect the manner in which public officials work. This means that two thirds of the respondents did not know that the Bill of Rights is prescribed to always affect the manner in which public officials work.

The data obtained from questions 8 and 9 distinctly divided the original total of all the respondents into two groups, namely one group that knows of the Bill of Rights and another group that does not know, or knows very little, of the Bill of Rights. In Figure 8.2 a summative illustration was given of the results obtained from questions 8 and 9.

Figure 8.2 revealed that in respect of each of the statements in question 9, a large percentage of the respondents who indicated that they knew of the Bill of Rights, apparently did not have sufficient knowledge of the contents of the Bill to be able to respond correctly to a few basic prescriptions that relate to the manner in which public administration must be exercised. Of this mentioned group almost two thirds (on average) of the respondents are old and the rest are new officials. This was an indication that officials probably only know of the Bill of Rights but do not necessarily have much or any knowledge of the contents of the Bill.

The results obtained relating to the *first hypothesis* thus revealed that more than half of the respondents indicated in question 8 that they do not know of the Bill of Rights. The rest that indicated that they did know of the Bill of Rights did not, however, have sufficient

knowledge of the contents of the Bill of Rights for the purposes of being efficient in their workplace. This might possibly be a reason why public officials in the Department of Home Affairs do not apply the principles in the Bill of Rights when exercising public administration. This is also possibly a reason why there cannot be a visible difference in the manner in which public administration was exercised before 27 April 1994 and the manner in which public administration is exercised today, solely because public officials in the Department of Home Affairs do largely not apply the rights in the Bill of Rights.

I therefore stated that the findings relating to questions 8 and 9 support the first hypothesis (see *supra* 8.3.1).

The *second hypothesis* was tested by means of questions 10 and 11 of the questionnaire (see *supra* 8.3.2). In question 10 respondents had to indicate whether they know of section 195 of the 1996 Constitution. The results showed that more than half of the respondents answered "no". Of these mentioned respondents almost two thirds are old and the rest are new officials. Barely less than half of the respondents answered "yes" to question 10. Of these mentioned respondents more than half are old and the rest are new officials. Those who answered "yes" had to answer question 11. The purpose of question 11 was to establish the extent of the knowledge that respondents have of the contents of section 195. Table 8.4 reflected that almost two thirds of the respondents, who indicated that they knew of section 195 of the 1996 Constitution, were able to acknowledge that they performed their official functions, to a large extent, with adherence to the provisions of section 195. More than half of these mentioned respondents are old and the rest are new officials. More than one third of the respondents knew of section 195 but did not necessarily have much or any knowledge of the contents of the section. More than two thirds of these mentioned respondents are old and the rest are new officials.

This suggests that public officials in the Department of Home Affairs are apparently not aware that section 195(1) states that when public administration is exercised, it is subject to the principles in the 1996 Constitution relating to, *inter alia*, democratic values, ethics, etc. I assume that this is also an indication as to why the manner in which public administration is exercised today does not differ radically from the manner it was exercised prior to 27 April 1994.

I then stated that the findings relating to questions 10 and 11 supported the second hypothesis (see *supra* 8.3.2).

The *third hypothesis* was tested by means of questions 13 and 14 of the questionnaire (see *supra* 8.3.3). Only the respondents who were employed in the public service prior to 27 April 1994 were required to answer these questions. By answering question 3 of the questionnaire, more than half of the respondents indicated that they were employed in the public service prior to 27 April 1994.

In question 13 respondents had to indicate whether the inception of the Bill of Rights on 27 April 1994 did or did not have an influence on the manner in which they performed their functions prior to the inception of the Bill of Rights. Respondents had to indicate their opinion by choosing an appropriate answer to two statements contained in question 13.

The results reflected in Table 8.5 showed that only a very low percentage of the respondents were certain that they did not still perform their functions in a similar manner as before 27 April 1994. This meant that almost ninety percent of the respondents did not or could not indicate that they do not still perform their functions in a similar manner as before 27 April 1994.

The results reflected in Table 8.6 indicated that only barely a third of the respondents were certain that the Bill of Rights did have an influence on the manner in which they performed their functions. The findings suggested that the mere existence of the Bill of Rights was not sufficient cause for public officials to change the manner in which they perform their functions. I assume that this could be attributed to officials in the Department of Home Affairs, *inter alia*, being either reluctant to bring about such change or ignorant about having to apply the rights contained in the Bill of Rights. Such ignorance is possible in the light of the large percentage of respondents who were uncertain of an appropriate answer or did not reply to question 13.

Question 14 was intended to establish whether the respondents personally experienced or observed any significant change in the manner in which public services are rendered today, when compared to the manner in which such services were rendered prior to 27 April 1994. Respondents had to merely answer "yes" or "no" to question 14. The results showed in Figure 8.4 revealed that barely more than half of the respondents personally experienced or observed any significant change in the manner in which public services are rendered today, when compared to the manner in which such services were rendered prior to 27 April 1994. Less than half of these mentioned respondents experienced a positive change.

Respondents answering "yes" to question 14 were requested to give an example of the change observed. The purpose of requesting an example was to establish whether the change so observed was favourable or not. The examples given were grouped into positive and negative responses.

I then stated that the findings supported the third hypothesis (see *supra* 8.3.3).

The *fourth hypothesis* was tested by means of question 15 of the questionnaire (see *supra* 8.3.4). Respondents had to indicate whether they were adequately informed through official channels of the significance of the Bill of Rights and its role regarding the manner in which official functions must be exercised. The data from Figure 8.5 suggested that a low percentage of the respondents had been officially informed of the Bill of Rights. This meant that a very large percentage of the respondents were not officially informed. This suggested a lack of knowledge among the officials in the Department of Home Affairs as to the actual role that the Bill of Rights plays in the manner in which public officials must exercise their functions.

Respondents who answered "yes" to question 15 had to state how they were informed of the Bill of Rights. The purpose of this request was to establish whether the respondent was in fact "officially informed" or not. The statements given served as an indication that not all of the respondents who answered "yes" to question 15 were in fact officially informed.

These results suggest therefore that a change cannot be evident in the manner in which public administration is exercised today, if compared to the manner in which public administration was exercised prior to 27 April 1994. This is possibly due to public officials in the Department of Home Affairs not being adequately informed of the relevant constitutional instructions and also being instructed as to how to implement such instructions.

I then stated that the findings supported the fourth hypothesis (see *supra* 8.3.4).

The *fifth hypothesis* was tested by means of questions 16 and 19 of the questionnaire (see *supra* 8.3.5). Respondents had to answer question 16 and indicate whether they have of their own accord studied the contents of the Bill of Rights. The results in Figure 8.6 revealed that barely more than a quarter of the respondents had of their own accord studied the Bill of Rights. Of these mentioned respondents more than half are old and the rest are new officials. Due to the fact that almost three quarters of the respondents (barely

more than half old and the rest new officials) did not of their own accord study the Bill of Rights, it suggested of a lack of knowledge among the respondents as to the value of the Bill of Rights in their workplace. In Figure 8.1 it was reflected that less than half of the respondents knew of the Bill of Rights. It correlated that a low percentage of respondents had of their own accord studied the Bill of Rights.

In question 19 respondents had to give their opinion as to whether it is necessary that public officials keep the principles of the Bill of Rights in mind when rendering public services. Table 8.8 reflected the results obtained from question 19 and revealed that more than half of the respondents responded with a positive answer. Of these mentioned respondents about half are old and the rest are new officials. This meant that less than half of the respondents apparently did not know that the Bill of Rights is prescribed to always have an influence on and affect the manner in which officials perform their functions.

These results suggest that, although more than half of the respondents realised the important role of the Bill of Rights as regards the manner in which public services are rendered, barely more than a quarter of the respondents of their own accord studied the Bill of Rights in order to ensure that public services are effectively and efficiently rendered. I stated that the findings supported the fifth hypothesis (see *supra* 8.3.5).

The *sixth hypothesis* was tested by means of question 18 of the questionnaire (see *supra* 8.3.6). In question 18 respondents had to indicate their opinion regarding two statements. The first statement covered the aspect whether the interests of the inhabitants of the country warrant priority and should be served above the political objectives of the government of the day when public services are rendered. The second statement covered the aspect whether the political objectives of the government should be served above the interests of the inhabitants of the country.

The results in Table 8.9 indicated that a little less than two thirds of the respondents knew that when they render public services, the interests of the inhabitants of the country warrant priority and should be served above the political objectives of the government. Of these respondents two thirds are old and the rest are new officials. This suggests that more than a third of the respondents gave a negative response to the first statement.

The results in Table 8.10 indicated that less than half of the respondents disagreed with the statement. Of these respondents more than half are old and the rest are new officials. This suggested that they knew that when they render public services, the political objectives of

the government do not warrant priority above the interests of the inhabitants of the country. This suggested that more than half of the respondents gave a negative response to the second statement. Of these respondents more than half are old and the rest are new officials.

