THE EXTENT TO WHICH REVIEW FOR UNREASONABLENESS IS MEANINGFULLY INCORPORATED IN THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT NO. 3 OF 2000

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ABSTRACT

Prior to the current constitutional dispensation, the development of South African administrative law was restricted by the doctrine of Parliamentary Sovereignty. Even in that comparatively 'hostile' environment, review for unreasonableness developed as an aspect of judicial review, and was applied as a check on the exercise of administrative power in certain circumstances. The principle of proportionality as an aspect of review for unreasonableness also developed during this period. With the advent of the new Constitutional dispensation, the framework within which administrative law in South Africa operates became one governed by Constitutional Supremacy. The Rights to Just Administrative Action, including a right to reasonable administrative action, were entrenched in the Constitution. Review for unreasonableness is an important aspect of administrative law in the present Constitutional dispensation as the mechanism for protecting the Constitutional right to reasonable administrative action. Proportionality is an important principle underlying the Bill of Rights as a whole, and it is an important aspect of the right to reasonable administrative action, and of review for unreasonableness. In early 2000, the Promotion of Administrative Justice Act No. 3 of 2000 ("the PAJA"), was passed by Parliament in fulfillment of the Constitutional requirement to pass legislation to give effect to the constitutional rights to Just Administrative Action. This thesis examines whether or not review for unreasonableness, and proportionality as an aspect of review for unreasonableness, have been meaningfully incorporated in the PAJA, and if they have not been, what potential remedies there might be. This is done by examining the basis of judicial review both before and under the current constitutional dispensation; defining unreasonableness, and proportionality; examining the content of the right to administrative action which is "justifiable in relation to the reasons given" in section 24(d) of the Interim Constitution and the right to reasonable administrative action in terms of section 33(1) of the Final Constitution; examining the application of review for unreasonableness and proportionality by the Courts both before and under the current constitutional dispensation; examining the content of judicial review incorporated in the PAJA and the drafting history of section 6(2) of the PAJA which relates to review for unreasonableness; drawing conclusions regarding whether or not review for unreasonableness and proportionality were meaningfully incorporated in the PAJA; and finally making recommendations with regard to review for unreasonableness and proportionality in light of the provisions of the PAJA.

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PREFACE

My interest in administrative law began in the Administrative Law Course taught by Professor Alistair Lucas at the University of Calgary, Canada in 1996-1997. I discovered a very interesting and intellectually challenging area of law which also had a very important impact in society.

In October 1999, I came to South Africa to work at the Legal Resources Centre in Grahamstown on a six month internship. This proved to be a most remarkable experience, in which I had the opportunity to work with a group of truly amazing and wonderful people, including the then Director, Mark Euijen; Advocate Johan Roos; Attorneys Sarah Sephton and Tabita Qangule; and Fellow Tembeka Ngcukaitobi. The Legal Resources Centre had commenced a litigation campaign against the Eastern Cape Provincial Government regarding the decision of the Government to unlawfully stop paying disability pensions to approximately 120 000 recipients of disability grants throughout the Province. Advocate Mark Euijen and then Professor (now Justice) Clive Plasket were developing a plan of action for a class action against the Provincial Government which ultimately was launched in early 2000 in the High Court as *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (12) BCLR 1322 (E), confirmed on appeal in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2001 (10) BCLR 1039 (SCA). It was at this time that I had the privilege of meeting, and beginning to work with, Justice Plasket, and it was a great experience to be able to have some exposure to this important landmark case which set a significant precedent particularly in relation to standing. It hopefully also will ultimately have the effect of reinstating the disability grants of the people whose grants were cancelled as a result of procedurally unfair administrative action.

From my exposure to this case, as well as many other administrative law cases that the Legal Resources Centre was handling at the time, I came to really appreciate the great importance of administrative law in the lives of people, and to see how, when martialled effectively in strategic litigation, it could be utilized to produce significant positive results for people.

While I was working at the Legal Resources Centre, Parliament was then considering the Promotion of Administrative Justice Bill, and Justice Plasket was preparing submissions to present to the Parliamentary Committee on behalf of the Legal Resources Centre. Justice Plasket requested me to assist in doing some comparative research to utilize in preparing the submissions to the Parliamentary Committee, and this was how I came to be very interested in the Promotion of Administrative Justice Act, and in particular the extent to which review for unreasonableness and proportionality may or may not have been meaningfully incorporated into the Act.

I am extremely honoured and grateful to have been able to work at the Legal Resources Centre among such a talented, dedicated and committed group of people. It was an inspiration which has set me on a very positive course ever since.

I would really like to thank the Plaskets (Justice Plasket, and Adrienne, Timmy and Ruth), the Euijens (Mark Erin, Eva, and Stefan), Johan and Nicky Roos, Sarah Sephton, Tabita Qangule, and Tembeka Ngcukaitobi for all of their encouragement and support, friendship, hospitality and immense kindness while I was in Grahamstown, and every since.

As my internship at the Legal Resources Centre progressed, my interest in administrative law, and particularly the constitutional rights to just administrative action and the Promotion of Administrative Justice Act continued to grow, and my love for South Africa deepened. I was delighted when the opportunity arose to commence my Master's thesis at Rhodes University under the supervision of Justice Plasket, and to be able to do some temporary lecturing. I really learned a great deal from working with the Faculty at Rhodes, and I am particularly grateful to Professor Midgely, the Dean of the Faculty, for offering me the opportunity, and for all of his assistance and support while I was working in the Faculty, as well as with assisting me to commence my thesis. I also would like to thank all of the Faculty Members and the students of the Law Faculty, from whom I learned so much.

In 2001, I had the opportunity to work as a researcher with the Honourable Justice Yvonne Mokgoro of the Constitutional Court. While at the Court, we had an opportunity to hear some cases involving interesting administrative law issues, most particularly the

case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC). I learned a great deal about the constitutional right to just administrative action while working at the Court, as well as about how the Courts consider and approach constitutional cases, which was extremely beneficial. It was a great honour, privilege and a pleasure to work with Justice Mokgoro, as well as with the wonderful and inspiring group of clerks who were working at the Court while I was there. I would really like to thank Justice Mokgoro for all of her kindness and support, and for the opportunity to work with her.

I would like to thank Mr Wandisile wakwa-Mandlana of the Law Faculty of Rhodes University for his kind assistance, support, and encouragement in being a joint-supervisor for this thesis since Justice Plasket was called to the Bench. I would like to pay tribute to Justice Plasket for all of his guidance, assistance, and extremely helpful advice during the preparation of this thesis. I cannot express properly in words what an honour, privilege and pleasure it has been to work with him. It is extremely rare in life to have an opportunity to work with such an extraordinary and exceptional person.

Finally, I wish to thank Nkosana Giyose; my parents, Pam and Larry Bednar; my grandmothers, Elsie Clark and Katherine Bednar; my sister and brother-in-law, Emily and Andy Kolaczek; as well the rest of my family and all of my friends, for their love, support and understanding while I was writing this thesis. This work is dedicated to them.

Jeannine Bednar

Johannesburg

Note: In this thesis, cases are considered which were reported in law reports published up to approximately September 2005.

INTRODUCTION

The entrenchment of constitutional rights to just administrative action in the new constitutional dispensation and the subsequent enactment of the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA') has undoubtedly brought about an important transformation in South African administrative law. Many questions then arise as to how administrative law in the new constitutional regime relates to the previously existing administrative law. Some questions which come to mind include, how does the content of the rights to just administrative action relate to common law principles which were applied in the pre-constitutional period? How does the content of judicial review in the current constitutional regime compare to the judicial review which previously existed? These are important questions which invite detailed and careful consideration, and it is possible that they may only be fully answerable after some time.

The PAJA has also raised some important questions which similarly invite careful examination. In particular, it is important to consider what the relationship is between the PAJA and the right to just administrative action which it was enacted to give effect to. Is the PAJA definitive of the right to just administrative action, or is it possible that there may be some aspects of the right which may not be defined in the Act? Is the Act a codification of the grounds of review which are now available in the current legal regime? Does this mean that any other grounds of review which existed at common law which are not defined in the Act now fall away and are no longer available?

Some of the above questions are important issues which are considered in this thesis. This thesis, which is comprised of seven chapters, focuses on the constitutional right to reasonable administrative action, and review for unreasonableness which is the mechanism by which the right is protected. This thesis asks whether review for unreasonableness, and proportionality, which at common law was an aspect of review for unreasonableness, are meaningfully incorporated in the PAJA. It is submitted that this must be so if the PAJA is to give effect to the right to reasonable administrative action, as it is required to do.

As a starting point to consider whether or not review for unreasonableness and proportionality are meaningfully are incorporated into the PAJA, it is essential to have an understanding of the basis of judicial review and the context in which judicial review

operates, both in the pre-constitutional and the constitutional eras. This is the focus of chapter one of this thesis. The basis of judicial review in the pre-constitutional era is first considered, and in particular, the rule of law, the *ultra vires* doctrine, and the doctrine of parliamentary sovereignty are examined and discussed. The basis of judicial review in the constitutional era is then considered, and the constitutional provisions entrenching the rights to just administrative action in the interim and final constitutions are discussed. The PAJA is then introduced, and in particular s6(2) of the Act, which deals with the grounds of judicial review, is described. The difference between the bases of judicial review in the pre-constitutional and constitutional eras is then considered, which is very relevant in considering how the content of review for unreasonableness may have changed in the constitutional era from the pre-constitutional era. It is finally emphasized that an important principle which underpinned judicial review in the pre-constitutional era, that judicial review is not an appeal, remains an important principle in the constitutional era.

In order to properly consider whether or not review for unreasonableness is meaningfully incorporated into the PAJA, it is vital to have a clear definition of what unreasonableness is, what proportionality is, and a clear understanding of how proportionality is an aspect of review for unreasonableness. This is the concern of chapter 2.

In order to have an understanding of the content of review for unreasonableness, it is important to consider how review for unreasonableness was applied in the pre-constitutional era. This is the focus of chapter 3. It is asserted that review for unreasonableness was a ground of review in the common law which developed in the pre-constitutional era, and it was particularly applied in relation to the review of subordinate legislation. The 'symptomatic' or 'gross' unreasonableness standard of review which the courts applied in relation to review for unreasonableness is considered, and it is noted how in the years just prior to advent of the constitutional era, this standard was being relaxed somewhat in some cases. In chapter 4, the impact of the Constitution on review for unreasonableness is then considered, which is a very important consideration in analyzing whether or not review for unreasonableness has been meaningfully incorporated in the PAJA. It is notable that the Constitution abolished the 'gross unreasonableness' standard of review. It also ended the practice in the pre-constitutional era of different standards of review being applied when subordinate

legislation was reviewed for unreasonableness as opposed to when specific administrative acts were reviewed, which had hindered the development of review for unreasonableness. The important cases which have discussed review for unreasonableness in the constitutional era are considered. It is asserted that the content of the right to reasonable administrative action under the Constitution was being defined by the courts when they defined the ambit of review for unreasonableness in the constitutional era prior to the advent of the PAJA. In order to give meaningful effect to the right to reasonable administrative action in the Constitution, the PAJA should give effect to the content of the right as it was being defined at the time the PAJA came into operation. Otherwise, it could be argued that the PAJA in fact is limiting the right to reasonable administrative action as it existed prior to the advent of the PAJA. Such a limitation of the Constitutional right, if it exists, would then have to be justified in terms of s36 of the Constitution.

In order to consider whether or not proportionality as an aspect of review for unreasonableness is meaningfully incorporated in the PAJA, it is necessary to examine the content of proportionality. This is the concern of chapter five. It is first emphasized that proportionality is a fundamental principle underlying the law in general, and in particular areas such as the criminal law, delict, and most importantly, constitutional law. Proportionality is an important fundamental principle underlying the constitutional regime, as it provides a means of balancing competing rights in the Bill of Rights. It is therefore appropriate that proportionality is an aspect of the right to reasonable administrative action. It is then described how proportionality was in fact an aspect of unreasonableness applied by the courts at common law. Proportionality as an aspect of the right to reasonable administrative action in the Constitution is finally discussed.

In chapter six, the real analysis of the PAJA, and in particular, s6(2)(h) of the PAJA, is engaged in. In order to properly analyze whether or not the PAJA has meaningfully incorporated review for unreasonableness and proportionality, it is vital to properly understand the relationship between the Constitution and the PAJA.

It is an important consideration whether the PAJA constitutes a codification of the grounds of review. If the PAJA is a codification of the grounds of review, then if review for unreasonableness and proportionality are not meaningfully incorporated among the

grounds of review included in the Act, then review for unreasonableness and proportionality might no longer be available as grounds for review, or might only be available in the perhaps limited form in which they are incorporated in the Act. This would again be relevant to the question of whether or not the right to reasonable administrative action was being restricted by the Act, and if so, then it could be argued that it should be open to challenge.

The history of the drafting of s6(2) of the PAJA, which deals with judicial review, is considered and the question of whether or not the PAJA is a codification of the grounds of review is examined. These are relevant considerations, because if it is apparent from the legislative drafting history of s6(2) that the drafters intended that review for unreasonableness should not be incorporated in the form in which it existed in the case law of the constitutional era at the time that the PAJA was being legislated, then it would strengthen a conclusion that perhaps the PAJA does not meaningfully incorporate review for unreasonableness. If it was trying to re-establish the content of review for unreasonableness which existed in the pre-constitutional era, it might potentially be argued that the drafters were attempting to limit the scope of the right to reasonable administrative action, and that this would require justification in terms of s36.

Finally, this thesis endeavours to reach some conclusions as to whether or not unreasonableness and proportionality are meaningfully incorporated in the PAJA, and to make some recommendations as to some possible approaches which might be taken in light of the conclusions. The purpose of the constitutional provision and the interpretation of unreasonableness and proportionality in the constitutional era, both prior to and since the advent of the PAJA, are considered in reaching the conclusions. It is an important consideration whether or not s6(2) of the PAJA could be interpreted in a manner which would meaningfully incorporate unreasonableness and proportionality, as this would potentially avoid a constitutional challenge to the legislation. It is then considered whether or not there may be any bases on which a constitutional challenge could be made to the legislation if it is not possible to interpret s6(2) in a manner such that it meaningfully incorporates unreasonableness and proportionality.

CHAPTER ONE: THE BASIS FOR JUDICIAL REVIEW AND THE CONTEXT IN WHICH JUDICIAL REVIEW OPERATES

1.1. Introduction

In order to examine whether or not review for unreasonableness and proportionality as an aspect of review for unreasonableness are meaningfully incorporated in the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA'), as a starting point, it is critical to have a clear conception of the vital role of judicial review in the present constitutional dispensation. With a good grasp of the role that judicial review generally plays in the legal system, it is then possible to conceptualize the role that review for unreasonableness plays, which is necessary in order for us to delimit the scope and define the content of review for unreasonableness (of which proportionality is a part) which should be incorporated in the PAJA.

In order to conceptualize and understand the role that judicial review plays in the current legal regime, it is useful to have an understanding of the basis for judicial review in the common law prior to the advent of the new constitutional order, because judicial review under the current dispensation evolved from common law review, and is informed by the principles of common law review. With this foundation, it is then possible to examine the foundation for judicial review in the present constitutional system, which is the focus of this chapter, as well as how the Constitution significantly changed the basis for judicial review in the legal system.

The constitutional right to just administrative action is the key feature of administrative law in the constitutional era. Section 24 of the Interim Constitution (s24 of the IC)[1] is first examined, as that formulation of the right to just administrative action was in place until the PAJA was passed by Parliament. Section 33 of the Constitution is then discussed,[2] which specifically incorporates the right to reasonable administrative action. The role of the PAJA and its relationship to s33 of the Constitution is then considered, and judicial review in terms of s6(2) of the PAJA is introduced. Finally, the important distinction

[1] Act 200 of 1993. This document shall be referred to as the Interim Constitution, or by the abbreviation (IC)
[2] The Constitution of the Republic of South Africa, Act 108 of 1996. This document shall consistently be referred to as the Constitution

between review and appeal is discussed, which is an important principle which influenced the development of judicial review under the common law, and which continues to play an important role shaping the development of judicial review in the constitutional era.

1.2 The Role of Judicial Review in the Legal System

As a starting point for examining judicial review for unreasonableness, it is essential to have an understanding of the crucial role of judicial review in the legal system. Baxter has emphasised that judicial review plays a critical role in checking the actions of the executive, in that the courts when conducting judicial review engage in 'external supervision' to ensure that the executive observes the legislature's enactments.[3] The executive must only exercise those powers which the legislature has conferred on it, and must not act outside the scope of those powers (*ultra vires*). Judicial review is, therefore, an important mechanism for ensuring that an appropriate separation of powers is maintained between the different branches of government.