I assumed that the respondents had mixed perceptions as to whether the interests of the inhabitants of the country warrant priority above the political objectives of the government of the day when public services are rendered. I therefore stated that the findings supported the *sixth hypothesis* (see *supra* 8.3.6).

The *seventh hypothesis* was tested by means of questions 17 and 20 of the questionnaire (see *supra* 8.3.7). In question 17 respondents had to indicate whether the principles in the Bill of Rights enjoy the necessary recognition when public officials render public services. In Table 8.11 the results revealed that more than half of the respondents didn't know or didn't answer. This suggested of a lack of knowledge among the respondents as to the contents and the purpose of the Bill of Rights. In Figure 8.3 it was reflected that more than half of the respondents did not know of section 195 of the 1996 Constitution. It correlated thus that more than half of the respondents did not know that public services must be rendered subject to the principles in the Bill of Rights. I did not expect that these respondents would necessarily recognise when public services are rendered subject to the Bill of Rights. These respondents apparently also did not have sufficient knowledge of the Bill of Rights in order to apply the principles when rendering public services.

The results in Table 8.11 reflected that barely less than a quarter of the respondents answered "yes" and indicated that public services are rendered in terms of the principles contained in the Bill of Rights. Table 8.11 also reflected that only a small percentage of the respondents knew that the rights contained in the Bill of Rights do not enjoy the necessary recognition when public officials render public services.

In question 20 a statement was made that all the fundamental rights granted in the Bill are unconditional. Respondents had to indicate their opinion by choosing an appropriate answer to the statement. The results in Table 8.12 revealed that only a small percentage of the respondents disagreed with the statement and indicated that all such rights are not unconditional. This suggested that a large percentage of the respondents did not have much knowledge of the rights contained in the Bill of Rights. This also suggested that the rights contained in the Bill of Rights do not enjoy the necessary recognition when public

officials in the Department of Home Affairs render public services due to the mentioned public officials not knowing much of the nature and operation of the Bill of Rights.

I therefore stated that the findings supported the *seventh hypothesis* (see *supra* 8.3.7).

All seven the hypotheses were supported by the data obtained from the questionnaires. The next chapter contains the conclusions and proposals relating to the study.



Chapter 9

Conclusions and proposals

9.1 Introduction

This thesis contains a description of the manner in which public administration was prescribed to be exercised in terms of pre-1994 constitutional and other legislative provisions. I dare to add that this description tends to be only in a negative sense. On 27 April 1994, when South Africa's first Bill of Rights came into operation, and thereafter, public administration was prescribed to be exercised in terms of post 1994 constitutional and other legislative prescriptions. This thesis also contains an empirical investigation into the extent to which the mentioned post 1994 provisions have been realised in public administration practice. This formed the subject of the study.

In this chapter of the thesis I intend to sum up the study by discussing conclusions reached by means of the study and, thereafter, make proposals based on the findings of the study.

Accordingly, the aims of the study are given, firstly. Secondly, the conclusions reached in terms of the study are given. THIRDLY, proposals are made for possible implementation by the public sector, and for possible further research. Finally, a summative final word is given.

9.2 Aims of study

The aims of this study were to:

- **Explore a wide variety of theories and past findings.** Most of the theories were from the legal environment as these contained directives as to of the manner in which public administration was to be exercised. The past findings related to descriptions of the manner in which public administration was to be exercised. The objective of this exploration was to discover what the

theories prescribed, and the past findings described, respectively, relating to the manner in which public administration was exercised in South Africa, before 27 April 1994

- **Collect and analyse related data**, from public officials in the Department of Home Affairs, and compare it with hypotheses and past findings made during the mentioned exploration
- **Gain insights** as to the extent to which the current constitutional and legislative provisions relating to the manner in which public administration must be exercised, are applied by public officials in the Department of Home Affairs.

Chapters 2 to 5 dealt with exploring theories and past findings. Chapter 6 contained the hypotheses, chapter 7 described how data were collected, and chapter 8 presented the results obtained and compared the results with theory and past findings.

9.3 Conclusions reached

My intention is to refer to particular parts in the study and come to relevant conclusions as to the events relating to public administration and fundamental rights. In this manner I will deal with a sequence of matters in an attempt to realise the purpose of this study (see *supra* 1.3).

Based on the study and the results of the empirical survey, the conclusions reached are now given.

- When public institutions and public officials exercise public administration, I presume that public administration interacts with the law. "The law" concerned is the law of the country as manifest in the legal system of South Africa. The law is made up of a large selection of rules and prescriptions that are binding on all persons, natural and juristic (see *supra* 2.4) in the country (see *supra* 2.2.1).

The basis for my conclusion is that public executive institutions derive their authority primarily from the 1996 Constitution. This mentioned Constitution not only grants such authority but places limitations and boundaries on the manner in which such authority is exercised (see *supra* 1.2.1). My contention is that it is essential that public officials comprehend the meaning and basic functioning of the law and that public officials are obliged to exercise public administration within parameters prescribed by law (see *supra* 4.8).

- A social setting, for example the inhabitants living within the borders of a country such as South Africa, is apparently a necessity for rights to be recognised by the law (see *supra* 2.2.1) and to exist in (see *supra* 2.5.1). "Rights" imply dual relationships between persons (see *supra* 2.4) whereby an obligation rests on certain persons to respect and abstain from violating the right held by another person (the bearer of the right) (see *supra* 2.5.1).

My view is that public officials need to understand that public institutions are juristic persons (see *supra* 2.4) and are involved in dual relationships when public administration is exercised whereby the general welfare and lives of inhabitants are affected (see *supra* 1.2.1). In my opinion this means that public officials are obliged to adhere to legislative prescriptions when exercising public administration. The obligation includes being aware of prescribed consequences in the event of prescribed procedures and requirements not being applied (see *supra* 2.6).

- A "right" that is recognised by the law is intended to mean a "legal right" by definition (see *supra* 2.7). In this manner legal rights are clearly distinguished from other rights that are actually intended to be moral expectations or privileges (see *supra* 2.5.2.1).

My conclusion is based on the fact that the law consists of countless legal relationships between persons (natural and legal), and accordingly between public institutions and inhabitants of the country (see *supra* 2.6). When public officials exercise public administration, officials are obliged to function within the framework of such a legal relationship as prescribed in the relevant legislation.

- Fundamental rights apparently did not enjoy comprehensive non-racial constitutional and legislative protection during the constitutional dispensations of the four pre-1910 South African colonies (the Cape of Good Hope, Transvaal, Orange Free State and Natal) or the neighbouring British protectorates (Lesotho, Botswana and Swaziland). The 1852 Constitution of the Cape of Good Hope, which remained in operation until 1910, did not contain any entrenched fundamental rights apart from the franchise and did not contain provisions regulating public administration (see *supra* 3.2.1). Natal's 1893 Constitution did not protect fundamental rights or regulate public administration. Other legislation, for example the 1896 Franchise Act, dealt with such rights and the 1894 Civil Service Act established a public service but did not regulate public administration (see *supra* 3.2.2). The 1858 Constitution of the Transvaal republic protected particular fundamental rights.

Other legislation, for example education regulations, regulated public administration (see *supra* 3.2.3). The republic of the Orange Free State probably set a good example of protecting fundamental rights. The Orange Free State's 1854 Constitution contained the principle of protecting fundamental rights against infringement by governmental activities. The 1854 Constitution was a supreme Constitution and all governmental activities were subject to the mentioned Constitution (section 61) (see *supra* 3.2.4). The three British protectorates (Lesotho, Botswana and Swaziland) did not have written constitutions to protect fundamental rights and did not have a public service with public institutions as it is known in a Western sense. Tribal fundamental rights were cared for collectively (see *supra* 3.2.5, 3.2.6 and 3.2.7).

My opinion is that the constitutions of the republics of the Orange Free State and Transvaal protected fundamental rights that had to be taken into consideration when public administration was exercised. The courts also played a role in setting parameters within which public administration was to be exercised (see *supra* 3.3.1.3).

- During the South African constitutional dispensations from 1910 until 1994, fundamental rights apparently did not enjoy comprehensive non-racial constitutional and legislative protection. Public officials apparently exercised public administration mostly arbitrarily with a disregard for fundamental rights especially towards non-White persons. Public administration was exercised in a manner to serve the political objectives of the government above the interests of the inhabitants of the country (see *supra* 4.2.2). The South Africa Act, 1909, only protected fundamental rights relating to the franchise and two official languages. The 1909 Act did not contain provisions prescribing the manner in which public administration had to be exercised (see *supra* 3.3.1.1).

My conclusion is based on the fact that the South Africa Act, 1909 was a product of the British Westminster tradition, which regarded constitutional guarantees as unnecessary (see *supra* 3.3.1.1). The then South African public service was based on similar British principles and public administration was exercised in a manner aimed at controlling public affairs rather than rendering a public service to the inhabitants. The courts did at times intervene in matters relating to public administration being exercised unfairly (see *supra* 3.3.1.2). In 1948 the governing authority adopted the policy of apartheid in terms of which fundamental rights were disregarded in the form of racial discrimination and political repression in legislation. Public administration was exercised in a manner which causes a sense of inferiority and humiliation among certain persons (see *supra* 3.3.2.2).

Pleas and efforts from persons acutely affected to curb this practice were rejected (see *supra* 3.3.2.3). The 1961 Constitution installed a supreme and sovereign Parliament and only protected the rights of the two official languages of that time (see *supra* 3.3.3.1). The 1983 Constitution introduced changes to the constitutional system but did not contain provisions prescribing the manner in which public administration had to be exercised (see *supra* 3.3.4.2). The public administrative environment between 1910 and 1994 appears to have been primarily based on discriminatory principles and the infringement on fundamental rights (see *supra* 3.3.1.2). The consequence was the development over the years of a fundamental rights-disregarding political and social culture and environment, especially towards certain population groups. My opinion is that the constitutional period 1910 to 1994 is recognisable for its institutionalised racial discrimination that was apparent in legislation and accordingly in public administration.

- On 27 April 1994 the supreme 1993 Constitution came into operation as an interim Constitution (section 73(1)). This Constitution contained transitional provisions aimed at bridging the apartheid constitutional dispensation with the post-apartheid constitutional dispensation (1993 Constitution: preamble and postscript). Public administration formed part of the bridging process with a challenge to reshape and adapt to the new constitutional requirements relating to the manner in which public administration must be exercised (see *supra* 4.2.1).

This conclusion is based on the fact that the 1993 Constitution was a supreme Constitution whereby all public institutions, Parliament included, and all law were subordinate to and bound by the provisions of the 1993 Constitution. This meant that public administration and the manner in which it was exercised was subordinate to the prescriptions in the supreme Constitution (see *supra* 4.2.2). The constitutional requirement did not exist before 1994 and formed part of the bridging requirement that involved public administration.

- Contemporary public administration apparently rests on a democratic foundation.

The basis for my conclusion is that the 1996 Constitution states that the South African society is based on democratic values and fundamental human rights. The provisions of section 1 also state that South Africa is established as a constitutional state with a democratic system of government. Chapter 2 of the 1996 Constitution provides that the Bill of Rights is the cornerstone of democracy (section 7(1)) and applies to all law and

public institutions (section 8(1)). My opinion is that South Africa's constitutional environment is a democracy. Public administration ought to be exercised in a manner which reflects democratic values such as *inter alia*, human dignity and equality (see *supra* 4.3). The contemporary democratic foundation on which public administration *de iure* rests did not exist before 1994 as such constitutional provisions did not exist in previous South African Constitutions (see *supra* 3.3.4).

- On 27 April 1994 the 1993 Constitution prescribed a manner in which public administration had to be exercised. My view is that these constitutional prescriptions did not exist before 1994 and therefore prescribed a *de iure* change to the manner in which public administration was exercised prior to 1994 (see *supra* 4.6.2).

My conclusion is based on the fact that the supreme 1993 Constitution's chapter 3 on fundamental rights bound all legislative and executive public institutions and applied to all administrative decisions taken and activities performed (see *supra* 4.6.2). This meant that any law or activity inconsistent with the provisions of the 1993 Constitution would have been of no force or effect (section 4(1)) (see *supra* 4.2.2). These prescriptions applied to public administration from 27 April 1994 and had to be applied by public officials. My opinion is that if public officials were adequately informed of these prescriptions and given directives as to how the prescriptions should be applied in practice, the bridging process would possibly have been completed soon after 27 April 1994.

- A constitutional obligation rests on public administration to reshape itself and the manner in which it is constitutionally prescribed to be exercised (see *supra* 4.1).

This conclusion I based on the fact that the 1993 Constitution brought an end to the former supreme parliamentary system. Sections 4(2) and 7 of the 1993 Constitution provide that public administration is bound by the principles of the 1993 Constitution and its chapter 3 on fundamental rights. Public officials may not exercise public administration autonomously and are obliged to perform their functions within parameters / guidelines as set out in authorising legislation (see *supra* 4.8). Currently sections 7 and 8, read with section 195, of the 1996 Constitution prescribe the manner in which public administration is to be exercised. These provisions did not exist before 1994 and therefore I believe that public officials should be adequately informed of this obligation and the manner in which it has to be applied in practice.

- The 1993 Constitution prescribed a manner in which public administration had to be exercised as from 27 April 1994. Such principles could not be fully translated into reality immediately as legislation still in force contained callous provisions from the apartheid-era. Only after 27 April 1994 could these provisions be addressed and eradicated in terms of directives in the 1993 Constitution and the legislative process (see *supra* 5.1 and 5.2.2). The transformation process is apparently a gradual process (see *supra* 5.4.1).

I based this conclusion on the fact that public officials are major role-players in the process to implement and apply the constitutional prescriptions relating to public administration that did not exist before 1994 (see *supra* 4.8 and 5.2). I assume that there are complex issues to overcome and that the process of reshaping the manner in which public administration must be exercised, needs a period of time. My opinion is that public officials serving from during the apartheid constitutional era, face a challenge to adapt to a reshaped manner of exercising public administration. My view is also that such an adaptation depends on the manner in which each such official exercised his / her functions before 1994.

- More than half of the public officials in the Department of Home Affairs apparently do not know of the Bill of Rights contained in chapter 2 of the 1996 Constitution, or the Bill's significance or its role in connection with the manner in which public administration must be exercised (see *supra* 8.3.1). Just over half of these mentioned officials are old and the rest are new officials.

This conclusion I based on the results obtained from the test of the first hypothesis (see *supra* 8.3.1). In my opinion a lack of knowledge of the Bill of Rights and its principles relating to public administration, means that public administration is not necessarily being applied in practice precisely as prescribed constitutionally. Accordingly, all the officials are not necessarily adhering to the obligation that rests on public officials to apply the rights contained in the Bill of Rights when exercising public administration (see *supra* 4.8).

- More than half of the officials in the Department of Home Affairs who do know of the Bill of Rights and its significance and role regarding the manner in which public administration must be exercised, are of the opinion that the Bill of Rights grants protection against arbitrary activities by government institutions and has an influence on

the manner in which they exercise their functions (see *supra* 8.3.1). Almost two thirds of these mentioned officials are old and the rest are new officials.

I based this conclusion on the results obtained from the test of the first hypothesis (see *supra* 8.3.1). My view is that it is encouraging that there are officials who are aware of the constitutional requirements relating to the manner in which public administration must be exercised (see *supra* 4.8). It is also my opinion that uniformity in applying such constitutional requirements will only be reached once all officials are adequately informed of the Bill of Rights and exercise their functions accordingly.

- More than half of the public officials in the Department of Home Affairs are apparently not aware of section 195 of the 1996 Constitution that prescribes the manner in which public administration must be exercised. Of these mentioned officials almost two thirds are old and the rest are new officials.

The basis for my conclusion is the results obtained from the test of the second hypothesis (see *supra* 8.3.2). My opinion is that all officials must be adequately informed of the mentioned section 195 and be given directives as to the manner in which they are expected to exercise their functions in compliance with the prescriptions in section 195. Such directives have the potential to assist officials to exercise public administration in uniformity with regard to constitutional requirements.

- Almost two thirds of the officials who are aware of the mentioned section 195 perform their official functions in adherence to the prescriptions in section 195. Of these mentioned officials more than half are old and the rest are new officials.

The basis for my conclusion is the results obtained from the test of the second hypothesis (see *supra* 8.3.2). I believe that it is encouraging that there are officials who are aware of section 195 and perform their official functions in adherence to the prescriptions in section 195. Such a situation has the potential to serve as an assurance that such officials will refrain from exercising public administration arbitrarily.

- A small percentage of the officials in the Department of Home Affairs who were employed in the public service before 27 April 1994, apparently experienced that after the inception of the Bill of Rights on 27 April 1994, they adapted the manner in which they performed

their official functions prior to 1994 in order to function in terms of the current constitutional requirements (see *supra* 8.3.3).

This conclusion is based on the results obtained from the test of the third hypothesis (see *supra* 8.3.3). There are possibly other explanations but my opinion of this conclusion is that public officials apparently were not adequately informed of the impact that the Bill of Rights would have on public administration as from 27 April 1994. I also believe that some officials were reluctant to respond to the constitutional requirement to apply the rights contained in the Bill of Rights when exercising public administration. Officials were probably not prepared or adequately equipped / trained to immediately respond to the constitutional obligation (see *supra* 4.8). As I mentioned in a previous conclusion, the application of the constitutional principles relating to public administration is a gradual process. Uniformity in the application of the rights in the Bill of Rights needs, though, to be speeded up. Therefore I am of the opinion that public officials need to be adequately informed and trained to perform their official functions in terms of constitutional prescriptions.