Jowell has asserted that courts when conducting judicial review play a critical role as 'the final arbiters of the limits of state power and of the rights of the individual against the state.'[4] Judicial review is an important mechanism for ensuring that an appropriate relationship is maintained between the individual and the state. It helps to ensure that public power is exercised appropriately, and that the rights of individuals are not affected by the state in a manner that is unlawful, unreasonable, or procedurally unfair. Judicial review played a useful role in protecting individuals' rights at common law in the pre-constitutional era, when there was not a justiciable Bill of Rights. It remains important in the constitutional era, particularly in light of the entrenchment of the right to just administrative action in the Constitution.

While some critics seem to view judicial review as being somehow anathema to the development of an efficient, effective, and creative public administration, Jowell has argued that in fact, judicial review plays a useful role in promoting proper administrative decision-making. By promoting public scrutiny of administrative decision-making, and

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[3] Baxter, 300
[4] Jowell 'Judicial Review of the Substance of Official Decisions' 1993 *Acta Juridica* 117, 118

requiring that administrative decisions are made rationally and fairly, the rationality and legitimacy of the decision-making process is strengthened.[5]

Commentators and the courts have frequently stressed the necessity of incorporating a significant degree of deference within the conduct of judicial review. Baxter, for example, has highlighted that the process of judicial review must particularly take cognizance of the consideration that a significant degree of mutual deference must exist between the different branches of government in order for an appropriate separation of powers to be maintained and for government to function truly effectively.[6] Jowell has cautioned that in engaging in judicial review, the courts must be careful not to usurp government's policy-making powers, and in particular not to engage in 'utilitarian calculations about social or economic goals.'[7]

Judicial review, therefore, is able to play an important role in maintaining an appropriate separation of powers and ensuring that the rights of individuals are appropriately protected in relation to the state, and also in developing an efficient, effective and creative administration. However, in order for judicial review to properly fulfil these roles, it is necessary for the courts to observe a significant degree of deference in the exercise of judicial review.

1.3 The Foundations of Judicial Review in the Common Law Prior to the Present Constitutional Dispensation

In order to properly examine and understand the content of judicial review, and in particular review for unreasonableness, under the current constitutional regime, it is essential first to have an understanding of the basis of judicial review in general, and of review for unreasonableness in particular, at common law prior to the advent of the present constitutional dispensation.

At common law, the fundamental principles which were cited by the courts and commentators as informing the exercise of judicial review were the doctrine of parliamentary sovereignty, the rule of law and the *ultra vires* doctrine. De Smith, Woolf

[5] Jowell, 118
[6] Baxter, 300

and Jowell have characterized these doctrines as being among the 'common law constitutional principles'[8] which were enunciated in English common law, and which were important in maintaining the separation of powers and providing some protection of the rights of individuals against the power of the state. These principles also came to be applied by South African courts, as the development of administrative law in South Africa was influenced by developments in England, and the courts frequently sought guidance from the English law of judicial review in developing the South African common law jurisprudence of judicial review.[9] The Constitutional Court, however, has noted that the doctrine of parliamentary sovereignty at common law meant that these 'fundamental rights' could be restricted or even excluded by legislation at Parliament's will, and they often were. [10] Judicial review did, however, serve an important purpose of enabling courts to place some constraints upon the exercise of public power.

1.3.1 Parliamentary Sovereignty

At common law, the doctrine of parliamentary sovereignty was a fundamental principle which defined the scope of judicial review.[11] In terms of this doctrine, legislation enacted by Parliament has the highest authority.[12] Parliament may enact any legislation that it sees fit, even though it might be terribly unjust or unreasonable.[13] Courts are bound to apply Parliament's enactments, and the role of the courts is simply to interpret legislation. In conducting judicial review, courts are only entitled to ask, '[h]as Parliament authorized this delegate to do this action in this manner?'[14] The courts must respect the will of the legislature and the powers that the legislature has delegated to administrative decision-makers. The doctrine of parliamentary sovereignty very narrowly circumscribed the scope of judicial review, and resulted in a significant inherent degree of judicial deference being present within the conduct of judicial review in general, and within review for unreasonableness in particular.

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[7] Jowell, 118
[8] De Smith, Woolf and Jowell, 14-15
[9] See Corbett CJ in *Du Prees and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (SCA), 231Hff; 1997 (4) BCLR 531ff
[10] *Pharmaceutical Manufacturers of SA; In Re: Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC)
[11] Jones and de Villars,16
[12] De Smith, Woolf and Jowell, 14-15
[13] Mahomed 'The impact of a Bill of Rights on Law and Practice in South Africa' June 1993 *De Rebus* 460, 460
[14] Jones and de Villars, 23

1.3.2 The Rule of Law and the Doctrine of Legality

In terms of the principle of the rule of law, government may only act in accordance with general laws which are already in existence, and which were enacted by a representative legislature (Parliament). This means that government cannot act in accordance with laws that are arbitrary, which do not apply generally (for example, a law which only applies to a single person), or which were not passed by a representative legislature. The courts may adjudicate disputes between individuals and government regarding whether or not action by the government was legal. In such cases, the government is not granted any different status as a party before the court than the individual. Therefore, both individuals and government are bound by the rule of law, and must adhere to the law. Dicey viewed the rule of law as being an important guarantee of individual freedom.[15]

The doctrine of legality, which arises out of the rule of law, emphasizes that all power has legal limits, and that no power can be exercised which is not conferred by law.[16] According to Wade and Forsyth, when conducting judicial review, the courts are involved in defining those legal limits, and they must balance the need for the executive to be able to act efficiently, on the one hand, versus the need to protect individuals against the exercise of government power, on the other.[17] The rule of law, therefore, acts as a constraint upon the exercise of all power. De Smith, Woolf and Jowell have argued that the rule of law is the justification for the requirements which are sought to be upheld by judicial review that administrative officials must faithfully execute the legislation which has been enacted by Parliament, and that power must not be arbitrarily exercised. It is a justification for much of judicial review in general.[18]

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[15] Dicey, *Introduction to the Study of the Law of the Constitution* (1885) 10 ed (1959),183-205, cited in Hoexter and Lyster, 69
[16] Hoexter and Lyster, 83-84
[17] Wade and Forsyth, 379
[18] De Smith, Woolf and Jowell, 14-15

1.3.3 The *Ultra Vires* Doctrine

At common law, a basis for judicial review which was commonly advanced by commentators and the courts was the *ultra vires* doctrine.[19] It was also specifically cited as a basis for review for unreasonableness.[20] This doctrine holds that Parliament confers powers on public authorities, and when it does so, it sets limits for the exercise of those powers. The appropriate role of the courts is to ensure that Parliament's enactments are properly carried out, and that public bodies do not act *ultra vires* (beyond the scope of the powers conferred on them by Parliament). This doctrine is very closely linked to the rule of law, because the rule of law requires that public power may only be exercised in accordance with the law, while the *ultra vires* doctrine provides that public authorities can only act in accordance with those powers which have been conferred on them by Parliament in its enactments. In ensuring that public authorities do not act *ultra vires*, the courts are seeking to uphold the rule of law. This doctrine can also be viewed as being the 'flip side' of the doctrine of legality, because at common law, the content of the doctrine of legality (what administrators are empowered to do) was generally inferred from what the courts had held was *ultra vires* for administrators (what administrators must not do).[21] Judicial review was traditionally viewed as being limited to the power of the courts to examine whether or not the administrator acted within the powers which were delegated to him or her by legislation. The focus of judicial review was on whether the administrator had jurisdiction to act, and on the application of the *ultra vires* doctrine to the particular facts of the matter.[22] This involves determining the scope of the powers that the legislature granted to the particular administrator.[23]

The application of the *ultra vires* doctrine is justified on the basis that in doing so, the court is only applying the law of the legislature,[24] and ensuring that the rule of law is adhered to. The courts are not interfering in the appropriate spheres of the executive or

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[19] Jones and de Villars, 8
[20] Wade and Forsyth, 380-381; See, for example, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), 234; *Kruse v Johnson* [1898] 2 QB 91, 100; *R v St Pancras Vestry* (1890) 24 QBD 371, 375; *R v Board of Education* [1910] 2 KB 165, 175; *Williams v Giddy* [1911] AC 381, 386; *R v Port of London Authority ex p Kynoch* [1919] 1 KB 176, 183; Baxter, 308-309
[21] Baxter, 301
[22] Jones and de Villars, 7
[23] At 16
[24] Baxter, 303

the legislature. It is unobjectionable for the courts to apply the *ultra vires* doctrine, and it is in fact a quite appropriate role for the courts.[25]

It has been argued by some commentators such as Jowell that the *ultra vires* doctrine provides an artificial and strained basis for judicial review, which is rather incomplete. The framework of the *ultra vires* doctrine does not easily accommodate all types of administrative action which are problematic. The *ultra vires* doctrine is very closely linked with the intention of the legislature, as the courts are supposedly examining whether or not the administrative action under scrutiny falls within the ambit of the powers which were delegated by the legislature. The *ultra vires* doctrine, therefore, does not really address the exercise of powers which are not granted by statute, such as prerogative powers, decisions made by private, non-statutory bodies, or where there are contractual powers involved.[26]

This debate about the justification of judicial review on the basis of the *ultra vires* doctrine is fortunately now essentially resolved in South African law, with the advent of the Constitution, and a legal regime based on constitutional supremacy.[27] It is, however, relevant to understand the *ultra vires* doctrine and be aware that it was advanced as a basis for judicial review at common law.

1.4 Judicial Review Under the Constitution

The advent of the present constitutional dispensation altered the basis for judicial review, and had a significant impact on the role of judicial review in the legal system. The importance and scope of the role of judicial review has increased under the Constitution. The Constitutional Court, in the case of *Pharmaceutical Manufacturers of SA; In Re: Ex Parte Application of the President of the Republic of South Africa*,[28] noted that in the present constitutional regime, the doctrine of parliamentary supremacy has been expressly rejected, while some of the other common-law constitutional principles have been incorporated in the Constitution (in particular, the rule of law), and have in fact been given greater substance than they previously had at common law. The rule of law

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[25] *Central Road Board v Meintjes* (1855) 2 Searle 165, 175-176, cited in Baxter, 303
[26] Jowell 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' 1999 *Public Law* 448, 449; Hoexter and Lyster, 79
[27] Hoexter and Lyster, 80

was expressly stated in the preamble of the Constitution to be one of the foundational values of the constitutional regime, a Bill of Rights was included in the Constitution which entrenched fundamental rights, and courts were empowered through express provisions in the Constitution to conduct judicial review of all legislation and conduct inconsistent with the Constitution in order to control the exercise of public power (including the right to just administrative action in section 33).[29] The control of public power is now regulated by the Constitution.[30]

The Constitutional Court has emphasized that the central principles which form the basis of judicial review in the present constitutional regime are the doctrines of constitutional supremacy and of legality. The exercise of all public power must now comply with these doctrines.[31]

1.4.1 Constitutional Supremacy

The doctrine of constitutional supremacy is enunciated in s2 of the Constitution, which states that, 'the Constitution is the supreme law of the Republic, and law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' Section 44(4) of the Constitution also provides that in the exercise of its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution.' Therefore, the enactments of the legislature and all actions of the executive are subject to the requirements of the Constitution.

The basis for judicial review now originates in the Constitution, and not in the application of the common law constitutional principles. The Constitutional Court has emphasized clearly that the common-law constitutional principles 'have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.'[32] Therefore, there is not a system

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[28] *Pharmaceutical Manufacturers,* supra
[29] At para 40; See s1(c) dealing with the incorporation of the rule of law, and also s172(1) which states that a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency
[30] At para 33
[31] At para 20
[32] At para 33

of common law judicial review which exists independently of constitutional judicial review. There is only a single system of judicial review which gains its force from the Constitution.

1.4.2 The Doctrine of Legality

In a constitutional regime, the doctrine of legality, which is an aspect of the rule of law, holds that there are legal limits to all public power, and that no power can be exercised which is not conferred by law. The courts engage in judicial review of the legality of the activities of public authorities. [33] The doctrine of legality under the current constitutional regime is an aspect of the rule of law, just as the common law doctrine of legality was in the pre-constitutional era.[34] The important difference between the content of the doctrine of legality at common law and in the constitutional era is that in the constitutional era, legality is particularly defined in terms of the Constitution, while at common law, it was only defined in terms of the enactments of Parliament.

According to Hoexter and Lyster, in the constitutional era, legality has two meanings, which overlap to a great extent. The first narrower meaning relates particularly to administrative action. Section 33 of the Constitution requires specifically that administrators must act lawfully, reasonably, and procedurally fairly, and that in some circumstances they must provide reasons for their decisions. Section 6 of the PAJA sets out a list of grounds of review, which specifies some of the content of legality.[35]

The second, broader meaning of legality relates generally to the exercise of all public power. The doctrine of legality was an implied provision in the Interim Constitution, and it has been explicitly declared to be one of the foundational values of the constitutional order, in s1(c) of the Constitution.[36] The courts are gradually fleshing out the content of legality in greater detail in the case law. [37]

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[33] Boulle, Harris, and Hoexter, *Constitutional and Administrative Law: Basic Principles* Cape Town, Juta: 1989, 98
[34] Hoexter and Lyster, 84
[35] At 83
[36] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers,* supra
[37] Hoexter and Lyster, 83-84

1.4.3 Rationality

A fundamental principle which underpins the constitutional regime is the principle of rationality. Rationality, at minimum, requires that a decision must be rationally related to the purpose for which the power was given. If it is not, the decision would be arbitrary and inconsistent with the requirement of rationality. This test for rationality involves an objective enquiry.[38]

The reason why judicial review has been given an important role in the constitutional regime is to ensure rationality in the exercise of public power, and to prevent arbitrariness in the exercise of power, which was a characteristic of the pre-constitutional legal order. Arbitrariness is inconsistent with the doctrine of legality and the other fundamental principles of a constitutional state.[39] This was emphasized very eloquently in *S v Makwanyane*[40] by Ackerman J. as follows:

> 'In reaction to our past, the concept and values of the constitutional state, of the 'regstaat', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble. The detailed enumeration and description in s33(1) of the criteria which must be met before the legislature can limit a right entrenched in Chapter 3 of the Constitution emphasises the importance, in our new constitutional state, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution.'

In the *Pharmaceutical Manufacturers* case, the Constitutional Court made it very clear that all actions of the executive, even actions of the President, are subject to judicial

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[38] *Pharmaceutical Manufacturers,* supra, paras 85-86
[39] *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759, (CC), para 25; *Pharmaceutical Manufacturers,* supra, paras 85-86
[40] 1995 (3) SA 391 (CC); 1995 (6) BCLR 665, para 156

scrutiny for rationality. The Court reviewed the Actions of the President in that case, and concluded that the President's decision to bring the Act into operation was not objectively rational. Even though the President acted in good faith, that did not make the action beyond the scope of judicial review. The Court then described the requirement of rationality in the following terms:[41]

> 'What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do.
>
> Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision.'

Rationality is of fundamental importance in our constitutional regime, and it is important to bear in mind that rationality is an objective, and a subjective standard, which incorporates a significant degree of judicial deference within it.

1.4.4 Section 24 of the Interim Constitution

Review for unreasonableness in administrative law was incorporated into the constitutional regime through s24(d) of the Interim Constitution (s24(d) of the IC) and s33 of the Constitution. Section the of IC (as incorporated in item 23 of Schedule 6 of the Constitution) provides that:

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[41] *Pharmaceutical Manufacturers,* supra, 273-274, paras 89-90

'Every person has the right to-

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'

Of particular interest in relation to the consideration of review for unreasonableness in the Constitutional era is subsection (d), which provides a right to administrative action 'which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.' The interpretation of the content of this provision by commentators and the courts will be discussed in detail in chapter 3.

1.4.5 Section 33 of the Constitution

Section 33 of the Constitution states that:

'1) Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair;

2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons; and

3) National legislation must be enacted to give effect to these rights and must:

a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

b) Impose a duty on the state to give effect to the rights in sub-sections 1 and 2; and

c) Promote an efficient administration.'