- Barely ten percent of the public officials in the Department of Home Affairs have been adequately informed through official channels of the significance of the Bill of Rights and its role regarding the manner in which public officials must exercise their official functions (see *supra* 8.3.4).

My conclusion is based on the results obtained from the test of the fourth hypothesis (see *supra* 8.3.4). This means that almost ninety percent of the mentioned officials have not been adequately informed of the significance of the Bill of Rights. In my opinion this situation suggests that there is a lack of knowledge among the officials in the Department of Home Affairs as to the actual role that the Bill of Rights plays in the manner in which officials must exercise their official functions. This means that public officials cannot adhere to the constitutional obligation (see *supra* 4.8) and apply the rights in the Bill of Rights before they have received relevant directives through official channels.

- Barely more than a quarter of the officials in the Department of Home Affairs have apparently of their own accord, studied the Bill of Rights in order to render public services subject to the principles of such rights. Of these mentioned officials almost two thirds are old and the rest are new officials (see *supra* 8.3.5).

I based this conclusion on the results obtained from the test of the fifth hypothesis (see *supra* 8.3.5). My view is that it is a matter of concern that such a small percentage of officials are familiar with the Bill of Rights. My remarks made under the previous conclusion also apply here.

- More than half of the officials in the Department of Home Affairs are of the opinion that it is necessary that the principles of the Bill of Rights be kept in mind when public services are rendered (see *supra* 8.3.5).

This conclusion is based on the results obtained from the test of the fifth hypothesis (see *supra* 8.3.5). My view is that officials probably are aware of the important role that the Bill of Rights plays. I do not believe, though, that officials are fully aware of the statutory influence that the Bill of Rights has on the manner in which officials exercise public administration. This necessitates that officials be officially informed of the legal / *de iure* role of the Bill of Rights.

- Public officials in the Department of Home Affairs apparently have mixed perceptions as to whether the interests of the inhabitants of the country warrant priority above the political objectives of the governing authority when public services are rendered (see *supra* 8.3.6).

I based this conclusion on the results obtained from the test of the sixth hypothesis (see *supra* 8.3.6). The results showed in Table 8.9 indicate that almost two thirds of the officials in the mentioned Department agree that when public services are rendered, the interests of the inhabitants should be served above the political objectives of the government. Of these officials almost two thirds are old and the rest are new officials. Barely more than one tenth of the mentioned officials disagreed with this scenario. Of these mentioned officials more than half are new and the rest are old officials. In my opinion these results show that the old officials are more in agreement than the interests of the inhabitants should best served above the political objectives of the government.

The results showed in Table 8.10 indicate that less than half of the mentioned officials disagree that when public services are rendered, the political objectives of the government should be served above the interests of the inhabitants. Of these mentioned officials, more than half are old and the rest are new officials. In my opinion a similar pattern of reaction emerges, namely that the old officials are more in agreement that the

interests of the inhabitants should be served above the political objectives of the government. My view of this pattern of reaction is that the old officials are probably more aware that the Bill of Rights protects the interests of the inhabitants against arbitrary government actions, and that such protection did not exist before 1994.

However, in both mentioned Tables almost one third of the officials are uncertain / did not respond to the question. My opinion is that the results showed in both mentioned Tables indicate that there is certainly a mixed perception among the officials in the mentioned Department.

- The rights in the Bill of Rights apparently do not enjoy the necessary recognition when public services are rendered by public institutions (see *supra* 8.3.7).

This conclusion is based on the results obtained from the test of the seventh hypothesis (see *supra* 8.3.7). The results showed in Table 8.11 reveal that barely a quarter of the officials in the Department of Home Affairs agree that the rights in the Bill of Rights do enjoy recognition when public services are rendered. The rest of the officials in the mentioned Department did not know or answered "no". My opinion is that officials are probably not adequately informed of the obligation that they have to adhere to (see *supra* 4.8) and therefore are apparently not fully aware that the right in the Bill of Rights have to be applied when public services are rendered).

9.4 Proposals

The primary proposals that have surfaced from the study are now given.

In terms of the provisions of the Bill of Rights the inhabitants of the country are *de iure* protected against arbitrary government activities. However, once the rights in the Bill of Rights have been comprehensively translated into reality, the full effect of protection against arbitrary government activities could become apparent. This means that public officials ought to exercise public administration strictly in accordance with and adhere to constitutional directives. It also means that officials must be fully aware of such constitutional directives. Officials can acquire such knowledge while performing their daily functions, but to my mind officials ought to acquire such knowledge in a more formal manner, such as by means of -

- comprehensive informative documents
- intensive training sessions and follow-up training sessions
- seminars and workshops
- study at tertiary institutions.

Training must never be regarded as complete or sufficient but rather as an ongoing process. Training must be regarded as a process of acquiring skills and knowledge. In order to keep public officials abreast of the contemporary constitutional and public administrative requirement in connection with the manner in which public services must be rendered, training and informative techniques need to be regularly revised, updated and improved. Training ought to be considered as essential for all public office incumbents, from the most senior government official to the most junior public official. It must never be taken for granted that a senior official, or any official for that matter is adequately equipped with knowledge and sufficiently trained to perform public functions.

In an initial phase, students enrolled for a course in Public Administration, ought to receive in-depth instruction as to the meaning and implications that constitutional directives have in relation to public institutions and public officials. To only refer to, for example, the Bill of Rights, without an analysis of the more important provisions and illustrating the influence of such provisions on public administration by means of examples, will not suffice. Comprehensive and practical education and training is needed. When such students enter the public sector as public officials, they will have the necessary expertise to ensure that the Bill of Rights is always a reality in practice.

Students, who have completed their studies in Public Administration, must be made aware of the fact that they have only completed the initial stage of a career in the public sector. Theory has to be applied and even adapted to practice. Practice can also be adapted to theoretical procedures.

Public officials, who are new recruits in the public sector, and who do not have tertiary education in Public Administration, can be given inservice training aimed at informing the officials of the Bill of Rights and its role when exercising public administration. A copy of the Constitution should be handed to each new recruit to use as a guide when exercising public administration.

Public officials ought to be given the opportunity to, at the expense of the relevant department, attend congresses and workshops dealing with the Bill of Rights and public

administration. In this way, individual officials can gain much experience and contribute to informing other officials who are unable to attend such congresses and workshops. In this way the inhabitants of the country can also benefit in that informed officials will be less inclined to, in an arbitrary way, infringe on the rights of individuals.

Each public official ought to be informed of where his/her delegated authority begins and ends, and what work is expected from him/her. The role of constitutional directives can be added to such information. This can be attained by means of a job description for each and every post incumbent in the public sector. Limits, with reference to constitutional directives, can be set as to what an official is required to do without unnecessary interference from a higher authority. The lines of reporting must also be clearly delineated because the work of each official can be carefully circumscribed. Training activities can be focussed in specifically identified needs of each incumbent. A feedback mechanism should be in place in order to record an official's training needs, the actual training and follow-up requirements. In this way it can be recorded when an official has received information and training in terms of the Constitution and its Bill of Rights. This could ensure that all officials receive adequate information of the Constitution.

By keeping record of officials who have been informed of, and trained in connection with, such constitutional aspects, it could serve as a deterrent against officials not performing their functions with adherence thereto and acting arbitrarily. Each public official ought to have a copy of a public service code of conduct that contains, *inter alia*, directives as to acceptable and unacceptable conduct by officials. Such a code of conduct should also contain sanctions for unacceptable conduct.

Training and informing public officials of all relevant aspects needed to perform their official functions effectively, efficiently and professionally, should be focused on developing and maintaining a **fundamental rights culture** among public officials. The primary directives in this regard are contained in the Bill of Rights and these provisions read with the provisions of section 195 of the 1996 Constitution, place the emphasis on where public service delivery should be focused.

9.5 Possible further research

Further research that could emanate from the study can have an empirical dimension. By means of a questionnaire and an empirical survey, it can be ascertained whether the

circumstances, as described in the 7 hypotheses, have changed since the use of the questionnaire and completion of the survey in this study. In this way it can also be ascertained to what extent the Bill of Rights has been realised in practice, if compared to the findings reflected in this study.

Further research can be undertaken with a view to compile a manual in which the Bill of Rights and other constitutional directives relating to public administration are dealt with. The manual can contain training proposals and practical examples in connection with implementing such directives.

9.6 Final word

The primary aim of this thesis was to contribute to the awareness that the Bill of Rights and constitutional principles and directives relating to public administration have an influence on the manner in which public administration should be exercised. I trust that the basic principle that was intended to be highlighted by the thesis, namely that public administration must be exercised strictly in terms of the principles and directives of the 1996 Constitution and its Bill of Rights, did in fact attain that purpose. It is, furthermore, trusted that this thesis will stimulate further study in a similar field and thereby contribute to the field of Public Administration. If this thesis managed to succeed in doing that which I expected, this study was a worthwhile effort to me.