Item 23(1) of Schedule 6 of the Constitution provided that the legislation which Parliament was required to pass in terms of s33(3) of the Constitution must be passed within three years of the date on which the Constitution came into effect (which was 4 February 1997). Item 23(2) provided that in the interim period until the legislation was passed, in effect, s24 of the IC continued to apply (the wording of the provision included

in item 23(2) was only modified very slightly). Item 23(3) provided that s33(3) of the Constitution would lapse if the legislation was not enacted within the required timeframe. The PAJA was eventually passed by Parliament on 3 February 2000. It was brought into force on 30 November 2000, with the exception of ss4 and 10.

The entrenchment of the right to just administrative action in the Constitution has 'constitutionalised' judicial review.[42] The sources of jurisdiction for judicial review are now the following, in the order on which they would potentially be relied upon:

(1) the PAJA;
(2) s33 of the Constitution;
(3) the constitutional principle of legality; and
(4) special statutory review.[43]

1.4.6 The PAJA

The PAJA is now the main pathway to seek judicial review in the constitutional era. The purpose of the PAJA is to give effect to the right to just administrative action in s33 of the Constitution, and to fulfill the injunction contained in s33(3).

1.4.7 Section 6(2) of the PAJA

Section 6(2) of the PAJA sets out quite a lengthy list of grounds of review. Many of the provisions of s6(2) incorporate various grounds of review which existed at common law. This section, and in particular the provisions that are relevant to examine when determining whether review for unreasonableness and proportionality are meaningfully incorporated in the PAJA, is discussed in more detail in chapter 6.

1.5 The Important Distinction between Review and Appeal

When considering judicial review, it is important to understand the important distinction between an appeal and review. In an appeal, the case is actually reheard before a new decision-maker, who may end up reaching a different decision in the matter than the initial decision-maker did. The new decision-maker is entitled to examine the merits of the case in coming to a decision in the matter. In a review, on the other hand, the case

[42] Hoexter and Lyster, 86
[43] At 87

is not being reheard before a new decision-maker. The court does not examine whether the decision was right or wrong, but whether the manner in which the decision which was reached was proper. It has traditionally been said that in conducting judicial review, the court is concerned with the procedure that was followed in reaching the decision, and not with the merits of the decision.[44]

The distinction between review and appeal has historically been a very important principle in relation to the conduct of judicial review, and it continues to play an important role in judicial review in the constitutional era. It assists in maintaining an appropriate separation of powers between the executive and the judiciary. This principle infuses a significant degree of deference into the conduct of judicial review, and into review for unreasonableness in particular. The courts are enjoined to bear in mind that judicial review is not the same as an appeal. In general, the courts do not have the right to substitute their view regarding the merits of the matter for a lawful decision taken by an administrator.[45] The distinction between review and appeal, and the fundamental importance of maintaining this distinction, was eloquently stated by Lord Brightman in the case of *Chief Constable of the North Wales Police v Evans*[46] as follows:

> 'Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.'

The distinction between appeal and review may not always be very clear. In some circumstances, review may necessarily involve some consideration of the merits of the decision. This is an issue which has particularly arisen in relation to review for unreasonableness,[47] and it has had a very important influence on development of review for unreasonableness, both at common law, and in the constitutional era. It has been the subject of substantial discussion by the courts and commentators, and this will be discussed in detail in chapter 3.

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[44] At 64
[45] Jones and de Villars, 4, fn3
[46] [1982] 3 All ER 141,154d
[47] Hoexter and Lyster, 65

1.6 Conclusion

At common law, the major principles which were frequently cited as providing the foundation for judicial review were the doctrine of parliamentary sovereignty, the rule of law and the associated principle of legality (as it was formulated in terms of the common law), and the *ultra vires* doctrine. The doctrine of parliamentary sovereignty played a very important role in delineating the scope of judicial review, and it restricted the development of judicial review. With the advent of the constitutional era, the foundation of judicial review was significantly altered. The doctrine of parliamentary sovereignty no longer was applicable, and it was replaced by the doctrine of constitutional supremacy. The doctrine of legality continued to play an important role, although the main source of authority now was the Constitution, and not simply the enactments of Parliament as it had been at common law.

CHAPTER TWO: DEFINING UNREASONABLENESS, AND PROPORTIONALITY AS AN ASPECT OF REVIEW FOR UNREASONABLENESS

2.1 Introduction

In order to determine whether or not review for unreasonableness and proportionality as an aspect of review for unreasonableness are meaningfully given effect to in the PAJA, it is necessary to first have a sound understanding of what constitutes unreasonableness and the concept of proportionality, and of how proportionality is an important aspect of unreasonableness. In this chapter, what constitutes unreasonableness is first discussed. Then the concept of proportionality, and how proportionality is an aspect of review for unreasonableness are examined.

2.2 Review for Unreasonableness

People use the term 'unreasonable' frequently, and tend to believe that they have a conception from their experience as to what unreasonableness means. However, it is necessary to examine what unreasonableness means when used as a legal term. One discovers that in legal terms, unreasonableness is a rather complex concept which is not easy to define concisely.

Diplock LJ, in the English House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service,* [1] classified the grounds of review under three heads: illegality, irrationality, and procedural impropriety. With respect to irrationality, Lord Diplock was referring to *Wednesbury* unreasonableness,[2] which is perhaps the best known formulation of unreasonableness. This formulation of unreasonableness was propounded by Lord Greene MR in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.[3] He discussed the various aspects of unreasonableness as follows:

> 'Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense... For instance, a person entrusted with a discretion must, so to speak, direct

[1] [1984] 3 All ER 935 (HL), 950 h-i
[2] At 951 a-b
[3] [1948] 1 KB 223 (CA), 229

> himself properly in law. He must call his attention to the matters which he is bound to consider. If he does not obey these rules, he may truly be said, and often is said, to be acting 'unreasonably.' Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v Poole Corporation* [1926] Ch 66,90, 91, gave the example of the red-haired schoolteacher, dismissed because she had red hair. This is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.'

Lord Greene MR set out a standard of review which has had a very important impact on the development of review for unreasonableness when he concluded:[4]

> 'It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere… but to prove a case of that kind would require something overwhelming'.

The description of unreasonableness above is quite lengthy and complex, and it is helpful to try to unpack it to understand what types of administrative action would classify as being unreasonable. According to Jowell, *Wednesbury* unreasonableness as described above embraces three categories of decisions: [5]

(a) Where there has been an extreme defect in the decision-making process. The examination by the courts in this type of case focuses upon the reasoning or justification advanced for the decision, and upon the quality of the argument made in support of the decision. Decisions that would fall under this category would include: decisions taken in bad faith; decisions that were based upon considerations that should not have been taken into account; decisions that were taken without taking into account considerations that should have been taken into account; decisions where a consideration was given inappropriate weight (either too much or too little weight); and irrational decisions, which were not justified by adequate evidence or reasoning.

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[4] Ibid
[5] Jowell 'Judicial Review of the Substance of Official Decisions' 1993 *Acta Juridica* 117, 120

(b) Where the decision was taken in violation of certain common law principles governing the exercise of official power. Unless the legislature has explicitly expressed a contrary intention, these common law principles apply even where a very broad discretion has been conferred. Examples of such common law principles are the principles of equality and of legal certainty.

(c) Where the decision is oppressive, and has an unnecessarily onerous impact on affected individuals, or where the means employed (even if the objective sought to be achieved is lawful) produce excessive or disproportionate results.

The *Wednesbury* formulation of unreasonableness is not the only formulation of unreasonableness. In order to gain a more comprehensive understanding of the concept of unreasonableness, it is relevant to consider another formulation of unreasonableness which was applied at common law in the pre-constitutional era in cases involving the review of subordinate legislation. This formulation of unreasonableness was described in the famous English case of *Kruse v Johnson,*[6] where Lord Russell of Killowen discussed unreasonableness as follows:

> '....I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws... as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification which some judges may think ought to be there'.

While the wording of this formulation of unreasonableness is somewhat different than the *Wednesbury* formulation, in fact, the aspects of unreasonableness described in the *Kruse v Johnson* formulation can be included in the same three categories described by

Jowell that were noted above. Decisions that are 'partial and unequal in their treatment' would fall under category (b) — decisions taken in violation of common law principles governing the exercise of official power, as it would be in violation of the common law principle of equality. Decisions that 'disclose bad faith' would fall under category (a) — decisions where there has been an extreme defect in the decision-making process. Decisions which are 'manifestly unjust' or which 'involve such gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men' would clearly fall under category (c).

The *Wednesbury* and *Kruse v Johnson* formulations of unreasonableness as described above clearly incorporate a significant degree of deference within them. They indicate that an approach of significant judicial restraint is appropriate when courts consider issues that come closer to the 'merits' of the exercise of the discretion, as opposed to cases which simply require an interpretation of the empowering statute to determine the scope of the discretion conferred and whether the decision-maker exceeded it.[7] Judges should not lightly interfere with the substance of an administrative decision, and certainly not simply because they would have decided the matter differently. The distinction between review and appeal is to be carefully maintained.[8]

Baxter has categorized review for unreasonableness into three categories, as follows:

(i) Basis: If a decision is entirely without foundation, because there is either no evidence or no evidence on which the decision could *reasonably* have been reached on that basis.[9] This category would also include decisions that were based upon considerations that should not have been taken into account (because they were irrelevant), and decisions that were taken without taking into account considerations that should have been taken into account.[10]

(ii) Purpose and Motive: If a public authority uses its powers dishonestly, or for purposes that were not contemplated by the empowering legislation.[11]

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[6] [1898] 2 QB 91, 99-100
[7] Evans, Janisch, Mullan and Risk, 1049
[8] Jowell, 120
[9] *Theron v Ring van Wellington van die NG Sendingkerk in Sud-Afrika* 1976 (2) SA 1 (A); Baxter, 497-499
[10] Baxter, 496
[11] At 497

(iii) Effect: Decisions that would result in harsh, arbitrary, unjust or uncertain consequences.

Category (i) above would seem to correlate to cases where there has been an extreme defect in the decision making process (category (a) in Jowell's analysis of unreasonableness). Category (ii) also seems to correlate to Jowell's category (a), and possibly in some cases it might also overlap with Jowell's category (b) (where there has been a violation of common law principles). Category (iii) correlates with Jowell's category (c) (where the decision is oppressive and has an unnecessarily onerous impact on affected individuals, or where the means employed produce excessive or disproportionate results).

From the above, it is apparent that unreasonableness embraces quite a wide range of circumstances. It is relevant to bear in mind that all of these aspects of unreasonableness were formulated in a rather *ad hoc* manner in the case law over a lengthy period of time, and in a wide range of circumstances. It is also possible that a particular case may be able to be characterized as involving more than one of these aspects of unreasonableness.[12] Ultimately, Baxter asserts that unreasonableness 'embraces all of the principles upon which a decision or act will be regarded as an abuse of discretion.'[13] By looking and a couple of different formulations of unreasonableness and some different ways of categorizing the various aspects of unreasonableness, it is possible to gain an understanding of some of the aspects of unreasonableness which have been identified, and of the scope and content of unreasonableness.

2.3 Proportionality

The principle of proportionality has been most extensively discussed and described in European administrative law. It is most highly developed in German and French administrative law, and it is also a part of European Community law. [14] The principle first developed in order to control excessive police action, but over time it evolved and came to be applied in relation to all kinds of administrative action, including, for example, the

[12] At 489-490
[13] At 490

control of migration and the regulation of trade.[15] In European law, it has been applied to inhibit the interference with freedom of action more than is necessary for the public interest.[16] Proportionality has been summarized by the phrase, 'a sledgehammer should not be used to crack a nut'.[17]

The principle of proportionality has been most extensively defined in German administrative law, where it is called *Verhältnismäßigkeit*. Proportionality is characterized as having three requirements, of suitability (*Geeignetheit*), necessity (*Erforderlichkeit*) and proportionality in the narrow sense (*Verhältnismäßigkeit in engeren Sinne*).[18] An act by an administrative authority must satisfy all three of these requirements in order to be consistent with the principle of proportionality.

The requirement of suitability means that when an administrative authority seeks to achieve a particular objective, from all of the possible means which could be used to achieve the desired objective, it must only select a means which will actually be suitable to achieve that objective. This involves an objective determination.[19] If the measure would not in fact actually be able to achieve the desired objective, then it would not meet the requirement of suitability.

The requirement of necessity entails that among the possible suitable means to achieve the objective, the administrative authority must select the one which causes the least harm to the individual(s) affected. This would involve a consideration of the disadvantages of or harm caused by each of the possible suitable measures, and then selecting the measure which achieves the desired objective while causing the least harm.[20]

The requirement of proportionality in the narrow sense means that there must be an appropriate balance between the advantages and the disadvantages or harm caused by the particular measure which is to be taken by the administrative authority. The injury

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[14] At 528
[15] Ibid
[16] Jowell, 126
[17] *S v Manamela* 2000 (3) SA 1 (CC), para 34
[18] De Ville 'Proportionality as a requirement of the legality in administrative law in terms of the new Constitution' 1994 *SA Public Law* 360, 361
[19] De Ville, 366
[20] Ibid

caused to the affected individual(s) by the measure must not be out of proportion to the advantages to be produced by the measure. There must be a proportionality between ends and means. This involves a consideration of the disadvantages and advantages produced by the measure, and weighing the advantages and disadvantages. The different rights and interests involved are considered, as well as the practical effects of the measure on the different interests involved.[21]

Baxter has noted that proportionality can be used in two different senses: a wider sense, and a narrower sense. In the wider sense, it emphasizes the requirements of reasonableness, fairness, and good administration. In the narrower sense, it emphasizes the principle that action by public authorities should not infringe fundamental individual rights beyond the extent necessary to achieve the desired objective which is sought to be achieved in the public interest. The action should bear a reasonable relationship to the purpose for which the power to act was conferred on the administrative authority.

Jowell and Lester have described proportionality in the following terms:[22]

> '…proportionality is a principle that requires a reasonable relation between a decision, its objectives and the circumstances of a given case. It requires the pursuit of legitimate ends by means that are not oppressively excessive. It looks therefore largely to the substance of decisions rather than the way in which they are reached, but it also requires the decision-maker not manifestly to ignore significant alternatives or interests.'

2.4 Proportionality as an Aspect of Unreasonableness

With respect to category (c) described by Jowell above (where the decision is oppressive, and has an unnecessarily onerous impact on affected individuals, or where the means employed, even though the objective sought to be achieved is lawful, produce excessive or disproportionate results), the analysis of the court when conducting review for unreasonableness primarily focuses on the impact of the decision on the affected person. The impact of the decision on the affected individual is often said to be 'disproportionate'. The nature of the decision and the purpose of the power

[21] At 366-367

that was exercised by the decision maker are considered. The principle of proportionality is involved in this scrutiny. [23] This category of unreasonableness has also sometimes been called 'irrationality' or 'substantive unreasonableness'. It is important to bear in mind that although 'irrationality' is sometimes used to refer to unreasonableness in general, in fact, irrationality is only one aspect of unreasonableness.[24] This 'substantive' aspect of unreasonableness relates to the *Wednesbury* standard where a decision may be challenged if it is so unreasonable that no reasonable public authority could have made it,[25] or the decision is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided, could have arrived at it'.[26] This usage of the terms 'proportionality' and 'substantive unreasonableness' in relation to the same category of decisions is consistent with the approach that proportionality is an aspect of unreasonableness.

Baxter asserts that the principle of proportionality is also implicit in the principles relating to the review of discretionary administrative action in English law.[27] In a similar vein, Jowell notes that proportionality may provide an implicit explanation in many cases where the English courts have exercised review in terms of *Wednesbury* unreasonableness, particularly in those cases where the court invalidated the administrative decision because there had been an improper balance of the relevant considerations or the effects of the decision were unreasonably oppressive.[28]

Baxter suggests that the principle of proportionality is compatible with both English and South African administrative law, and that it is a facet of review for unreasonableness. He asserts that if the Courts confine themselves to intervention where the degree of action is so excessive that no reasonable man would consider it to be appropriate, disproportionality as a ground of review would not constitute a departure from the normal principles of review.[29]

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[22] Jowell and Lester 'Proportionality: neither novel nor dangerous' *New directions in judicial review*- reprinted from *Current Legal Problems* 1988, 67
[23] Jowell,124-125
[24] De Smith, Woolf, and Jowell, 559, para 13-019
[25] Craig, 404
[26] *Council of Civil Service Unions*, supra, 951 a-b
[27] Baxter, 528
[28] Jowell, 126
[29] Baxter, 529

2.5 Conclusion

A sense of the scope and content of the concept of unreasonableness can be gained from an examination of various formulations and classifications of unreasonableness. Unreasonableness encompasses the all of the principles which at common law were considered to be an abuse of discretion. The most commonly cited formulation of unreasonableness is *Wednesbury* unreasonableness, which says that a decision would be reviewable if it 'is so unreasonable that no reasonable authority could ever have come to it'. [30]

The concept of proportionality is an important principle for balancing interests, which in administrative law is used to balance the effects of an administrative decision on individuals, against the objective sought to be achieved, and the means used to achieve the objective. It seeks to protect individuals from being harmed by oppressive or onerous decisions which have an excessive impact on them. An examination of various classifications of unreasonableness reveals that proportionality is an aspect of unreasonableness at common law.

[30] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation,* supra, 229

CHAPTER 3: REVIEW FOR UNREASONABLENESS IN THE PRE-CONSTITUTIONAL ERA

3.1 Introduction

In order to properly assess whether review for unreasonableness and the principle of proportionality have been incorporated into the PAJA, it is necessary to understand the content that review for unreasonableness was given by the South African courts in the pre-constitutional era. That is the concern of this chapter.

3.2 The Early Case Law

Review for unreasonableness has been conducted in South Africa for a lengthy period, as a number of early judicial *dicta* suggest.[1] Courts have examined the decision-making process, and have held decision-makers to account for unreasonable decisions. Courts have been willing to review decisions where irrelevant considerations have been taken into account, or where there has been a failure to take into account relevant considerations.

In *Mail Trotter and Co v Licencing Board, Escourt*,[2] the court examined a decision of the Liquor Licencing Board, and Bale CJ stated that the 'reasons of the Board do not commend themselves to us. They have decided not upon the facts of the case, but upon what they conceive to be the law of the case, and I think they have decided wrongly upon the law.'[3] He identified a number of factors which the board would have been required to take into account, and others which it was entitled to consider, in reaching a decision. Bale CJ concluded that not all of the relevant factors were considered, and ordered that the case be referred back to the licencing authority, 'in order that they might decide it upon the facts, and with regard to the equities of the case, their reasons being, in my opinion, entirely wrong.'[4]

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[1] See, for example, *Hildebrandt v The Attorney-General* (1897) 4 OR 120; *Homberger v the Mining Commissioner of Johannesburg* (1897) 4 OR 19; *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111; Baxter, 477

[2] *Mail, Trotter & Co v Licensing Board, Estcourt* (1903) 24 NLR 447

[3] At 452

[4] At 453

In *Ovenstone v Durban Licencing Board*,[5] the Licencing Board had rejected an application based upon the manner in which the applicant had conducted his business in the past. The court emphasized that-

> '[t]he Board is not a judicial but an administrative body, and we should be very slow in interfering with their exercise of it. But this is a discretion which has to be exercised reasonably and not capriciously (*Mail, Trotter & Co v Licencing Board, Estcourt* 24 NLR 447), but 'fairly and justly' (*Downard v Durban Licencing Board* 25 NLR 15).'

The court went on to state that—

> 'although we feel reluctance in interfering with their decision we cannot help thinking that they ought not to have refused a renewal of the license on the grounds stated in their reasons or on any other grounds deducible from the evidence before them. Whatever may be sufficient grounds for a Licensing Board in its discretion to refuse a license we cannot think that the Legislature ever contemplated that it would refuse a license merely upon the ground that the business had been carried on in a manner sanctioned by the Statute.'[6]

The court apparently concluded that the discretion had not been exercised reasonably.

3.3 'Gross' or 'Symptomatic' Unreasonableness

For many years, apart from in cases involving the review of subordinate legislation, the courts adopted the very narrow grounds for conducting review for unreasonableness set out in the decision in *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa), Ltd*[7] That case involved a challenge to a decision by the Minister of Mines and Industries,[8] which was argued to be unreasonable. Stratford JA rejected this argument, and in doing so set out what came to be known as the 'symptomatic'[9] or 'gross' unreasonableness standard of review as follows:

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[5] *Ovenstone v Durban Licensing Board* (1913) 34 NLR 104
[6] At 110-111
[7] 1928 AD 220
[8] At 222-223
[9] Taitz 'But 'Twas a Famous Victory (or *Theron en andere v Ring van Wellington NG Sendingskerk in Suid-Afrika* 1976(2) SA 1 (AD) considered critically)' 1978 *Acta Juridica* 109, 111

> 'In my judgment, however, the unreasonableness of the Minister by itself affords no grounds for a court's interference with the exercise of his discretion. The only assumption in the Act is that the Minister, whoever he may be, and whatsoever mental type he may be, shall honestly bring his mind to bear upon the real question he has to decide. There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true, the word is often used in cases on the subject, but nowhere has it been held that unreasonableness is a sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of *mala fides* or ulterior motive,' see *African Realty Trust v Johannesburg Municipality* (1906 TH 179) or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter.'

This test for review was extremely strict, as review for unreasonableness was essentially regarded as not being a ground of review in itself. Unreasonableness would only be relevant if it was 'so gross' as to be 'symptomatic' of another ground of review, such as *mala fides*, dishonesty, or ulterior motive. Bristowe AJ in *African Realty Trust Ltd v Johannesburg Municipality*[10] adopted this standard of review, and emphasised that, 'once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not the one at which it would have itself arrived.'[11]

A similar approach was taken in *National Transport Commission v Chetty's Motor Transport (Pty) Ltd*,[12] where Holmes JA held that decisions of the Transport Commission would not be overturned by the court unless:

> '(a) the Commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice: in other words that, *de jure*, it failed to decide the matter at all. Such failure could be established by reference to *mala fides*, improper motive, arbitrariness or caprice. The list is not exhaustive; or

[10] 1906 TH 179
[11] At 182
[12] 1972 (3) SA 726 (A)

(b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid- a formidable onus.'

Holmes JA went on to state that the 'degree of proof required is a preponderance of probability; but this is less easily envisaged in that one does not readily impute dereliction of duty to a responsible body.'[13] There was therefore a rebuttable presumption that the responsible body had been carrying out its duty properly, which meant that a very significant degree of deference would be granted to the decision maker.

It appears that in some cases, the courts required a standard of review even beyond what one might consider to be 'gross' unreasonableness. In *Administrator, Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council*,[14] for example, Ogilvie Thompson JA interpreted the standard required as follows:

> '…the *onus* resting upon a litigant seeking to set aside the exercise of a discretion on the ground of 'unreasonableness' is considerable indeed. It is, for instance, a heavier *onus* that that which rested upon a litigant seeking to set aside the decision of a Liquor Licensing Board as being 'grossly unreasonable' within the meaning of s29 of Act 30 of 1928. (*Loxton v Kenhardt LL Board,* 1942 AD 275, 286-287, 311-312). In a case such as the present, the 'unreasonableness' relied upon must be so great as, on a preponderance of probabilities at the end of the case, to warrant the inference of the existence of *male fides* or one or other of the further features mentioned by STRATFORD JA in the above-cited passage (see *Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd and Rhodesia Railways and Others* 1956 (3) SA 480 (FC), 487-491). Unless that is fully appreciated, statements to be found in the cases to the effect that the Court can interfere if a decision 'is so unreasonable that no reasonable authority could ever have come to it' (*per* Lord Greene MR in *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* (1947) 2 All ER 680 (CA),683, are apt to be misleading. Similarly, a correlative qualification must, in my opinion, be added to the observation of GREENBERG J in *Scottes and Callinicos v City Council of Johannesburg,* 1935 WLD 100, 104, where, after stating that a local authority is presumed to be composed of reasonable men, he went on to say that when such an authority 'gives a decision which is such that it could not properly have been given by any reasonable man, then the Court is

[13] At 735 H; see also *Clan Transport Co (Pvt) Ltd v Swift Transport Services (Pvt) Ltd and Rhodesia Railways and Others*, 1956 (3) SA 480 (FC), 487-491
[14] 1971 (1) SA 56 (A), 80, 86

> fully justified in assuming that the authority has been moved by improper motives or has not properly applied its mind to the matter.'
>
> The learned Judge had, immediately before, referred to the *Union Steel Corporation* decision, *supra,* and his above-noted remarks should not, in my opinion, be read as intended to modify what was said in that decision.'[15]

Miller J in the Natal Provincial Division decision in *Chetty's Motor Transport (Pty) Ltd v National Transport Commission*[16] (which was overturned in the appeal noted above) emphasised just how stringently the standard for 'gross unreasonableness' had been expressed in some earlier cases when he noted:

> 'The final submission made by the applicant in the affidavit is that the Commission's decision to allow the Council's appeals was so grossly unreasonable 'as to be completely arbitrary' and that the only inferences which could be drawn were that the Commission 'did not properly apply its mind to the issues before it' or that it was 'motivated by considerations which are completely extrinsic to such issues and ought not to have been entertained at all'.
>
> I did not understand counsel for either of the respondents to contend that the applicant would not be entitled to relief if it substantiated this submission, except to say that the degree of unreasonableness of the Commission's decision was required to be extraordinarily high to justify such interference. (See *Union Government v Union Steel Corporation (SA) Ltd* 1928 AD 220, 237; *Clairwood Motor Transport Co, Ltd v Pillai and Others* 1958 (1) SA 245 (N), 253). I must accept this qualification, although I do not think that any purpose is to be served by seeking a degree of unreasonableness beyond the superlative which is reflected by the word 'gross'. It seems to me that to stigmatise a decision as being unreasonable to a gross degree is, in cases of the type now under consideration, to say that the decision is indefensible on any legitimate ground.'[17]

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[15] At 86
[16] 1972 (1) SA 156 (N)
[17] At 159D

3.4 The *Theron* Case and the 'Extended Yardstick'

While the 'gross unreasonableness' standard was adopted by the courts for a lengthy period, eventually some criticism began to be expressed by the courts and by commentators regarding the excessive stringency of this standard. Gradually, there was a move away from such a restrictive approach, to what Burns has described as a more objective approach to review for unreasonableness.[18] Miller J's comment above seems to indicate that he felt that the 'gross unreasonableness' standard had been carried to ridiculous extremes.

Initially, some judges expressed dissatisfaction with the standard, while accepting that the standard still had to be applied. For example, Henning J in *Bangtoo Brothers v National Transport Commission*[19] discussed the line of authorities dealing with review for unreasonableness, and stated that he shared the unease of Miller J in the *Chetty's Motor Transport* case described above.[20] He indicated that he was bound to apply the principles laid down by the Court of Appeal, but he did, however, state:

> 'With due deference to the pronouncements of the learned Judges, amongst the eminent produced by the country, it is humbly suggested that the acknowledgment of degrees of gross unreasonableness might well be regarded as importing a notion of super-superlatives.
>
> The question might well be asked whether Parliament, in entrusting the performance of functions to individuals and bodies- without providing for a right of appeal or review- intended that their decisions, however harmful they might be to third parties, should not be subject to correction by the Courts on the ground of gross unreasonableness. The power of review, as already mentioned, exists by virtue of the common law. To say that a decision is grossly unreasonable means, as MILLER J put it, that it is indefensible. This appears to me to accord with what INNES CJ had in mind when he spoke of 'grave irregularities' in the *JCI* case,[21] supra.'[22]

In *Theron en Andere v Ring van Wellington van die N.G. Sendingkerk in Suid-Africa en*

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[18] Burns, 187
[19] 1973 (4) SA 667 (N)
[20] 1972 (1) SA 156 (N), 159 D
[21] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111
[22] *Bangtoo Brothers,* supra, 683 D- 684A/B

Andere,[23] Jansen JA held that the courts can conduct review on the ground of unreasonableness. This conclusion was supported on two bases. [24]

The first basis was that there is a common law presumption that the legislature intends that powers be exercised reasonably. This mandate granted by the legislature would be violated by unreasonable action.[25] He accepted that the principle of statutory interpretation that the legislature does not intend an unjust, unfair or unreasonable result was a principle of law.[26]

The second basis was that he argued that there is support in South African law for what he termed the 'extended formal yardstick' ('uitgebreide formele maatstaf'). In terms of the 'extended formal yardstick', a court may set aside a decision on review if the decision could not reasonably have been reached on the available evidence before the decision maker. Jansen JA's approach approved a liberal interpretation of the 'no evidence' rule which was not previously clearly established in South African law.[27] Jansen JA stated as follows:

> 'It should therefore be accepted that with regard to statutory bodies the formal standard (for intervention in review) in our law in respect of actions of a purely judicial nature was extended to cover not only the case in which the finding is based on no evidence whatsoever, but also the case in which the evidence is not such that the finding may reasonably be made on the basis thereof. Since even the essential test- hereinafter called the 'extended formal standard'- is not whether the Court itself would have decided otherwise, the distinction between appeal and review remains intact. Nevertheless it should be emphasised that in using the extended formal standard the Court will *necessarily* have to apply legally correct standards to establish the *facta probanda* and to judge what may be considered as 'evidence' in the specific case.'[28]

The effect of the application of an extension to the formal standard would be to recognize unreasonableness as a separate ground of review, distinct from and additional

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[23] 1976 (2) SA 1 (A)
[24] Baxter, 497-498; see also Burns, 187
[25] Ibid
[26] Taitz, 111
[27] Baxter, 497-498; see also Burns, 187
[28] *Theron,* supra, 20D-F. This is a translation by Friedman J in *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) BCLR 305 (B), 319F-G/H

to the 'symptomatic unreasonableness' standard.

Jansen JA expressed reservations regarding what he called the 'formal standard' ('formele maatstaf').[29] This 'formal standard,' according to Taitz, is what has been termed the 'irregularity doctrine', which provides that a court will not review the decision of a body with a statutorily conferred discretion, unless an irregularity or illegality has taken place, from among a group of judicially recognized irregularities. The irregularity doctrine was extended within the gross unreasonableness standard.[30] It is expressed within the formulation of the gross unreasonableness standard by Holmes JA in *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* [31] as follows:

> 'The court will intervene only in cases where the decision which is so grossly unreasonable as to be disturbing warrants no inference but that the authority has failed to apply its mind honestly, i.e. the authority has committed a recognized irregularity.'[32]

Jansen JA's reservations regarding the formal standard related to the fact that the formal standard involved a distinction between the 'merits' of a judgment, and 'jurisdictional facts' which fall outside the scope of the merits. The formal standard did not take into account the presumption against unreasonableness, and other legal developments.[33]
Jansen JA emphasised that when the legislature grants powers to officials, there is a presumption that the legislature intends those powers to be used reasonably. Decisions may be set aside by the courts which could not reasonably have been taken on the evidence available to the decision-maker.

Jansen JA distinguished *Union Government v Union Steel Corporation (South Africa Ltd)*[34] and the cases following it on the basis that those cases involved 'quasi-judicial' powers as opposed to 'judicial' powers which were exercised in this case. Jansen JA's approach involves a slight expansion of the ambit of review for reasonableness beyond the 'gross unreasonableness' standard, so that purely judicial administrative decisions could be declared invalid on the basis of unreasonableness if the decision was

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[29] See the discussion by Friedman J in *Standard Bank of Bophuthatswana Ltd,* supra, 319C-G/H
[30] Taitz, 111
[31] 1972 (3) SA 726 (A), 735
[32] Ibid
[33] *Standard Bank of Bophuthatswana Ltd,* supra, 319C-G/H
[34] *Union Government,* supra

unsupported by evidence or where there was no reasonable evidence on which the decision could be based.[35]

In *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board,* [36] the applicant, who was a road transport contractor, unsuccessfully applied to the Johannesburg Local Road Transportation Board for a public road carrier permit under the Road Transportation Act 74 of 1977. The National Transport Commission dismissed the applicant's appeal, and the Transvaal Provincial Division dismissed an application to review the National Transport Commission's decision.[37]

The Local Road Transportation Board rejected the application because the appellant had failed to discharge the *onus* of proving that the South African Railways and Harbours Administration's service was not satisfactory and sufficient to meet the transportation requirements of the public.[38] Kotze JA set out the issues to be examined as follows:[39]

> '. . . whether the appellant had, upon a preponderance of probability, established that the Commission failed to have regard to the evidence, firstly when finding that the Railway Administration can provide a satisfactory and sufficient service to meet the transport requirements of the public (here the mining concerns) and, secondly, in not considering and deciding whether the service contemplated by the appellant will be expedient in the public interest.'