Appendices

Appendix 1 - Letter to Director General

466 Gunning Street
Elarduspark
0181

10 June 1998

The Director General
Department of Home Affairs
Private Bag X114
Pretoria
0001

Dear Sir

REQUEST FOR PERMISSION THAT OFFICIALS PARTICIPATE AS RESPONDENTS IN THE COMPLETION OF A QUESTIONNAIRE

I am a student at the University of South Africa. The attached questionnaire is part of my research for a doctoral thesis.

The purpose of the questionnaire is to obtain data in connection with the question whether the principles in the Bill of Rights in chapter 2 of the **Constitution of the Republic of South Africa**, 1996 (Act 108 of 1996), has an influence on public administration and the manner in which public officials exercise their functions.

The Department of Home Affairs was selected as the location of the exercise because it deals with a wide variety of public services and in many areas renders a service on a person-to-person basis. My personal knowledge of the activities of the Department (I was senior legal officer from September 1988 until April 1993) will be of much assistance in the exercise.

The questionnaires are to be kept anonymous and all information gathered will be kept confidential. The information will only be used for the purpose stated and will not have any negative implications for the Department.

My **request** is for permission to involve a number of officials of the Department (Civitas) as respondents to complete the questionnaire. The idea is to select at random a few officials from the various chief directorates. At a given time a large group can meet in an available office to complete a questionnaire each. I will be present to assist where necessary and the exercise should take about **10 minutes**. Participation will be voluntary.

My **request** is also for permission to involve officials at the Pretoria regional/district offices and the Centurion district office. With your permission I will make the necessary arrangements with the head of each office.

Thank you for your assistance and co-operation in this matter.

Yours faithfully

Mike van Heerden

Appendix 2 - Facsimile to Director General

466 Gunning Street
Elarduspark
0181

9 July 1998

☎ 012 - 3148109
Fax 012 - 3232416

Mr Albert Mokoena
Director General: Home Affairs
Private Bag x 114
Pretoria
0001

Dear Mr Mokoena

Request for permission that officials participate as respondents in the completion of a questionnaire

I refer to my request dated 10 June 1998 regarding the above-mentioned matter.

Mr Hennie Meyer (Communications) informed me this morning that you did not want officials to use their official time to be involved as respondents. I have the greatest respect for your stance and agree that public officials should utilize their official time fully to the benefit of the Department and Public Service. Being a former public servant, I have due regard for such a principle.

I do however request that you please reconsider the matter and grant permission for officials to be involved during lunchtime and even after official hours. Participation is voluntary and officials will be asked for only ten minutes of their time.

I understand that you will be away for some time and I really need the assistance requested during July.

Thank you very much in anticipation.
Yours faithfully

Mike van Heerden

☎ 012 - 3452855
Fax 012 - 3546135

PS: Reply can be handed to Mr Hennie Meyer, Communications, Room 11.23,
Telephone number 012 - 3148105.

Appendix 3 - Questionnaire

- Your answers will be treated as confidential
- Please answer all questions even if you are in doubt
- The questionnaire is anonymous – please do not write your name on any page

For official use only

1	2	3
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

SECTION 1: PERSONAL AND GENERAL DATA OF RESPONDENT

Mark your answer with a ✓ in this column

1. Department: Home Affairs	Head Office	1	4	<input type="checkbox"/>
	Regional/District Office	2		
2. On what level of management are you? [Director & above] [Asst & deputy director] [All levels under asst dir]	Upper level	1	5	<input type="checkbox"/>
	Middle level	2		
	Junior level	3		
3. How long have you been employed in the Public Service of South Africa?	0 --1 year	1	6	<input type="checkbox"/>
	1 - 4 years	2		
	4 - 6 years	3		
	6 years +	4		
4. How long have you been employed in this Department?	0 - 1 year	1	7	<input type="checkbox"/>
	1 - 4 years	2		
	4 - 6 years	3		
	6 years +	4		
5. Were you earlier employed in the public service of a former self-governing or independent TBVC state? <i>(If you answer "no" to this question, please go to question 7)</i>	Yes	1	8	<input type="checkbox"/>
	No	2		
6. If you answered "yes" to the previous question, how long were you employed in that public service?	0 - 1 year	1	9	<input type="checkbox"/>
	1 - 4 years	2		
	4 - 6 years	3		
	6 years +	4		
7. Please mark one statement which best describes your present work situation with regard to working with the public -	▪ I always work on a person-to-person basis	1	10	<input type="checkbox"/>
	▪ I sometimes work on a person-to-person basis	2		
	▪ I seldom work on a person-to-person basis	3		
	▪ I never work directly with the public	4		

SECTION 2: CONTEMPORARY INFLUENCE OF BILL OF RIGHTS

Mark your answer with a ✓ in this column 

8.	Do you know of the Bill of Rights in chapter 2 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ? <i>(If you answer "no" to this question, please go to question 10)</i>	Yes	1	11	<input type="checkbox"/>
		No	2		

9.	If you answered "yes" to the previous question, please indicate your opinion regarding each of the following statements:	<ul style="list-style-type: none"> The Bill of Rights effectively grants protection to the public against arbitrary activities by government institutions. 	To a large extent	1	12	<input type="checkbox"/>
			To a lesser extent	2		
			Uncertain	3		
			Not at all	4		
		<ul style="list-style-type: none"> The Bill of Rights has an influence on the manner I exercise my official functions because I have to keep the principles of the Bill of Rights in mind when exercising my official functions. 	Always	1	13	<input type="checkbox"/>
			Sometimes	2		
			Uncertain	3		
			Never	4		
		<ul style="list-style-type: none"> The manner in which I perform my official functions would not differ if there were no Bill of Rights because the Bill of Rights does not affect my manner of working. 	Agree	1	14	<input type="checkbox"/>
			Uncertain	2		
			Disagree	3		

10.	Do you know of section 195 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), which states that public administration must be governed by the democratic values and principles enshrined in the Constitution ? <i>(If you answer "no" to this question, please go to question 12)</i>	Yes	1	15	<input type="checkbox"/>
		No	2		

11.	If you answered "yes" to the previous question, do you perform all your official functions with adherence to the prescriptions contained in section 195?	To a large extent	1	16	<input type="checkbox"/>
		To a lesser extent	2		
		Uncertain	3		
		Not at all	4		

SECTION 3: OFFICIAL FUNCTIONS PERFORMED PRIOR TO 27 APRIL 1994 Mark your answer with a ✓ in this column 

12.	If you were a public official prior to 27 April 1994, please indicate your opinion regarding each of the following statements: <i>(If you were not, please go to question 15)</i>	<ul style="list-style-type: none"> Before 27 April 1994 there was no Bill of Rights and I exercised my official functions to a large extent in favour of the interests of the government of the day. 	True	1	17	<input type="checkbox"/>
			Uncertain	2		
			Untrue	3		
		<ul style="list-style-type: none"> Before 27 April 1994 there was no Bill of Rights but I exercised my official functions to a large extent in favour of the interests of the inhabitants of the country. 	True	1	18	<input type="checkbox"/>
			Uncertain	2		
			Untrue	3		

13. Please indicate your opinion regarding the following statements:

Before 27 April 1994, I performed my official functions in a particular manner. The inception of the Bill of Rights on 27 April 1994 -

- Did not have an influence on the manner in which I performed my official functions, and I still to a large extent perform my official functions in a similar manner as before.

True	1
Uncertain	2
Untrue	3

 19
- Did have an influence on the manner in which I performed my official functions and I have now to a large extent changed the manner in which I perform my official functions.

True	1
Uncertain	2
Untrue	3

 20

14. Have you experienced or observed any significant change in the manner public services are rendered today, if compared to the manner public services were rendered prior to 27 April 1994?

Yes	1
No	2

21

If you answered "yes", please give one example:

.....

.....

SECTION 4: GENERAL

Mark your answer with a ✓ in this column

15. Have you been officially informed of the significance of the Bill of Rights and its role in connection with the manner you exercise your official functions?

Yes	1
No	2

22

If you answered "yes", please state how you were informed:

.....

.....

16. Have you on your own accord studied the contents of the Bill of Rights?

Yes	1
No	2

23

17. Do the principles contained in the Bill of Rights, in your opinion, enjoy the necessary recognition when government institutions render public services?

Yes	1
Don't know	2
No	3

24

18. Please indicate your opinion regarding each of the following statements:

When public services are rendered by public officials:

The interests of the inhabitants of the country should be served above the political objectives of the government of the day.

Agree	1
Uncertain	2
Disagree	3

25

The political objectives of the government of the day should be served above the interests of the inhabitants of the country.

Agree	1
Uncertain	2
Disagree	3

26

19. To what extent, in your opinion, is it necessary that public officials when rendering public services keep the principles of the Bill of Rights in mind?	Always	1	27 <input type="checkbox"/>
	Mostly	2	
	Sometimes	3	
	Never	4	

20. Please indicate your opinion regarding the following statement: All the fundamental rights granted in the Bill of Rights are unconditional.	Agree	1	28 <input type="checkbox"/>
	Uncertain	2	
	Disagree	3	

21. What do you consider should be done to inform public officials of the contents of the Bill of Rights and how to apply the principles when exercising public administration?
Please elaborate briefly:

.....

.....

.....

.....

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.....

.....

22. Please use the space below if you wish to add any other comments regarding any of the issues in the questionnaire.

.....

.....

.....

.....

.....

.....

.....

.....

Thank you very much for your participation



List of Sources

Abbott, W.F., R.J. Mosen, 1979. **On the measurement of corporate social responsibility: self-respect disclosure as a method of measuring corporate social involvement.** *Academy of Management Journal* 22, No. 3, September: 501-515

Aliens Control Act, 1991 (Act 96 of 1991)

Aliens Control Amendment Act, 1995 (Act 76 of 1995)

Anderson, A., September 1994. Letter from London: Unwritten Constitutions also have their advantages, in **De Rebus**, No 321

Andrews, W.G., 1968. **Constitutions and Constitutionalism.** Third edition, Princeton, New Jersey: D van Nostrand

Austin, J., 1885. **Lectures on jurisprudence.** Fifth edition, London: London Printers

Babbie, E.R., 1973. **Survey research methods.** Belmont California: Wadsworth

Babbie, E.R., 1992. **The practice of social research.** Sixth edition, Belmont California: Wadsworth

Bailey, K.D., 1987. **Methods of social research.** Third edition, New York: The Free Press

Basson, D.A., H.P. Viljoen, C. van der Walt, 1991. **South African Constitutional law.** Second impression, Cape Town: Juta and Company Ltd

Basson, D.A., 1995. **South Africa's Interim Constitution.** Revised edition, Kenwyn: Juta and Company Ltd

Baxter, L., 1984. **Administrative Law**. Kenwyn: Juta

Bekker, J.C., 1989. **SM Seymour's customary law in southern Africa**. Fifth edition, Cape Town: Juta and Company Ltd

Benjamin v Pietermaritzburg Liquor Licencing Board 1939 NPD 121

Bennett, T.W., 1985. **Application of customary law in southern Africa**. Kenwyn: Juta and Company Ltd

Bot, A.K., 1965. **Transvaal historical reviews 1836-1960**. Pretoria: Government Printer

Botha, C., 1998. **Statutory interpretation**. Third edition, Kenwyn: Juta and Company Ltd

Botswana, in **Obondo-Okoyo, Botswana**. Gaborone: Publications Division of the Department of Information and Broadcasting, 1986

Boulle, L.J., 1978. The Turnhalle testimony, in **South African Law Journal**, Vol. 95

Boulle, L.J., B. Harris, C. Hoexter, 1989. **Constitutional and administrative law**. Cape Town: Juta and Company Ltd

Brown v Leyds NO (1897) Cape Law Journal, Vol. XIV, 71 and 94

Brown v Board of Education 347 US 483 (1954)

Brynard, D.J., November 1987. Toesighouding as 'n koördineringsaktiwiteit, in **Nexus**

Brynard, D.J., 1993. Rise of the administrative state: threat or asset? In **Politeia**, Vol. 2(2)

Brynard, D.J., 1995. The citizen and the state: implications of the interim Constitution of South Africa, in **Journal of theoretical politics**, 7(4)

Buckland, W.W., 1945. **Some reflections on jurisprudence**. Cambridge: University Press

Burger, M., 1992. **Reference Techniques**. Eighth revision, Pretoria: Unisa

Burns, J.H., 1970. The rights of man since the reformation: a historical survey, in Vallat, F. (Ed), **An introduction to the study of human rights**. London: Europa Publications

Cachalia, A., H. Cheadle, D. Davis, N. Hayson, P. Maduna, G. Marcus, 1994. **Fundamental Rights in the New Constitution**. Reprint, Kenwyn: Juta and Company Ltd

Carpenter, G., 1987. **Introduction to South African Constitutional Law**. Reprint, Durban: Butterworths

Cassim and Solomon v The State (1892) Cape Law Journal, Vol. IX, 58

Chaskalson, A., 1985. Legal control of the administrative process, in **South African Law Journal**, Vol. 102

Christensen, L.B., 1988. **Experimental methodology**. Fourth edition, Boston, Mass., Allyn & Bacon

Chunquete v Minister of Home Affairs 1990(3) SA 661 (A)

Cloete, J.J.N., 1986. **Inleiding tot die Publieke Administrasie**. Sixth revised edition, Pretoria: J.L. van Schaik

Cloete, J.J.N., 1989. **Sentrale regionale en plaaslike owerheidsinstellings van Suid-Afrika**. Revised edition, Pretoria: J.L. van Schaik

Cloete, J.J.N., 1994. **Public Administration and management**. Eighth revised edition, Pretoria: J.L. van Schaik

Cloete, J.J.N., 1996. **Accountable government and administration for the Republic of South Africa**. Pretoria: J.L. van Schaik

Coetzee, C.J., 1986. **Botswana, Lesotho en Swaziland politieke verwickelinge**. Potchefstroom: University for Christian Higher Education

Collins, K., 1999. **Participatory research**. First edition, first impression, South Africa: Prentice Hall

Corbett, M.M., 1979. Human rights: the road ahead, in **South African Law Journal**, Vol. 96

Civil Service Act, 1894 (Natal)

Constitution Act, 1893 (Act 14 of 1893) (Natal)

Constitution of the Orange Free State, 1854

Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)

Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

Constitution Ordinance, 1852 (Ordinance 2 of 1852) (Cape)

Constitution Ordinance Amendment Act, 1872 (Act 1 of 1872) (Cape)

Cowling, M.G., 1993. Developing a Human rights culture in South Africa, in Cowling, M.G. and T. Barrett (Eds), **Debating a Bill of Rights**. Pietermaritzburg: The Natal Witness Printing and Publishing Company (Pty) Ltd

Cronje, D.S.P., J. Heaton, 1999. **Die Suid-Afrikaanse Personereg**. Durban: Butterworths

Currie, D.P., 1988. **The Constitution of the United States**. Chicago: The University of Chicago Press

Davis, D., 1990. **Social power and civil rights: Towards a new jurisprudence for a future South Africa**. Cape Town: UCT Printing Department

De Beer, J., 1987. Experiencing Public Administration in Practice, in Gildenhuys, J.S.H. (Ed), **South African Public Administration: Past, present and future**. Pinetown: Owen Burgess Publishers

De Giorgi, B., 1999. The Open Democracy Bill: a preliminary investigation into its provisions and their implications for public administration, in **Politela**, Vol.18(2)

De Klerk, W.J., 1994. The process of political negotiation, in De Villiers, B. (Ed), **Birth of a Constitution**. Kenwyn: Juta and Company Ltd

De Villiers, M., 1897. The Relation of the Judicial to the Legislative Authority, in **Cape Law Journal**, Vol. XIV

Debates of the Parliament of the Republic of South Africa, House of Assembly, 30 April 1913, in **Hansard**. Cape Town: Government Printer, 1913

Debates of the Parliament of the Republic of South Africa, House of Assembly, 20 March 1952, in **Hansard**. Cape Town: Government Printer, 1952(a)

Debates of the Parliament of the Republic of South Africa, House of Assembly, 7/8 May 1952, in **Hansard**. Cape Town: Government Printer, 1952(b)

Debates of the Parliament of the Republic of South Africa, House of Assembly, 20 January 1960, in **Hansard**. Cape Town: Government Printer, 1960

Debates of the Parliament of the Republic of South Africa, House of Assembly, 15 August 1983, in **Hansard**. Cape Town: Government Printer, 1983

Debates of the Parliament of the Republic of South Africa, House of Assembly, 23 April 1986, in **Hansard**. Cape Town: Government Printer, 1986

Debates of the Parliament of the Republic of South Africa, House of Assembly, 2 February 1990, in **Hansard**. Cape Town: Government Printer, 1990

Denning, L., 1970. Freedom of association and the right to work, in Vallat, F. (Ed), **An introduction to the study of human rights**. London: Europa Publications

Denoon, D., 1972. **Southern Africa since 1800**. Sixth impression, London: Longmans

Devenish, G.E., 1998. **A commentary on the South African Constitution**. Durban: Butterworths

Dooley, D., 1990. **Social Research Methods**. Second edition, New Jersey: Prentice Hall

Dugard, J., 1978. **Human Rights and the South African Legal Order**. Princeton, New Jersey: Princeton University Press

Dugard, J., 1988. Changing attitudes towards a bill of rights in South Africa, in Van der Westhuizen, J. and H. Viljoen, (Eds), **A bill of rights for South Africa**. Durban: Butterworths

Du Plessis, J.R., L. Kok, 1990. **South African Law**. Cape Town: Juta and Company Ltd

Du Plessis, L.M., 1994. Drafting the Chapter on Fundamental Rights, in De Villiers, B. (Ed), **Birth of a Constitution**. Kenwyn: Juta and Company Ltd