Kotze JA noted that he was bound to follow the authority adopting the 'gross unreasonableness' approach, and stated that—

> 'I appreciate full well that the mere fact that the Commission's decision appears to this court to be unreasonable or unfair 'is not *per se* a ground for review'. It is necessary to go further and to determine whether it did direct its mind to its statutory responsibility and whether it did decide the issue which it was called upon to decide.'[40]

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[35] See Devenish 'The Interim Constitution and Administrative Justice In South Africa' 1996 (3) *TSAR* 458
[36] 1982 (4) SA 427 (A)
[37] At 433H-442A
[38] At 446B/C-D
[39] At 447 B-C
[40] At 448A-B

However, in spite of this, Kotze JA found a way to avoid the standard producing a harsh result in this case. He held that the Board had clearly not directed its mind to the question whether, in terms of s15(2)(a)(iii) of the Act, it was expedient in the public interest to grant the application. It had prematurely applied a prohibition and closed its mind to a statutory duty which it was required to perform under the Act. It had failed to decide a required issue, which meant that the decision was vitiated. Even though the National Transport Commission was not obliged to give reasons for its decisions, that did not necessarily mean that it should not provide reasons. If it did not give reasons, the Commission might risk an adverse inference being drawn that it had not taken all of the relevant evidence into account. Where, as in this case, the only evidence before the court was impressive and acceptable and remained unchallenged in cross examination and uncontradicted by other evidence, the failure to give reasons tended to support the adverse inference that the evidence had been ignored.[41] Kotze JA concluded that it was appropriate to draw such an inference in this case, in light of other important circumstances:

(i) 'at no stage did a single member of either the Board or the Commission suggest that the facts testified to by the witnesses were incorrect or unacceptable or that the matter would be decided on a basis other than the said facts;

(ii) no member of the Commission did, at the hearing of the appeal, suggest that there was any fact or matter which would be taken into account by the Commission other than the facts and matter which had been adverted to in the course of the argument; and

(iii) no doubt was expressed at any stage upon the authenticity of the contents of the letters from the mining companies.'[42]

Kotze JA finally held:[43]

> 'It follows that the conclusion to be arrived at, on the balance of probabilities, is that the Commission, by reason of ignoring the evidence, failed to apply its mind to the question, firstly, whether the appellant discharged the onus of proving that the transportation provided by the Railway Administration were not satisfactory and sufficient to meet the

[41] At 448D-E
[42] At 448E-G
[43] At 448G/H-449A

> transportation requirements of the mining industry within the area outlined in the application, or to the question, secondly, whether having regard to the circumstances it was expedient in the public interest to grant the permits applied for. It seems clear that on the evidence it should have come to a conclusion opposite to the one it did arrive at and that, in ignoring the cogency of the uncontradicted evidence presented to it, the Commission, in coming to the conclusion that the Railway Administration is able to provide a satisfactory service and that additional services are not necessary or in the public interest, arrived at a grossly unreasonable decision- one to which no reasonable body could in the circumstances of the present matter have come.'

3.5 Academic Discussion of Review for Unreasonableness

A scathing critique of the 'gross unreasonableness' standard was provided by Mahomed,[44] who argued that the *Union Government v Union Steel* standard for review for unreasonableness had 'inhibited and debilitated' the courts.[45] He pointed out that the courts had not had difficulties in recognising unreasonableness as a ground of review of subordinate legislation in terms of the formulation set out in *Kruse v Johnson*.[46] The requirement with the 'gross' or 'symptomatic unreasonableness' approach that a search be made for an 'underlying malaise betrayed by the symptom of unreasonableness' was inconsistent with the *Kruse v Johnson* approach, and legislative reform was required.[47] There is no reason why subordinate legislation should be treated differently than other types of cases. [48] However, he noted that there was some potential for courts to engage in creative interpretation in order to ease the restrictiveness of the standard somewhat. He expressed the hope that if the judgment of Jansen JA in the *Theron* case was followed and expended, judicial review potentially could be applied in potentially large areas where 'symptomatic unreasonableness' would not be applicable.[49] Chaskalson also expressed similar views.[50]

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[44] Mahomed 'Disciplining Administrative Power- Some South African Prospects, Impediments and Needs' 1989 (5) *SAJHR* 345
[45] At 347
[46] *Kruse v Johnson* [1898] 2 AB 91, 91-100; *R v Abdurahman* 1950 (3) SA 136 (A); *R v Jopp* 1949 (4) SA 11 (N),13; *Louvis v Municipality of Roodepoort-Maraisburg* 1916 AD 268, 276
[47] Mahomed, 347; see also SA Law Commission Working Paper 15 'Investigation into the Court's power of review of Administrative Acts' 1986, 46-9
[48] Mahomed, 347- 348
[49] At 350
[50] Chaskalson 'Legal Control of the Administrative Process' 1985 (102) *SALJ* 419

In the *Theron* and *WC Greyling and Erasmus* cases, while lip-service was paid to the 'gross' or 'symptomatic unreasonableness' test of *Union Government v Union Steel*, it seems that there was perhaps somewhat more flexibility introduced into the test, at least on the part of some judges. While these cases did not substantially change the law, the orthodox approach was being questioned.

3.6 Review for Unreasonableness of 'Subordinate Legislation'

In administrative decisions involving subordinate or delegated legislation, unreasonableness has long been a ground for review. When the validity of subordinate legislation is challenged, the test for unreasonableness applied traditionally has been that set out in the English case of *Kruse v Johnson*,[51] and it has been applied with approval in a long line of South African decisions.[52] In the application of this formulation, subordinate or delegated legislation could be held to be unreasonable in the following circumstances: [53]

(a) if it was partial and unequal in its operation between different classes;
(b) if it was manifestly unjust or if it disclosed bad faith; or
(c) if it involves such oppressive or gratuitous interference with the rights of those subject to the legislation as could find no justification in the minds of reasonable men.

Barrie has emphatically argued that despite attempts in some decisions such as *Union Government v Union Steel* to 'disavow' that administrative action could be set aside for unreasonableness, or to deny that unreasonableness constitutes a separate ground of review, in fact it was a ground of review, at least with respect to delegated legislation and cases involving 'purely judicial' decisions. This is apparent from an examination of the case law.[54] Barrie cites Jansen JA in the *Theron*[55] case as stating that reasonableness is a requirement at common law, and that unreasonableness should be

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[51] [1898] 2 QB 91, 99
[52] See the discussion in Baxter, 477 and the cases cited there
[53] *Kruse v Johnson* [1898] 2 AB 91, 91-100; *R v Abdurahman* 1950 (3) SA 136 (A); *R v Jopp* 1949 (4) SA 11 (N), 13; *Louvis v Municipality of Roodepoort-Maraisburg* 1916 AD 268, 276
[54] Barrie 'The public administrator as adjudicator: an exercise in 'reasonableness' ' 1988 (3) *SAPL* 118, 120
[55] *Theron*, supra, 17-20

recognised as a ground of review.[56]

In the case of *Minister of Posts and Telegraphs v Rasool*,[57] the Appellate Division clearly stated that the *Kruse v Johson* standard for unreasonableness should not only apply to by-laws, but also should apply to instructions issued in terms of statutory authority. De Villiers JA in his judgment noted that the underlying principle in all of the cases in which the *Kruse v Johnson* approach was applied is that 'the legislature cannot have intended to give authority to make unreasonable rules, whether in the form of by-laws or 'instructions'.' [58] Stratford ACJ emphasised that 'an enabling Act must not be construed to confer the power to do unreasonable things unless such latter power is specifically given.'[59] In *Municipal Council of Johannesburg v Stocken*,[60]the Court emphasized that the interference with a person's liberties (in that case, with business) must only be so far as is 'reasonably required by the necessities of the case.'

Historically, unreasonable administrative action frequently involved discrimination between groups of people, by infringing, restricting, or unjustifiably terminating existing rights, privileges, and freedoms.[61] Plasket and Firman have stated that much of the discriminatory legislation during the apartheid era was implemented through proclamations and regulations, which would be reviewable under the test in *Kruse v Johnson* They have also argued that 'to label the four legs of Lord Russell's test a 'mini bill of rights of the common law' would not be to exaggerate the potency of *Kruse.*'[62] In a number of cases, discriminatory regulations and by-laws were held to be unreasonable in terms of the *Kruse v Johnson* formulation.[63] The regulations or by-laws were held to be unreasonable in some cases on the basis of their partial and unequal operation

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[56] Barrie, 120
[57] 1934 AD 167, 173; See also Plasket and Furman 'Subordinate Legislation and Unreasonableness: the Application of *Kruse v Johnson* [1898] 2 QB 91 by the South African Courts' (1984) 47 *THRHR* 416, 421
[58] At 180
[59] At 173, See also Plasket and Furman
[60] 1925 TPD 469
[61] *Brink v Kitshoff NO* 1996 4 SA 197 (CC); Burns, 186
[62] Plasket and Furman, 418
[63] See, for example, *R v Hildick Smith*1924 TPD 69, where discriminatory regulations under the Mines, Works and Machinery Act 12 of 1911 which reserved certain jobs for whites were held to be unreasonable; *R v Carelse* 1943 CPD 242, where a regulation which segregated beaches on the basis of race was held to be unreasonable; *R v Abdurahman* 1950 3 SA 136 (A), where a regulation which reserved coaches for whites, but did not reserve any for other races, was held to be unreasonable; *Swarts v Pretoria Municipality* 1920 TPD 187, where a municipal by-law relating to the licencing of vehicles for public transport which discriminated on the basis of race was held to be unreasonable

between different classes,[64] in some other cases due to fact that this inequality of treatment was manifestly unjust or oppressive,[65] and in others due to the degree and arbitrariness of the interference with the rights of those who were being treated unequally.[66]

3.7 Conclusion

Prior to the advent of the Constitution, when conducting review for unreasonableness in cases that did not involve a challenge to subordinate legislation, the courts generally applied the 'symptomatic' or 'gross' unreasonableness test. In the *Theron* and *WC Greyling and Erasmus* cases, there was perhaps somewhat more flexibility introduced into the test, at least on the part of some judges. While these cases did not substantially change the law, the orthodox approach was being questioned. Review for unreasonableness of subordinate legislation was carried out using the *Kruse v Johnson* formulation of unreasonableness. In several cases, review for unreasonableness was applied in a manner that protected the rights of individuals who were being treated unequally.

[64] *R v Abdurahman*, supra
[65] *R v Carelse*, supra
[66] *R v Hildick Smith*, supra

CHAPTER 4: REVIEW FOR UNREASONABLENESS IN THE CONSTITUTIONAL ERA

4.1 Introduction

In order to properly assess whether review for unreasonableness has been meaningfully incorporated into the PAJA, it is necessary to examine the content that review for unreasonableness has been given by the South African courts under the Interim Constitution and the Constitution.

Review for unreasonableness in administrative law was incorporated into the constitutional regime through s24(d) of the Interim Constitution (s24(d) of the IC) and s33 of the Constitution.

Prior to the advent of the PAJA, the courts dealt only with the wording of the right in s24(d) of the IC, and directly with the wording of the right in s33(1). It is relevant to consider whether or not the difference in wording between s24(d) of the IC (which provides for the 'right to administrative action which justifiable in relation to the reasons given for it') and s33(1) of the Constitution (which provides for the 'right to administrative action that is reasonable') is meaningful, or whether the two provisions mean essentially the same thing. If they have essentially the same meaning, then the discussion and interpretation of the content of s24 of the IC would be directly applicable to the content of the right under s33(1), which the PAJA must fulfill. Even if the two provisions do not have exactly the same meaning, it might be found that the requirement that administrative action must be 'justifiable in relation to the reasons given' does not require quite as stringent a standard of review as is required for 'reasonableness.' If that is the case, and if the PAJA does not properly incorporate the standard of review required by 'justifiability in relation to the reasons given,' then the PAJA certainly could not be found to properly incorporate the standard of review required by 'reasonableness.' It could then be argued that the PAJA does not properly give effect to the right to reasonable administrative action, and that the PAJA is unconstitutional as a result.

In order to gain an understanding of the content of the right to reasonable administrative action, as it must be incorporated in the PAJA, it is necessary to assess how the content of the constitutional right has been defined by the courts and interpreted by scholars prior to the advent of the Act. It is also important to consider how the courts and

commentators interpreted the impact of s24(d) of the IC on review for unreasonableness. As a result of the continued relevance and importance of s24(d) of the IC prior to the enactment of the PAJA, it is necessary to examine the content given to s24(d) of the IC. The content provided by the courts to the 'right to administrative action that is justifiable in relation to the reasons given for it' in terms of s24(d) of the IC will be discussed in this chapter, which is vital for ultimately understanding the content of the right to reasonable administrative action under s33(1) of the Constitution, which the PAJA must give effect to. Academic commentary regarding the content of s24(d) of the IC is also discussed.

In conclusion, courts' interpretation of s33(1) will be discussed, as well as a few recent cases which have had occasion to consider s6(2) of the PAJA. Particular focus is placed on the recent important Constitutional Court judgment in *Bato Star Fishing (Pty) Ltd v the Minister of Environmental Affairs and Tourism and Others*.[1]

4.2 Is there a Meaningful Distinction between 'Justifiable in relation to the reasons given' and Reasonableness?

It is necessary to examine whether or not the content of s24(d) of the IC and s33(1) is essentially the same. In this inquiry, it is relevant to consider whether or not those who were involved in drafting s24 of the IC perceived there to be a difference in the meaning of 'justifiable in relation to the reasons given' and 'reasonableness.' It seems that the drafters used the phrase 'justifiable in relation to the reasons given' in s24(d) of the IC as opposed to 'reasonableness' because some of the parties to the constitutional negotiations were somewhat nervous and had reservations about using the term 'reasonableness'.[2] Mureinik described aspects of the discussions relating to the adoption of s24(d) as follows:[3]

> 'Paragraph (d) uses the term 'justifiable' instead of 'reasonable'. The wording derives from dissension during the drafting. In one of their early reports, the drafters of the Bill

[1] 2004 (4) SA 490 (CC)
[2] Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* Cape Town Juta and Co: 1994, 169
[3] Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 (10) *SAJHR* 31, 40, fn 34. Davis and Marcus also note that considerable debate took place during the negotiations surrounding s24 regarding the entrenchment of review for unreasonableness. An impasse arose which was resolved through the adoption of the compromise wording of s24(d). Marcus and Davis 'Administrative Justice' in Davis, Cheadle and Haysom (eds) *Fundamental Rights in the Constitution* Cape Town, Juta and Co: 1997 155, 160

opposed the entrenchment of review of administrative decisions for unreasonableness on the ground that that would have 'far reaching consequences for South African administrative law' (Technical Committee on Fundamental Rights During the Transition 7th progress report (29 July 1993) 6). This is a very curious objection- after all, much of the Bill, and the Constitution of which it is part, will have cataclysmic consequences for South African law- and it sparked fierce debate. At that stage there appeared to be two sources of resistance among political negotiators to the notion of review for unreasonableness. The one was the usual- and legitimate- anxiety that that idea might be abused by the courts to usurp the policy making prerogatives of the executives. The other was an anxiety arising from a somewhat irrational distrust of the word 'reasonable'. In an effort to allay these concerns, I proposed a compromise clause which tried to meet the first anxiety by defining the scope of the review jurisdiction in a way which attempted to guard against the kind of abuse feared. Paragraphs (2) and (3) of the compromise clause (below) embody this effort. And it tried to meet the second anxiety by replacing the word 'reasonable' with 'justifiable', which I take to mean the same thing, but which is apparently freer of the connotations which dismay those who fear 'reasonableness'.'

The compromise clause read as follows: [4]

'Compromise Administrative Justice Clause:

18(1) Every person shall have the right not to be effected adversely by a decision made in the exercise of public power which is unlawful, procedurally unfair or not justifiable.

(2) A decision shall not be considered justifiable unless:

(a) a plausible answer can be given to any reasonable objection to the decision;

(b) a plausible explanation can be given why the decision was chosen in preference to any arguably superior alternative; and

(c) a rational connection can be shown between the premises of the decision (including any evidence or argument on which it purports to be based) and the decision itself;

(3) In deciding whether a decision is justifiable, the [designated authority] shall not usurp the prerogative of the decisionmaker to make such policy choices as the decisionmaker considers desirable in the interests of good governance, and it shall respect and uphold every such choice.

(4) Every person shall have the right to be furnished with reasons in writing for any decision, made in the exercise of public power, which effects him or her

[4] Mureinik, 40, fn 34

adversely.'