Du Toit, P.E., 1975. **A historical survey of public administration in the Transvaal up to the Shepstone annexation**. Unpublished dissertation, University of South Africa, Pretoria

Du Toit, D.A., 1984. **Menseregte**. Cape Town: Tafelberg

Dworkin, J.R., 1987. **Taking rights seriously**. Fifth impression, London: Gerald Duckworth and Co Ltd

Dworkin, R., 1995. **Law's empire**. Ninth print, Cambridge Massachusetts: The Belknap Press of Harvard University

Dworkin, R., April 1995. Constitutionalism and democracy, in **European Journal of Philosophy**, Vol. 3, No. 1

Eloff, J., September 1981. Suid-Afrikaanse Staatsdepartemente, in **The Public Servant**, Vol. LXI, No. 9

Engelenburg, F.V., 1928. **Generaal Louis Botha**. Pretoria: Van Schaik

Erasmus, G., 1994. Limitation and suspension, in Van Wyk, D., J. Dugard, B. de Villiers and D. Davis, (Eds), **Rights and Constitutionalism: the new South African legal order**. Kenwyn: Juta and Company Ltd

Ex Parte Minister of Native Affairs: in re Yako v Beyi 1948(1) SA 388 (A)

Feit, E., 1962. **South Africa: the dynamics of the African National Congress**. London: Oxford University Press

Fox, W., I.H. Meyer, 1995. **Public Administration Dictionary**. [S.I.]: Juta

Franchise Amendment Act, 1896 (Act 8 of 1896) (Natal)

Frowein, J.A., May 1990. Administrative structures for the protection of human rights, in **Journal of Contemporary Roman-Dutch Law (THRHR)**, Vol. 53, No. 2

Galligan, D.J., 1990. **Discretionary powers: a legal study of official discretion**. Oxford: Clarendon Press

Gay, L.R., 1992. **Educational research: competencies for analysis and application**. Fourth edition, New York: Macmillan Publishing Company

Gerth, H.H., C. Wright Mills, 1982. **From Max Weber: Essays in Sociology**. Reprint, London: Routledge & Kegan Paul

Gila, B., A.J. van Rensburg, 1996. Local government and the concretisation of the Bill of Rights, in Gutto, S. (Ed), **A practical guide to human rights in local government**. Pinetown: Kohler Carlton & Print

Gildenhuis, J.S.H., 1994. The South African Government Service in a Post-Apartheid Era, in Müller, J.J. and A. van Rooyen, (Eds), **Public Administration in Post-Apartheid South Africa**. Bellville: School of Public Management

Goldwin, R.A., 1994. What is a Bill of Rights and what is it good for?, in Licht, R.A. and B. de Villiers, (Eds), **South Africa's crisis of Constitutional democracy**. Cape Town: Juta and Co Ltd

Grobbelaar, J.J.G., 1939. **Die Vrystaatse Republiek en die Basoetovraagstuk**. Vol 2, second edition, Cape Town: Government Printer

Grondwet van die Zuid-Afrikaansche Republiek, 1858 (Transvaal)

Hahlo, H.R., E. Kahn, 1973. **The South African legal system and its background**. Second impression, Cape Town: Juta and Co Ltd

Hailey, W.M.H., 1953. **Native administration in the British African territories.** Part 5, London: His Majesty's Stationary Office

Hall, J.L., 1969. **Government policy and public attitudes during the administration of Natal by Lieutenant Governor Benjamin CC Pine.** Unpublished dissertation, University of Natal, Pietermaritzburg

Harris v Minister of the Interior 1952 (2) SA 428 (AD)

Henderson, S., G. Pierson, R. Brown, 1992. **Financial accounting theory: its nature and development.** Second edition, Melbourne: Longman Chesire

Henning, P.J. van R., 1968. Die administratiewe staat, in **Journal of Contemporary Roman-Dutch Law (THRHR)**, Vol. 31, No.1

High Court of Parliament Act, 1952 (Act 35 of 1952)

Hilliard, V.G., N.D.Kemp, 1999. Citizen participation crucial to good governance and administration in South Africa, in **Politeia**, Vol. 18(3)

Hirst, P., 1990. **Representative democracy and its limits.** Padstow: TJ Press

Holmes, O.W., 1881. **The common law.** Boston: Boston Printers

Hosten, W.J., A.B. Edwards, F. Bosman, J. Church, 1995. **Introduction to South African Law and Legal Theory.** Second edition, Durban: Butterworths

Immigrants Regulation Act, 1913 (Act 22 of 1913)

Immorality Act, 1957 (Act 23 of 1957)

Judd, C.M., E.R. Smith, L.H. Kidder, 1991. **Research methods in social relations.** USA, Holt Rinehart and Winston Inc

Kerlinger, F.N., 1986. **Foundations of behavioural research.** Third edition, New York: Holt, Rinehart

Kotzé, J.G., 1949. **Memoirs and Reminiscences**. Vol. 2, Cape Town: Maskew Miller Limited

Krippendorff, K., 1980. **Content analysis: an introduction to its methodology**. London: Sage

Langa, P., 1996. Importance for the Bill of Rights for local government, in Gutto, S. (Ed), **A practical guide to human rights in local government**. Pinetown: Kohler Carlton & Print

Lapping, B., 1986. **Apartheid - A History**. London: Grafton Books

Lawbook of the Orange Free State, 1854

Leedy, P.D., 1993. **Practical research. Planning and design**. Fifth edition, New Jersey: Prentice Hall Inc

Leyds, W.J., 1914. **Het insluiten van de Boeren-Republieken**. Amsterdam: De Bussy

Lynch, J.R., 1975. **Public administartion in Natal, 1838 to 1893, an (sic) historical survey**. Unpublished dissertation, University of South Africa, Pretoria

Lyons, D., 1984. **Ethics and the rule of law**. Cambridge: Cambridge University Press

Madala, T.H., 1996. Human rights, local government and the restoration of human dignity, in Gutto, S. (Ed), **A practical guide to human rights in local government**. Pinetown: Kohler Carlton & Print

Mandela, N., 1986. **The struggle is my life**. New York: Pathfinder

Marais, D., 1989. **South Africa: Constitutional Development**. Second edition, first impression, Halfway House: Southern

Marbury v Madison 5 US 137 (1803)

March, J.G., J.P. Olsen, 1995. **Democratic governance**. New York: The Free Press

Martin, R., 1993. **A system of rights**. Oxford: Clarendon Press

Mason, E.J., W.J. Bramble, 1978. **Understanding and conducting research.** Johannesburg: McGraw-Hill Book Company

Matjila, C., 1996. The concretisation of human rights as a challenge for the future, in Gutto, S. (Ed), **A practical guide to human rights in local government.** Pinetown: Kohler Carlton & Print

Matsebula, J.S.M., 1988. **A history of Swaziland.** Third edition, Cape Town: Longman Penquin

McBurney, D.H., 1993. **Research methods.** Boston: McGraw-Hill

McWhinney, E., 1959. The Supreme Court and the Bill of Rights - The lessons of comparative jurisprudence, in **Canadian Bar Review**, Vol. XXXVII

Minister of the Interior v Harris 1952 (4) SA 769 (AD)

Molteno, D.B., November 1960. **Franchise Proposals and Constitutional Safeguards.** Unpublished report, Volume 1, Durban: Central Press (Pty) Ltd

Motala v University of Natal 1995(3) BCLR 374 (D)

Mouton, J., H.C. Marais, 1996. **Basic concepts: in the methodology of the social sciences.** Fifth impression, Pretoria: HSRC

Muller, C.F.J., 1993. **Five hundred years: a history of South Africa.** Third edition, revised and illustrated, Pretoria: Academica

Mureinik, E., 1994. A Bridge to where? Introducing the interim bill of rights, in **South African Journal for Human Rights**, Vol. 10(1)

Murphy, J.J., 1981. **Evaluating, planning and the supporting systems in South African Universities with special reference to a planning programme budgeting system.** DBL thesis, University of South Africa, Pretoria

Native Administration Act, 1927 (Act 38 of 1927)

Native Land Act, 1913 (Act 27 of 1913)

Neale, J.M., R.M. Liebert, 1986. **Science and behaviour: an introduction to methods of research.** Third edition, Engelwood Cliffs, New Jersey: Prentice Hall

Nieuwoudt, C.F., G.C. Olivier, M. Hough, 1979. **Die Politieke Stelsel van Suid-Afrika.** Pretoria: Academica

Olivier, P.J.J., 1994. Constitutionalism and the New South African Constitution, in De Villiers, B. (Ed), **Birth of a Constitution.** Kenwyn: Juta and Company Ltd

Oppenheim, A.N., 1992. **Questionnaire design, interviewing and attitude measurement.** New edition, London: Printer

Ordinance 29 of 1890 (OFS)