Mureinik discussed what happened during the legislative process as follows:

> 'In the end, as can be seen from the administrative justice clause actually enacted, the legitimate anxiety was ignored, and no wording was adopted to guard against it; but the irrational anxiety was met, and the word 'justifiable', the sole survivor of the compromise clause, somehow found its way into the final product.' [5]

Devenish has noted that the former Deputy Minister of Justice delivered a paper at a conference organised by the CSIR on 22 February 1994, where he stated that the technical committee on fundamental rights did not support the inclusion of the word 'reasonable' in s24(d) of the IC.[6]

The above seems to suggest that the drafters considered that there was some difference in meaning between 'justifiability in relation to the reasons given' and 'reasonableness'. Rautenbach and Malherbe have argued that while s24(d) of the IC was a compromise provision, '[i]t is nevertheless fairly generally regarded as *the* constitutional reasonableness requirement.' They assert that the provision 'requires that a justifiable *balance* be struck between the extent to which the rights have been affected and the reasons for the decision.' They further note that-

> 'In deciding whether the decision was 'justifiable', it will have to be determined which *balance* has been achieved, taking into account various factors, such as the nature of the right that has been affected, the detail on how seriously it has been affected, the purpose of affecting the right, how effectively the purpose has been served, and the availability of less restrictive measures to achieve the purpose. This method to determine 'justifiability' overlaps with the method employed by the Constitutional Court to determine whether limitations of rights comply with the requirement of the general limitation clause in the interim Constitution. It has been reiterated expressly in the general limitation clause of the new constitution.'[7]

The process described above involves a proportionality analysis.

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[5] Ibid
[6] Devenish, 468, fn 86
[7] Rautenbach and Malherbe *Constitutional Law* (Revised 2nd ed) Durban, Butterworths: 1996, 207-8

Burns has emphasised that a justifiable decision is based on reason, and that it is essential that a decision be capable of objective substantiation.[8] Section 24(d) of the IC requires that administrative action must be 'rational, reasonable, and proportionate.'[9] Barrie has argued that s24(d) of the IC and s33(1) of the Constitution both contemplate reasonableness, as the 'former requires that administrative action be rational and capable of being reasonably sustained having due regard to the reasons underlying the decision,' and the 'latter demands reasonableness in so many words.'[10] De Waal, Currie and Erasmus have discussed the meaning of s24(d) of the IC and s33(1) as follows:[11]

> 'Subsection (d) of the right in item 23(2)(b) of Schedule 6 in effect requires rational administrative action, granting courts a wide power to review the reasonableness of an administrative decision. 'Justifiable' is likely to be interpreted as synonymous with 'reasonable', especially since 'justifiable' was substituted for 'reasonable' during the process of drafting the subsection, with the intention that the former term would cover the same ground as the latter. In avoiding the use of 'reasonable', the drafters perhaps wished to distinguish the approach taken to reasonableness in administrative law (an assessment of the justifiability of a decision) from that used in criminal law or delict (an assessment of whether conduct measures up to an objective standard). By contrast with the complexities of this formulation, s33 of the 1996 Constitution grants a right simply to reasonable administrative action.'

This interpretation of the intention of the drafters seems to differ from that described by Mureinik, above. It seems that a number of commentators viewed the wordings in s24(d) of the IC and s33 of the Constitution as having similar meanings.

Some commentators, however, did not view the two provisions as having essentially the same meaning. Du Plessis and Corder, for example, have argued that the term 'justifiability'-

> 'goes some way towards incorporating a standard of 'reasonableness' for valid administrative action, but it should be noted that such action need only be 'justifiable in

[8] Burns, 182
[9] Burns, 185
[10] Barrie 'Proportionality- Expanding the Bounds of Reasonableness' in Carpenter (ed) *Suprema Lex: Essays on the Constitution Presented to Marinus Wiechers* Durban, Butterworths: 1998, 23,23.
[11] De Waal, Curie and Erasmus *The Bill of Rights Handbook* (2nd ed) Cape Town, Juta and Co: 1999, 497

> relation to the reasons given for it'. We prefer to view s24(d) as giving the right to a rational, coherent decision-making process, which will tend to produce a reasonable result, but which may on occasion not do so.'[12]

Davis and Marcus have noted that s24(d) of the IC-

> 'provides an important right to affected persons to hold the administration accountable to the principles of openness and transparency, the very principles which form the basis of the Constitution. 'Reasonable' might well be a wider concept than 'justifiability' since a decision may be justifiable whereas the reasons given need not necessarily have an objectively reasonable basis. However, an inquiry into the justifiability of a decision remains a powerful tool of judicial review.'

However, they have also contended that s24(d) of the IC-

> 'introduces the requirement that administrative decisions must be rational, coherent and capable of being reasonably sustained having due regard to the reasons for such decisions. In short, there must be a rational link between the decision and the reasons given therefore.'[13]

The above description of the content of s24(d) of the IC seems to me to suggest 'reasonableness'. They have noted that with respect to s33(1) of the Constitution that '[t]he introduction of the concept 'reasonableness' allows the court to examine the substantive justification for the administrative action taken.'[14] Du Plessis has suggested that 's33(1) goes further than s24 in guaranteeing a right to reasonable administrative action — a stronger right than the s24(d) right to 'administrative action which is justifiable in relation to the reasons given for it.' ' [15]

As described above, some commentators have asserted that the 'justifiability' formulation in s24(d) of the IC is not quite as strong a formulation as a 'right to reasonable administrative action' in s33(1) of the Constitution. However, a number of

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[12] Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* Cape Town, Juta and Co: 1994, 169
[13] Ibid
[14] Davis and Marcus, 163
[15] Du Plessis 'Evaluative Reflections on the Final Text of South Africa's Bill of Rights' 1996 (3) *Stell LR* 283, 304; Devenish, 468

commentators have suggested that the 'justifiability' formulation essentially incorporates a 'right to reasonable administrative action.' Even if the right in 24(d) of the IC is not quite as broad as the 'right to reasonable administrative action' in s33(1) of the Constitution, it can be argued that the interpretation by commentators and the courts of s24(d) of the IC provides at least a *minimum* content of the right to reasonable administrative action. If that is so, then the right to reasonable administrative action which the PAJA is required to incorporate must *at the very least* incorporate the content which the courts have found to be included in s24(d) of the IC. It is certainly clear that 'reasonableness' is not a *narrower* concept than 'justifiability'.

4.3 Commentators regarding the Impact of the Constitution on Review for Unreasonableness

Mureinik emphasized the significant effect of s24(d) of the IC on review for unreasonableness, and argued that s24(d) of the IC 'expressly empowers a court to inquire into the justification of administrative action,'[16] and it also overrules—

> 'two closely linked doctrines which have stultified review for unreasonableness in our administrative law. The first doctrine is that unreasonableness is not, in itself, a reviewable defect; unreasonableness is material only so far as from it may be inferred the existence of some other deficiency in the decision. That other deficiency has been described variously, but under inspection generally comes down to abuse of discretion. The second doctrine, usually perceived to be a corollary of the first, is that a merely ordinary degree of unreasonableness does not suffice to vitiate the decision; there must be some egregious degree of unreasonableness. Prevailing authority teaches that what is required is a decision which is 'grossly unreasonable to so striking a degree' as to warrant the appropriate inference; entailed in which is that the decision must be worse than strikingly grossly unreasonable.' [17]

He concluded that s24(d) of the IC 'deals this doctrine of deep deference a blow', because it 'empowers a court to review administrative decisions within its reach for justifiability- which is to say, for reasonableness- on its own.'[18]

Klaaren has asserted that s24(d) of the IC provides the basis and justification for

[16] Mureinik, 40-41
[17] Ibid
[18] Ibid

successful judicial review when administrative action is unjustifiable either on its face or in its application,[19] and that this is similar to the basis on which unreasonableness traditionally could be established in subordinate legislation.[20]

Commentators have argued that the entrenchment of s24(d) of the IC and s33(1) of the Constitution has completed the move away from the 'symptomatic' or 'gross' unreasonableness test. It has been asserted that 'even if the Constitution does not, on its own, abolish symptomatic unreasonableness as the standard of review of administrative acts in general, the common law developed in accordance with the spirit, purport and objects of the Constitution has done so.'[21]

It is also very important to note that the entrenchment of the constitutional rights in s24(d) of the IC and s33(1) of the Constitution means that judicial review now applies in a similar manner to all administrative action. The application of different standards of review in respect of 'legislative', 'judicial' 'quasi-judicial' and 'administrative' decisions is no longer applicable. At common law, there was a test for unreasonableness of legislative acts, and then there was the 'no reasonable evidence' test which was applied in respect of 'purely judicial' decisions.[22] In respect of 'administrative' decisions, the 'gross unreasonableness' standard was applied, which denied the existence of unreasonableness as a separate ground of review.[23] In the pre-constitutional era, the application of different standards of review when conducting review for unreasonableness of subordinate legislation as opposed to review of specific administrative acts hindered the development of review for unreasonableness. The entrenchment of the rights in s24(d) of the IC and s33(1) of the Constitution means that a similar standard of review for unreasonableness is now applicable in respect of all administrative action, and that is a very welcome development.[24]

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[19] Klaaren *'*Administrative Justice' Chapter 25 in Chaskalson et al *Constitutional Law* (Revision Service 3) Cape Town, Jutas: 1998, 25-16B

[20] See *R v Abdurahman*, supra; *R v Hildick-Smith,* supra, 76 and *Amoils v Johannesburg City Council* 1943 TPD 386, 390

[21] See, for example, Davis and Marcus; *Standard Bank of Bophuthatswana v Reynolds NO and Others* 1995 (3) BCLR 305

[22] Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid Afrika en Andere 1976 (2) SA 1 (A)

[23] *Union* Government *(Minister of Mines and Industries) v Union Steel Corporation (South Africa), Ltd.* 1928 AD 220

[24] Hoexter and Lyster, 171-177

4.4 Case Law

4.4.1 Case Law Interpreting s24(d) of the IC

The courts defined the content of s24(d) of the IC gradually, and an approach to review in terms of the constitutional right emerged.

Friedman JP in *Standard Bank of Bophuthatswana v Reynolds*[25] engaged in a thorough analysis of the pre-constitutional case law relating to review for unreasonableness, particularly looking at the importance of the 'no reasonable evidence' standard enunciated in *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board.* He also examined cases involving a failure by the decision maker to properly apply his/her mind:[26] cases where relevant considerations were ignored, or irrelevant considerations were taken into account.[27] Friedman JP noted that with the advent of the Interim Constitution, the importance of judicial review had increased, and the courts had been appropriately adopting a more resourceful, purposive, effectual, inventive, and stimulating approach to review.[28] Friedman JP advocated a move away from the 'gross unreasonableness' standard and stated that—

> '[t]he test of 'gross unreasonableness', in view of the testing rights given to the Courts in the Constitution of the Republic of South Africa, 1993 (Interim Constitution) does not accord with the modern approach to judicial review, particularly when applied to a Constitution such as the South African one, which contains a chapter of fundamental rights, binding on 'all legislative and executive organs of State at all levels of Government' and which 'shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution'.
>
> From the aforgoing it is necessary that the courts adopt the less stringent test of 'unreasonableness' rather than the more restricted one of 'gross unreasonableness'.' [29]

He advocated that the courts should adopt a less restrictive standard of review of

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[25] Supra
[26] *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A), 152A-E.; see also the discussion in *Hira v Booysen* 1992 (4) SA 69 (A), 93A-94A
[27] See *Johannesburg Stock Exchange*, supra, 152A-E
[28] *Standard Bank of Bophuthatswana*, supra, 318-324
[29] At 325

'unreasonableness', as opposed to 'gross unreasonableness.'[30] He went on to suggest some considerations which should be applied when reviewing factual decisions by decision-makers as follows:

> '(i) The concept of 'unsupported by substantial evidence' may be involved to widen the scope of review;
>
> (ii) In this regard and considered as integral to (i) above, some Judges 'have already asserted jurisdiction to set aside decisions based on clearly erroneous inferences of fact either by classifying this type of error as an error of law or merely by proceeding on the assumption that manifest error of fact makes a decision *ultra vires.*' See De Smith *supra* at 139, and the cases cited in note 58, as well as cases cited at 118, notes 46-7, *ante.*
>
> (iii) The principle of 'no reasonable evidence' may be used as a test for resolving questions of fact and should be applied in the law of South Africa dealing with review.
>
> (iv) The corollary also applies, namely that if a decision maker fails to take into account all the evidence and considerations *relevant* to the decision, the decision or finding is reviewable and may be set aside.
>
> (v) The courts are empowered to set aside a decision of a decision maker or administrative organ where he/she or it is obliged to decide a matter, and uncontroverted or undisputed evidence or data is ignored.'[31]

From Friedman JP's discussion, it is apparent that the courts were expanding the scope of review for unreasonableness prior to the advent of the Constitution, and the Constitution provided an impetus for the final abandonment of the 'gross' unreasonableness standard.

In *Maharaj v Chairman of the Liquor Board,*[32] an application for review was made both in terms of the Liquor Act 27 of 1989, and in terms of s24 of the IC. Section 131(a) of the Liquor Act provides for review where a decision-maker has exercised power with *mala fides* or in a grossly unreasonable manner. Nicholson J emphasised that this statutory ground of review was much narrower than the test for justifiability enshrined in s24(d) of

[30] Burns, 187
[31] *Standard Bank of Bophuthatswana*, supra, 325
[32] 1997 (1) SA 273; 1997 (2) BCLR 248 (N)

the IC and stated that, 'to the extent that they limit an applicant's rights to review the present respondent are inconsistent with the said provisions of the Constitution,'[33] the provision in the Liquor Act must yield to the Constitution. While Nicholson J ultimately decided the matter on the basis that the respondent's decision was grossly unreasonable, and was therefore reviewable under the statutory provision, he stated:[34]

> 'Even if I am wrong on whether the respondent exercised his powers in a grossly unreasonable manner, he manifestly cannot justify his decision even with the reasons furnished in his answering affidavit in this application. Had I not been satisfied that the respondent's decision was the product of gross unreasonableness, I would have referred the matter to the Constitutional Court as the Supreme Court does not have jurisdiction to enquire into the constitutionality of any Act of Parliament (See s98(3)).'

The case of *Kotze v Minister of Health*[35] involved an application to review and set aside a decision of the Director-General refusing the applicant early retirement on medical grounds. The applicant argued that the decision had been made based on incorrect facts.[36] Spoelstra J noted that s24(d) of the IC had widened the scope of judicial review, and discussed the content of s24(d) of the IC as follows:[37]

> 'The word 'justifiable' as used in s24(d) of the Constitution will receive proper judicial consideration in the years to come. Its meaning will become clearer as it becomes more definite/precise/better defined by such careful deliberation. According to the shorter *Oxford English Dictionary* 'justifiable' means 'capable of being justified or shown to be just.' The Afrikaans text used the word 'regverdigbaar'. These words denote something that can be defended. As I understand it, the section requires that the reasons advanced for the administrative action must show that the action is adequately just or right. In other words, it must be clear from the reasons that the action is based on accurate findings of fact and a correct application of the law. In this regard the difference between a review and an appeal may have been largely eroded. If a review under this section is to succeed, a court of review must be satisfied that the reasons advanced for the action under review are not supported by the facts or the law or both.'

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[33] At SA B/C-D; BCLR 251D
[34] At SA 277 D-F; BCLR 251E-F
[35] 1996 (3) BCLR 417 (T)
[36] At 423 C-E
[37] At 425E-G

Spoelstra J held that the Director-General's decision was not justifiable because relevant factors had not been taken into account, and the Director-General had failed to properly apply her mind to the matter. The Director-General had made the decision in spite of the medical evidence that had been presented. The Director-General made an unwarranted assumption that none of the doctors '(including those appointed by the Department to the departmental medical board) took the trouble to enquire into the nature and extent of his [the applicant's] duties.' Spoelstra J found that this was a 'completely groundless and unjustified' assumption, and he concluded that the disregard of this vital evidence—

> 'in the absence of facts to prove that they are ill-informed opinions, gives rise to an inference that she [the Director-Genera]failed to properly apply her mind to the issue she had to decide and that she did not reach her conclusion on the facts that were relevant to the issues before her.' [38]

Burns has asserted that this emphasises that 'the decision maker must interpret his/her powers correctly, assess the facts and circumstances correctly, consider relevant factors, and disregard irrelevant factors. Rationality, factual accuracy, and correctness in law are clearly required of the decision-maker.'[39] It is important to bear in mind that the *dictum* of Spoelstra J to the effect that the distinction between review and appeal may have been largely eroded has been expressly denied in subsequent judgments. In particular, the Constitutional Court in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*[40] has been at pains to emphasise that the distinction between review and appeal must be carefully maintained.

In *Carephone (Pty) Ltd v Marcus NO*,[41] Froneman DJP examined the standard of review required under the Constitution. He noted[42] that s24(d) of the IC extended the scope of review and stated that it 'introduces a requirement of rationality in the merit or outcome of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety.' [43]

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[38] At 426A-B
[39] Burns, 183
[40] 2004 (4) SA 490 (CC)
[41] 1998 (10) BCLR 1326 (LAC)
[42] At 1336D-1337E
[43] At1336E, para 31

Froneman DJP discussed the content of s24(d) of the IC as follows:[44]

> 'Many formulations have been suggested for this kind of substantive rationality required of administrative decision-makers, such as 'reasonableness', 'rationality', 'proportionality', and the like (cf for example Craig, *Administrative Law*, 337-349; Schwarze *European Administrative Law,* 1992, 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: its there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA.'

Froneman DJP clearly did not see any significant difference in meaning between 'justifiability' and 'reasonableness'. The focus of the analysis in review must be particularly on the decision-making process. He noted, however, that this process is not just examining procedural impropriety, as there must also be rationality of merit or outcome.

Subsequent cases paid significant attention to the decisions in *Kotze v Minister of Health*, [45] *Roman v Williams NO*,[46] and *Carephone (Pty) Ltd v Marcus NO*[47] . For example, in *Farjas (Pty) Ltd v Regional Land Claims Commissioner, Kwazulu-Natal,*[48] Dodson J discussed both pre- and post-constitutional jurisprudence relating to review for unreasonableness and s24(d) of the IC, and he emphasised that 'the weight of authority to date suggests that the impact of s24 of the IC has been to widen the grounds for judicial review.'[49] He concluded:

> 'There can, in my view, be no doubt that s24 of the interim Constitution widens the common-law grounds of review. To hold otherwise is to deny any reason for the inclusion

[44] At 1337 E-G
[45] Supra
[46] Supra
[47] Supra
[48] 1998 (2) SA 900 (LCC)
[49] *Farjas (Pty) Ltd,* supra, 911F-912A. The cases of *Kotze,* supra; *Standard Bank of Bophuthatswana Ltd v Reynolds,* supra; *Maharaj,* supra, 1275F, 1278G were cited in this regard

> of s24 by the framers of the interim Constitution. This is against the presumption that the Legislature does not include superfluous provisions in a statute. Statements of the law such as that in the *Shidiack* case[50] quoted above, which discourage intervention by Courts in administrative action or decisions except in the most extreme circumstances, cannot be reconciled with the right to a justifiable decision which s24(d) of the interim Constitution confers. That the grounds of review are so widened follows also from the fact that the right to administrative action which is *intra vires* is elevated to the status of a fundamental constitutional right by the s24(a) right to lawful administrative action. That must cast a duty on reviewing Courts to be all the more astute to ensure that public officials confine themselves strictly to the law which confers powers on them. Finally, the rights which formed the basis of administrative law prior to their constitutionalisation were vulnerable to restriction or removal at the whim of a sovereign Parliament by any particular statute. Now those rights are buttressed by their new-found status as fundamental constitutional rights. Limitations on those rights which exceed the bounds of the limitations clause are liable to be struck down.'[51]

In the same case, Bam P emphasised that it was important for Regional Land Claims Commissioners to study carefully the implications of the extended scope of judicial review under s24 of the IC.[52]

Similarly, in *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others*,[53] Hlophe JP and Brand J noted that the scope of judicial review had been broadened by the Constitution,[54] and stated that—

> 'it is no longer necessary for an applicant on review to satisfy the pre-constitutional standard formulated in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152A-E, namely that the decision in question was grossly unreasonable as to justify an inference that the decision-maker had failed to apply his/her mind to the matter. Nevertheless, we do not believe that the right to 'administrative action which is justifiable in relation to the reasons given for it', as contemplated in item 23(2)(b) of Schedule 6 to the Constitution, must be understood as

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[50] *Shidiack v Union Government (Minister of Interior)* 1912 AD 642, 652
[51] *Farjas (Pty) Ltd,* supra, 912H-913D/E, para 18
[52] At 938C, para 30
[53] 2000 (4) SA 621; similar views were also expressed in other cases, such as *Derby-Lewis and Another v Chairman of the Committee on Amnesty of the TRC and Others* 2001 (3) BCLR 215 (C), 243E/F-G-244B/C; *Deacon v Controller of Customs and Excise*1999 (6) BCLR 637 (SE), 648F-G
[54] *Deacon*, supra*,* 640E-641A/B, citing *Kotze*, supra; *Maharaj*, supra

> an attempt to abolish the distinction between review and appeal.'[55]

In the Constitutional Court case of *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*[56], Mokgoro J and Sachs J in a dissenting judgment had occasion to discuss review for unreasonableness in the context of the content of s33 of the Constitution prior to the enactment of the PAJA, where there was a right to administrative action 'that is justifiable in relation to the reasons given for it'. Mokgoro J and Sachs J discussed the content of the right, and noted that administrative action could be attacked either when it is unjustifiable on its face, or, in certain circumstances, even when the action on its face appears to be valid.[57]

They emphasized that justifiability requires more than just a rational connection between the reasons and the decision. A rational connection is necessary, but not sufficient, to satisfy the requirements of justifiability. Justifiability requires 'something more substantial and persuasive than mere rational connection.' It does, however, not require what the court might consider to be the best possible outcome if the court was making the decision. The test for determining what justifiability requires in each case must be flexible. The test would include taking into account factors such as 'the problems of the country, the complexities of government, and the need for officials to exercise a genuine discretion in the fulfilment of their functions'.[58]

Mokgoro J and Sachs J set out the requirements of a justifiable decision as follows:[59]

> '… the decision-making process must be sound, and the decision must be capable of objective substantiation by examination of the facts and the reasons for the decision. Put another way, there must be a rational and coherent process that would tend to produce a reasonable outcome. The suitability and necessity of the decision are to be examined, and in this regard, a number of factors might have to be considered: the nature of the right or interest involved; the importance of the purpose sought to be achieved by the decision; the nature of the power being exercised; the circumstances of its use; the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; the broad public interest involved. It might be relevant to consider whether or

[55] Citing *Carephone*, supra, 1337B-C
[56] 2002 (3) SA 265 (CC)
[57] At 314, para 161
[58] At 315-316, para 164
[59] At 316, para 165

> not there are manifestly less restrictive means to achieve the purpose.'

In the majority decision, Chaskalson CJ noted that the standard of 'reasonableness' is a higher standard than rationality review, and he noted that some provisions within the Bill of Rights require a 'reasonableness' standard (such as s26 which requires the State to take 'reasonable legislative and other measures, within its available resources, to achieve progressive realisation' of the right of access to housing), while some other provisions only require rationality review (for example, s9(1)) .[60]

Chaskalson CJ disagreed with the findings of Mokgoro J and Sachs J regarding the validity of the policy in issue. In his judgment he did not discuss in detail what a justifiable decision would require, because there had not been argument led in court directly on the requirement of justifiability, and because the reasoning in his judgment did not depend to any great extent on that point.[61] Regarding what a justifiable decision would require, he stated that:[62]

> 'The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met, and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.'

He later went on to state, in a similar vein:[63]

> 'What they require for a decision to be justifiable, is that it should be a rational decision taken lawfully and directed to a proper purpose.
>
> If that is the case, and if the decision is one which a reasonable authority could reach, it would in my view meet the requirements of item 23(2)(b).'

The initial component of Chaskalson CJ's statements focused on the aspect of rationality. It is notable, though, that the above statements seem to incorporate the requirement that in order for a decision to be justifiable, it would also have to meet the

[60] At 282, para 46
[61] At 300, paras 124, 126
[62] At 292, para 87
[63] At 292, paras 89- 90

standard of *Wednesbury* unreasonableness, which Chaskalson CJ's description of the requirements of a justifiable decision echoes.

Chaskalson CJ noted that the only right which was alleged by the appellants to have been infringed was the right to equality, and he concluded that that right had not been infringed. He further concluded that the policy in issue did not infringe any of the rights of the appellants.[64] He noted that the courts of England have adopted an approach where the intensity of review may be adjusted depending on the subject mater involved in the case. If there are fundamental rights protected under the English Human Rights Act which are affected, then the intensity of review applied by the courts will be greater, and heightened scrutiny will be applied in that case. Chaskalson CJ stated that he would not express a view as to whether a more stringent standard of review than rationality would be required when there is an issue whether particular rights have been infringed, as no argument had been led in that regard in court.[65] He concluded his brief discussion as follows:[66]

> 'Largely for the reasons given by me in dealing with the claim based on equality, I am satisfied that even if sub-item (iv) [which relates to the right to a decision which is justifiable in relation to the reasons given] is applicable to the appellants' claim, and even if justifiability may in certain cases permit a standard of review more intensive than review for rationality, this is not a case in which it would be appropriate to set a higher standard, or for this Court to interfere with the decision of the WCED.'

The judgment of Chaskalson CJ does not really provide clear guidance regarding the content of review for justifiability. He seemed to suggest in the above passage that perhaps the standard of review may only be rationality review, and he appeared to harbour some concerns about the widespread application of the reasonableness standard.[67] However, in his statements regarding what would constitute a justifiable decision, a justifiable decision seems to require more than just rationality, and it actually appears to incorporate a reasonableness standard of review.

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[64] At 300, paras124-125
[65] At 300, para 127
[66] At 301, para 128
[67] At 282, para 46. Chaskalson CJ expressed the concern that if the standard of review in relation to s9(1) of the Constitution was reasonableness, and not rationality, a court 'could be called upon to review all laws for reasonableness, which is not the function of a court'

4.4.2 Case Law Interpreting s33(1) and s6(2) of the PAJA

In the case of *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa*,[68] the Supreme Court of Appeal had occasion to consider the right to reasonable administrative action, as well as some of the provisions of s6(2) of the PAJA. Howie P in his judgment relied extensively on the judgment of Chaskalson CJ in the *Bel Porto* case. He commenced his discussion of the right to reasonable administrative action by stating:[69]

> 'In requiring reasonable administrative action, the Constitution does not, in my view, intend that such action must, in review proceedings, be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words, it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively *unreasonable*: *cf Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*. As made clear in *Bel Porto*, the review threshold is *rationality*. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in s 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2)(h)).'

In respect of Howie P's statement that reasonable administrative action does not require that the action be substantively reasonable, he appears to be propounding his interpretation of a statement made in Chaskalson CJ's judgment in *Bel Porto*.[70] In the paragraph of Chaskalson CJ's judgment cited by Howie P, Chaskalson CJ was in fact rejecting an approach by Mokgoro J and Sachs J where they argued that the right to just administrative action in totality must be seen as being animated by the principle of fairness- both procedural and substantive fairness.[71] Chaskalson CJ expressed concerns about courts being called upon to assess the substantive fairness of decisions,

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[68] 2004 (3) SA 346 (SCA)
[69] At 353- 354, para 20
[70] See Chaskalson CJ's judgment in *Bel Porto*, supra, 292, para 90
[71] See Mokgoro J and Sachs J's judgment in *Bel Porto*, supra, 309, para 152

especially concerning complex policy matters.[72] Chaskalson CJ did not make any reference to substantive *reasonableness* in his judgment. He only referred to a distinction between rationality and reasonableness.

In support of Howie P's statement that '[a]part from that [reasonableness] being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively *unreasonable*,' he cited a paragraph in Chaskalson CJ's judgment in *Bel Porto* where Chaskalson CJ was referring to the standard of review in respect of s9(1) of the Constitution, and not in respect of the right to decisions which are justifiable in relation to the reasons given. As noted above, Chaskalson CJ did not pronounce clearly upon the appropriate standard of review in respect of that right.

In light of the discussion of Chaskalson CJ's judgment above, it would not seem to be correct to say that the threshold of review regarding the right to reasonable administrative action is clearly rationality, as Howie P asserts. Chaskalson CJ stated clearly that the threshold of review was rationality only in respect of s9(1). If one considers Chaskalson CJ's statements regarding the requirement for a decision to be justifiable, a justifiable decision seems to require something in addition to rationality, as discussed above.

It should also be borne in mind that in that same paragraph of Chaskalson CJ's judgment cited by Howie P, Chaskalson CJ indicated that certain rights in the Bill of rights might require a rationality standard of review, while others would require a reasonableness standard of review. He noted in particular that s26 of the Constitution, which specifically calls upon Parliament to enact *reasonable* legislative and other measures, requires a reasonableness standard of review. It therefore should follow that where s33 of the Constitution specifically calls for reasonable administrative action, that that should require a reasonableness standard of review. It would seem illogical if the right to reasonable administrative action did not require a reasonableness standard of review, but only rationality.

It further must be noted that in that in the same cited paragraph, Chaskalson CJ raised

[72] See Chaskalson CJ's judgment in *Bel Porto*, supra, 292, para 88

concerns that if a reasonableness standard of review was applied in respect of s9(1) of the Constitution, the court potentially could be called upon to review all *laws*. He did not raise concerns about all administrative action being subject to review for substantive reasonableness.

The statement by Howie P that '[r]easonableness can, of course, be a relevant factor, but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see s 6(2)(h))' is rather confusing. He seems to be saying that reasonableness is only relevant in relation to the right to reasonable administrative action in certain very limited circumstances, which does not seem logical. It is submitted that in respect of s6(2) of the PAJA, that certain aspects of unreasonableness are enumerated as grounds of review, including irrationality as a ground of review in s6(2)(f)(ii). If an action is in fact irrational, then an application for review could be brought in terms of s6(2)(f)(ii). If an action might be rational, but in fact is unreasonable, then it is submitted that review could be brought in terms of s6(2)(h). If an action is irrational, it would also be unreasonable, but an action could potentially be rational, but be found to be unreasonable. Howie P seems to be viewing unreasonableness as being an extreme subspecies of irrationality, rather than viewing irrationality as being an aspect of unreasonableness.

Howie P then proceeded to consider case law cited by the respondent in support of the respondent's contention that a standard of 'perversity' as opposed to a test of rationality would be applicable. Howie P noted that the use of the term 'perversity' in connection with judicial review seemed to originate in some recent English decisions which used the term in connection with a *Wednesbury* formulation. The use of 'perversity' seemed to Howie P to suggest something beyond simple 'irrationality': something 'utterly irrational'. Howie P declined to express an opinion on whether or not such a standard of review might be appropriate in respect of s 6(2)(h) of the PAJA, but he stated that it was not relevant for the consideration of s 6(2)(f)(ii) of the PAJA, which incorporates the rationality test.[73] Such an approach as discussed by Howie P would seem to view unreasonableness as being an extreme form of irrationality ('utter irrationality'), rather than viewing irrationality as being an aspect of unreasonableness.

[73] *Trinity Broadcasting,* supra,354-355, para 21

The recent Constitutional Court case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[74] involved a challenge to the allocation of fishing quotas by the Chief Director in the Department of Environmental Affairs and Tourism. The Constitutional Court had an opportunity to consider the content of review for unreasonableness in terms of the PAJA, and to examine s6(2)(h) of the PAJA, which provides that a decision may not be 'so unreasonable that no reasonable person' could have reached it.

In considering the status of unreasonableness at common law, O'Regan J for the Constitutional Court stated that:

> 'It is well known that the pre-constitutional jurisprudence failed to establish reasonableness or rationality as a free-standing ground of review. Simply put, unreasonableness was only considered to be a ground of review to the extent that it could be shown that a decision was so unreasonable that the official failed to apply his or her mind to the decision.'[75]

The judgment took into account the 'gross unreasonableness' jurisprudence, and while reference was made in a footnote to the judgment of Jansen JA in the *Theron* case, O'Regan J did not really discuss any of the case law or the discussion by commentators in the late pre-constitutional era which cast some doubt on the 'gross unreasonableness' standard. She also did not discuss any of the case law regarding to review for unreasonableness in relation to subordinate legislation at common law. The judgment did not consider any of the jurisprudence relating to unreasonableness in the constitutional era, or contain any discussion regarding how the entrenchment of a right to reasonable administrative action in the Constitution has had an impact on review for unreasonableness. It would have been very helpful if discussion of the above matters had been included in the judgment.