Perrot, D.L., 1973. The logic of fundamental rights, in Bridge, J.W., D. Lasok, D.L. Perrot, and R.O. Plender (Eds), **Fundamental rights.** London: Sweet & Maxwell

Philliber, S.G., M.R. Schwab, G.S. Sloss, 1980. **Social research.** Itasca, Illinois: FE Peacock

Population Registration Act, 1950 (Act 30 of 1950)

Posel, D., 1987. **Influx control and the construction of apartheid 1948 - 1961.** London: Oxford University Press

Potgieter, J.M., 1989. **The future of South Africa.** Cape Town: Gospel Defence League

Proclamation No.1014, Government Gazette No. 261 of 25 July 1912. Pretoria: Government Printer

Proclamation No. 103, Government Gazette No. 15791 of 3 June 1994. Pretoria: Government Printer

Public Service and Pensions Act, 1912 (Act 29 of 1912)

Putt, A.D., J.F. Springer, 1989. **Policy research. Concepts, methods and applications.** Englewood Cliffs, NJ: Prentice Hall

R v Forlee 1917 TPD 52

R v Oakes (1986) 1 SCR 103 (Canada)

R v Pretoria Timber Co (Pty) Ltd and Another 1950(3) SA 163 (A)

R v Vine Street Police Station Superintendent : Ex Parte Liebmann (1916) 1 KB 268

R v Zinn 1946 AD 346

Rautenbach, I.M., E.F.J. Malherbe, 1994. **Staatsreg.** Johannesburg: Lex Patria

Rautenbach, I.M., 1995. **General provisions of the South African Bill of Rights.** Durban: Butterworths

Renwick, A., I. Swinburn, 1980. **Basic political concepts.** London: Hutchinson

Republic of South Africa Constitution Act, 1961 (Act 32 of 1961)

Republic of South Africa Constitution Act, 1983 (Act 110 of 1983)

Reservation of Separate Amenities Act, 1953 (Act 49 of 1953)

Reyntjens, F., 1992. Protecting human rights in Sub-Saharan Africa: specific problems and challenges, in **South African Public Law**, Vol. 7, No. 1

Robinson, J., 1900. **A lifetime in South Africa.** London: Smith, Elder and Co

Ross, J.J., 1957. Die uitoefening van kontrole oor die uitvoerende mag van die staat, in **Journal of Contemporary Roman-Dutch Law (THRHR)**, Vol. 20(1)

Roux, B., July 1966. Die Terminologiese Vraagstuk in Publieke Administrasie, in **South African Institute for Public Administration**, Vol. 2, No. 1

Royse, D., 1991. **Research methods in social work.** Chicago: Nelson-Hall

- Rudner, R., 1966. **Philosophy social science**. Engelwood Cliffs, NJ: Prentice Hall
- Salmond, J., 1966. **Jurisprudence**. Twelfth edition, London: London Printers
- Saslow, C.A., 1992. **Basic research methods**. New York: Random House, Inc
- Schlag, P., 1996. Rights in the postmodern condition, in Sarat, A., and T.R. Kearns, (Eds), **Legal rights**. USA: University of Michigan Press
- Schlemmer, L., 1983. Bridges that have to be built, in De Villiers, F. (Ed), **Bridge or Barricade? The Constitution**. Johannesburg: Jonathan Ball Paperbacks
- Schmandt, H.J., P.G. Steinbicker, 1954. **Fundamentals of government**. Milwaukee: Bruce Publishing
- Sea Shore Act**, 1935 (Act 21 of 1935)
- Separate Representation of Voters Act**, 1951 (Act 46 of 1951)
- Skweyiya, Z., August 1995. The Future and the Public Service, in **Publico**, Vol. 15.4
- Smit, G.J., 1985. **Navorsingsmetodes in die gedragswetenskappe**. Pretoria: HAUM
- South Africa (Republic), Constitutional Committee of the Presidents Council. **Second report of the Constitutional Committee of the Presidents Council**. Unpublished report, PC 4/1982
- South Africa (Republic), South African Law Commission. **Group and Human Rights**. Unpublished report, project 58, October 1994
- South Africa Act**, 1909
- South Africa Act Amendment Act**, 1956 (Act 9 of 1956)
- South African Passports and Travel Documents Act**, 1994 (Act 4 of 1994)
- Stanislao, J., B.C. Stanislao, 1983. Dealing with resistance to change, in **Business horizons**, Vol. 26(4)

Strong, C.F., 1972. **Modern political Constitutions**. Revised edition, London: Sidgwick & Jackson

Teffo, J., August/September 1995. Ubuntu: 'n uitdaging vir staatsdiensbestuurders, in **Infospec**, No. 4

Terreblanche, S.J., 1994. The Economic Context of Public Administration in Post-Apartheid South Africa, in Müller, J.J. and A. van Rooyen, (Eds), **Public Administration in Post-Apartheid South Africa**. Bellville: School of Public Management

Theal, G.M., 1894. **South Africa**. Ninth impression, sixth edition, London: T Fisher Unwin

Thompson, L.M., 1954. Constitutionalism in the South African Republics, in **Butterworths South African Law Review**

Thompson, L.M., 1960. **The Unification of South Africa 1902-1910**. London: Oxford University Press

Thornhill, C., August/September 1995. Restructuring the Public Service, in **Infospec**, No. 4

Tötemeyer, G., 1988. Where politics and public administration meet, in Heymans, C. and G. Tötemeyer, (Eds), **Government by the people**. Cape Town: Juta and Company Ltd

Union Government v Fakir 1923 Appellate Division 466

US v Lovett (1946) 328 US 310

Van Breda v Jacobs 1921 AD 330

Van den Heever, C.M., 1946. **General JBM Hertzog**. Johannesburg: APB Book Store

Van der Vyver, J.D., 1975. **Die beskerming van menseregte in Suid-Afrika**. Cape Town: Juta and Company Ltd

Van der Vyver, J.D., 1976. **Seven lectures on human rights**. Cape Town: Juta and Company Ltd

- Van der Waldt, G., R. Helmbold, 1995. **Die Grondwet en 'n nuwe publieke administrasie**. Cape Town: Juta and Company Ltd
- Van Niekerk, P., 1990. Categories of fundamental rights and Constitutional reform in South Africa, in **South African Public Law**, Vol. 5, No. 1 & 2
- Van Oordt, J.F., 1899. **Paul Kruger en die opkomst van de Zuid-Afrikaansche Republiek**. Cape Town: Juta and Company Ltd
- Van Wyk, A., 1994. The 1993 Constitution: the essence and spirit, in **RSA Review**, Vol. 7, No. 2
- Vorster, M.P., 1982. Konstitusies, in Van Vuuren, D.J., D.J. Kriek, H. Booysen, A. du Pisani, H.J. Kotzé, G.C. Olivier, and M. Wiechers (Eds.), **Politieke alternatiewe vir Suider-Afrika: grondslae en perspektiewe**. Johannesburg: Macmillan
- Wade, E.C.S., A.W. Bradley, 1993. **Constitutional and administrative law**. Eleventh edition, second impression, London: Longmans
- Waldock, H., 1970. The legal protection of human rights, in Vallat, F. (Ed), **An introduction to the study of human rights**. London: Europa Publications
- Walker, E.A., 1925. **Lord de Villiers and His Times: South Africa 1842-1914**. London: Constable & Co
- Walker, E.A., 1928. **A History of Southern Africa**. Third edition, London: Longman Group
- Wamala, A.S., 1994. Some reflections on Africa's Constitutional history, in De Villiers, B. (Ed), **Birth of a Constitution**. Kenwyn: Juta and Company Ltd
- Wells, R.G., 1982. Guidelines for effective and defensible performance appraisal systems, in **Personnel Journal**, No. 61(10)
- Wendland, W., De Oliveira, J., 1995. The Constitution of the Republic of South Africa, 1993, in **Juta's Business Law**, Vol. 3, Part 1

Wessels, J.W., 1908. **History of the Roman-Dutch Law**. Grahamstown: Cape Colony: African Book Company Limited

Wheare, K.C., 1951. **Modern Constitutions**. London: Oxford University Press

Wiechers, M., 1983. The new Constitution: Can it be salvaged? in De Villiers, F. (Ed), 1983. **Bridge or Barricade? The Constitution**. Johannesburg: Jonathan Ball Paperbacks

Wiechers, M., 1985. **Verloren van Themaat : Staatsreg**. Third edition, Durban: Butterworths

Wiechers, M., 1989. **South African Political Terms**. Cape Town: Tafelberg

Woolman, S., 1994. Riding the push-me pull-you: constructing a test that reconciles the conflicting interests which animate the limitation clause, in **South African Journal for Human Rights**, Vol. 10(1)

X v United Kingdom (7992/77) Dacca Reports 14

Yin, R., 1990. **Case study research design and methods**. Revised edition, California: Sage, (Applied social research methods series, Vol. 5)

Zgili v McLeod (1904) 21 Supreme Court Reports (Cape) 150