O'Regan J highlighted that the formulation in s6(2)(h) of the PAJA, which provides that a decision would be reviewable if a decision 'is so unreasonable that no reasonable person could have so exercised the power' is drawn from the formulation of *Wednesbury* unreasonableness. She noted that some English case law has found the

[74] 2004 (4) SA 490 (CC)
[75] At 511-512, para 43

repetitiousness of this formulation of unreasonableness to be unfortunate and confusing.[76] Such sentiments were expressed in the following statement by Lord Cooke commented in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*,[77] which O'Regan J quoted with approval:

> 'It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the Courts of the United Kingdom and beyond. *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR ([1947] 2 All ER 680, 683, 685, [1948] 1 KB 223, 230, 234) twice uses the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it'. Yet Judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1976] 3 All ER 665, [1977] AC 1014 the precise meaning of 'unreasonably' in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court, all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock ([1976] 3 All ER 665, 697, [1977] AC 1014, 1064) as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. . . . Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him.'

O'Regan J supported the approach of Lord Cooke in the above statement that it is not helpful to cloud unreasonableness with overcomplexity, and that it is not necessary to overexaggerate the need for judicial deference in the formulation of unreasonableness. Judges are already aware of the need for deference, and are accustomed to according a significant degree of deference when conducting review for unreasonableness. O'Regan J supported a more simplified formulation of unreasonableness than the *Wednesbury* formulation, as advocated by Lord Cooke.

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[76] At 512, para 44
[77] [1999] 1 All ER 129 (HL), 157

O'Regan J importantly went on to emphasize that the content of review for unreasonableness under the PAJA must be defined in light of the constitutional right to reasonableness in s33(1) of the Constitution. She further emphasised that the Constitution does not support a requirement that there be some extraordinary standard of unreasonableness for a decision to be reviewable, in the following statement:[78]

> 'Even if it may be thought that the language of s6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.'

O'Regan J then helpfully described how the reasonableness of a decision can be appropriately assessed. She set out some factors which would be appropriate for a Court to consider in evaluating the reasonableness of a decision, as follows:[79]

> 'What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

O'Regan J recognized that judicial review appropriately may involve a substantive as well as a procedural aspect, but emphasized that the distinction between review and

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[78] *Bato Star*, supra, 513, para 44
[79] At 513, para 45

appeal remains important. She also highlighted that courts must ensure that review does not overstep appropriate bounds and result in the courts usurping appropriate functions of the administration. This approach entails a recognition that substantive review does not necessarily entail an obliteration of the distinction between review and appeal.

O'Regan J then considered what judicial deference appropriately entails. She supported the view expressed by Schultz JA in the Supreme Court of Appeal decision in this case that judicial deference was appropriate in this case, but judicial deference does not mean that a court should be timid or avoid carrying out its appropriate function. She went on to state:[80]

> 'The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.'

O'Regan J elucidated what an appropriate approach in conducting judicial review by the Courts should entail as follows:[81]

> 'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably

[80] At 513, para 46
[81] At 514-515, para 48

> supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

O'Regan J concluded that on the facts of this case, the Chief Director did take into account all of the considerations identified in the empowering legislation, and that the decision taken by the Chief Director struck a reasonable equilibrium between the principles and objectives set out in the applicable legislative provisions. The Constitutional Court held, therefore, that the decision by the Chief Director could not be said to be unreasonable.[82]

The judgment of O'Regan J, which was concurred in by Chaskalson CJ, seems to provide some helpful and much needed clarity regarding the right to reasonable administrative action and review for unreasonableness in terms of the PAJA. It seems to suggest that some extreme standard of 'perversity' should not be applied in respect of s6(2)(h) of the PAJA, as was discussed by Howie P in the *Trinity Broadcasting* case. This Constitutional Court judgment is very welcome, as it seems to counter some of the rather worrying statements made by Howie P in the *Trinity Broadcasting* case regarding the standard of review required in relation to the right to reasonable administrative action.

4.5 Conclusion

The entrenchment of the right to administrative action that is 'justifiable in relation to the reasons given' in s24(d) of the IC marked a final decisive move away from the 'gross unreasonableness' standard. It was the culmination of a process that had been slowly progressing prior to 1994. Reasonableness has been entrenched within the Constitution, and the right to reasonable administrative action is an important feature of the constitutional regime. The courts have been developing jurisprudence that permits an appropriate role for review for unreasonableness within the current constitutional framework, most notably in the recent Constitutional Court decision in the *Bato Star* case.[83]

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[82] At 516, para 54
[83] Supra

CHAPTER FIVE: PROPORTIONALITY IN SOUTH AFRICAN LAW

5.1 Introduction

In order to properly assess whether the principle of proportionality has been meaningfully incorporated into the PAJA, it is useful to have an understanding of the important role that proportionality plays in the South African legal system. In particular, it plays an important role in the law of delict, criminal law, and constitutional law. It is necessary to examine the content that proportionality has been given by the South African courts, both prior to 1994, and under the Interim Constitution and the Constitution. It is also relevant to consider the discussion of commentators regarding the relationship of proportionality to s24(d) of the IC and s33(1) of the Constitution.

Initially in this chapter, the role of proportionality in the South African legal system is discussed. The courts' approach to proportionality in the pre-constitutional era is then described. The approach of the courts and discussion by commentators regarding the relationship of proportionality to s24(d) of the IC, s33(1) of the Constitution, and s6(2) of the PAJA are finally examined.

5.2 Proportionality as a Principle Underlying the Law in General

The principle of proportionality and the balancing of interests that it entails arises in various areas of South African law, and it is an important principle underlying the law in general. The law very frequently entails the balancing of competing interests, and this involves a proportionality analysis. Proportionality can be seen as a fundamental principle which underpins the law generally.

5.2.1 Delict

Proportionality plays an important role in the law of delict. In examining the component of wrongfulness in delict, the *boni mores* or legal convictions of the community is the criterion applied to determine whether the infringement of interests in that case is lawful. It is an objective test based on reasonableness, and it is sometimes also called the

'reasonableness' or 'general reasonableness' criterion.[1] The question which is examined is 'whether the defendant's conduct was reasonable according to the legal convictions or feelings of the community'.[2]

The application of this standard involves a proportionality analysis which entails balancing or weighing up the interests which were promoted by the defendant's action against those interests which were infringed.[3] The court must 'carefully balance and evaluate the interests of the concerned parties, the relationship of the parties, and the social consequences of the imposition of liability in that particular type of situation.'[4] All of the relevant circumstances and pertinent factors must be taken into account in order to determine if the infringement of the plaintiff's interests was reasonable or unreasonable. The decision involves policy considerations.[5]

Among the factors which have been indicated as being relevant to take into consideration include: the nature and extent of the harm; the nature and extent of the loss which was foreseeable or foreseen; the possible value to the community or the defendant of the defendant's action; the cost or effort which would have been required to prevent the loss or harm; the likelihood of success of measures to prevent the loss or harm; economic considerations; ethical and moral considerations; the values underlying the Constitution and the Bill of Rights; considerations of the public interest and public policy; and economic considerations.[6]

The legal convictions of the community is a standard which is used to express the community's prevailing convictions as to what should be considered delictually wrongful. It is a flexible standard which can be adopted to reflect the community's evolving values and needs.[7]

The legal convictions of the community test is often not applied directly in cases, because it is quite general and somewhat vague.[8] Other common law and statutory norms, methods for establishing wrongfulness, and grounds of justification have been

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[1] Neethling et al, 37-38, fn 18
[2] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D), 380
[3] Neethling et al, 39
[4] *Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) , 384
[5] Neethling et al, 39; *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749(N), 753-754.
[6] Neethling et al, 40
[7] At 41
[8] Ibid

developed in relation to particular types of cases. The test may be applied directly in novel cases where there is no other clear legal norm or ground of justification which is applicable and in situations where there are personality infringements (such as defamation or impairment of dignity) involved.[9] The test may also be applied in borderline cases to assist in refining the determination of wrongfulness.[10]

In the case of *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,[11] the applicant in the Constitutional Court was appealing the granting of absolution from the instance in the High Court in her claim. She was seeking to sue the police and public prosecutor in delict because they had breached their duties to protect the applicant and ensure that she was able to enjoy her constitutional rights (the right to life, the right to respect of and protection of dignity, the right freedom and security, and the right to freedom of movement).[12] The applicant argued that they had breached their duties towards her by failing to prevent bail being granted to the perpetrator who raped the applicant, even though they were aware that the perpetrator had a history of sexual offences and was in fact facing a charge of rape. While out on bail, the perpetrator had raped the applicant.

In considering whether or not delictual liability should attach to the police and prosecutors because they had a legal duty to protect the applicant, the High Court had to consider the 'legal convictions of the community' standard. The Constitutional Court was called upon to consider whether the High Court, in considering the application for absolution from the instance, and the Supreme Court of Appeal, on considering the applicant's appeal of the High Court's judgment granting absolution from the instance, had a duty to develop the 'legal convictions of the community' standard in light of the Constitution.

Ackerman and Goldstone JJ for the Constitutional Court noted that the 'legal convictions of the community' standard at common law involved a proportionality analysis.[13] The common law analysis was described by Hefer JA in the case of *Minister of Law and Order v Kadir*[14] as follows:

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[9] At 48
[10] At 50
[11] 2001 (4) SA 938 (CC)
[12] At 957, para 26
[13] At 957, para 43
[14] 1995 (1) SA 303 (A), 318 E-H

> 'As the judgments in the cases referred to earlier demonstrate, conclusions as to the existence of a legal duty in cases for which there is no precedent entail policy decisions and value judgments which 'shape and, at times, refashion the common law [and] must reflect the wishes, often unspoken, and the perceptions, often dimly discerned, of the people' (*per* M M Corbett in a lecture reported *sub nom* 'Aspects of the Role of Policy in the Evolution of the Common Law' 1987 *SALJ* 52, 67). What is in effect required is that, not merely the interests of the parties *inter se*, but also the conflicting interests of the community, be carefully weighed and that a balance be struck in accordance with what the court conceives to be society's notions of what justice demands.'

Ackermann and Goldstone JJ held that the courts had a duty to develop the common law test of the 'legal convictions of the community' to be in line with the spirit, purport and object of the Constitution. They noted that s173 of the Constitution gives to all higher courts, including the Constitutional Court, the inherent power to develop the common law, taking into account the interests of justice. In s7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the State to respect, promote and fulfill these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the judiciary as well as on the legislature and the executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. Ackerman and Goldstone JJ concluded that 'it follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.'[15]

It was noted that the exercise in proportionality previously conducted by the Courts in order to determine the duty to act in delictual cases (in which the interests of the parties and the conflicting interests of the community were weighed and balanced) was consistent with the Bill of Rights. However, this exercise now had to be carried out in accordance with the spirit, purport and objects of the Bill of Rights, and the relevant factors weighed in the context of a constitutional State founded on dignity, equality and freedom and in which the government had positive duties to promote and uphold such values.[16] The test for determining the duty to act in delictual cases remains a

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[15] *Carmichele*, supra, 953-954, para 33
[16] At 957A/B - 958C, paras 43-45

proportionality analysis, but the factors to be taken into account and balanced within that analysis have evolved slightly under the constitutional regime.

Ackerman and Goldstone JJ upheld the appeal against absolution from the instance which had been granted in the High Court, and referred the matter back to the High Court for the trial of the matter to continue.[17]

5.2.2 Criminal Law

Proportionality also plays an important role in Criminal law, particularly in the area of sentencing. In the case of *S v Rabie*,[18] the principles to be taken into account in sentencing were set out as follows:

> 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.

All sentences should also take into account the main purposes of punishment, which are: retribution; deterrence; prevention; and rehabilitation. In order to ensure that the punishment fits the criminal as well as the crime, and takes into account all of the relevant factors, the court must engage in a proportionality analysis. The process of arriving at an appropriate sentence has been called the personalization or individualization of punishment. In order to allow for an appropriate proportionality analysis to be engaged in, in general, a wide range of discretion is allowed the court in relation to sentencing. The court is then able to consider all of the factors relevant to the particular case, and determine a sentence which is appropriate for that case.[19]

Parliament has seen fit, however, in the Criminal Law Amendment Act 105 of 1997 to legislate mandatory minimum sentences in respect of certain of the most serious crimes. A court is only permitted to impose a lesser sentence than the mandatory minimum sentence if there are 'substantial and compelling circumstances' why a lesser sentence should be imposed in the particular case. Those circumstances must be put on record.[20]

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[17] At 971, para 84
[18] 1975 (4) SA, 826 G
[19] Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche *Criminal Procedure Handbook* (4th ed) Kenwyn, Juta & Co:1999, 260
[20] At 261

The expression that 'the punishment must fit the crime' finds its highest expression in the constitutional right not to be subjected to cruel, inhuman or degrading punishment, which is entrenched in s12(1)(e) of the Constitution. If a punishment is cruel, inhuman or degrading, it certainly is gravely disproportionate and does not 'fit the crime'.

In the case of *S v Dodo*,[21] the Constitutional Court was called upon to consider whether or not s51(1) of the Criminal Law Amendment Act 105 of 1997,[22] read with s51(3)(a), compelled the High Court to pass a sentence which was inconsistent with an accused's right under s12(1)(e) of the Constitution.

A High Court had declared the provisions of s51(1) to be constitutionally invalid because it was inconsistent with the provisions of the Constitution, particularly s35(3)(c),[23] and with the separation of powers required by the Constitution. The High Court had found that the section in issue resulted in an invasion of the domain of the judiciary by the legislature. A 'criminal trial before an ordinary court' required that there be an independent court which was able, when carrying out sentencing, to weigh and balance all factors relevant to the crime, the accused and the interests of society before the imposition of a sentence. In other words, the court must be able to carry out the necessary proportionality analysis appropriately.

The High Court was of the view that requiring courts to impose a mandatory minimum sentence was a limitation of the fair trial envisaged by s35(3)(c) of the Constitution which could not be justified under the provisions of s36. The court also expressed a view that a court bound by the provisions of s51(1) of the Act was no longer an 'ordinary court'.

Ackerman J for the Constitutional Court emphasized that the legislature may not compel a court 'to pass a sentence which is inconsistent with the Constitution.'[24] He stated that in order to examine this issue, the relevant inquiry is whether the provisions in issue compel the High Court to pass a sentence which is inconsistent with the right of the

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[21] 2001(3) SA 382 (CC)
[22] This section made it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s51(3)(a), the Court was satisfied that 'substantial and compelling circumstances' existed which justified the imposition of a lesser sentence
[23] This constitutional provision guarantees every accused person 'a public trial before an ordinary court'
[24] *Dodo*, supra, 402-403, para 33

accused not to be punished in a cruel, inhuman, or degrading way in terms of s12(1)(e) of the Constitution.[25]

Ackerman J emphasized the centrality of proportionality in the consideration of whether or not the punishment was cruel, inhuman or degrading as follows:[26]

> 'The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in *S v Makwanyane*. Section 12(1)*(a)* guarantees, amongst others, the right 'not to be deprived of freedom . . . without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.
>
> To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in para [37] above), the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.'

[25] At 403, para 34
[26] At 403-404, paras 37-38

Ackerman J indicated that the standard for finding that a punishment was cruel, inhuman or degrading would not be just 'mere disproportionality', but 'gross disproportionality' between the sentence legislated and the sentence that the offence in question should merit.[27] The analysis, therefore, involves a proportionality balancing of interests, but the intensity of review is altered to incorporate an enhanced degree of deference to the legislature in legislating mandatory minimum sentences.

Ackerman J concluded that s51(1) did not oblige a court to impose a sentence which would violate an offender's right not to be subject to cruel, inhuman or degrading punishment. The court would not be compelled to act in violation of the Constitution. Ackerman J concluded that the provision in issue did not violate the Bill of Rights or infringe the principle of the separation of powers.[28]

5.2.3 Constitutional Law

The principle of proportionality in German administrative law is regarded as arising from the principle of the constitutional state, the *Rechtsstaatsprinzip* as well as the nature of the basic rights in the German Constitution, the *Grundgesetz*. It is viewed as being a fundamental principle of the constitutional regime.[29] A *Rechtsstaat* requires that the exercise of state authority be based on the constitution and statutes which are consistent with the constitution. It also requires that the exercise of state authority strives to protect human dignity, freedom, justice and legal certainty.[30]

It is arguable that the principle of proportionality plays a similarly important role in the constitutional state which has been established in South Africa.[31] A vital component of the Bill of Rights in the Constitution is the limitations clause, s36, which involves a proportionality analysis. Section 36(1) provides as follows:

> 'The rights in the Bill of Rights may be limited only in terms of law of general application to

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[27] At 404, para 39
[28] At 405, paras 40-41
[29] De Ville 'Proportionality as a requirement of the legality in administrative law in terms of the new Constitution' 1994 *SA Publikreg/Public Law* 360, 362
[30] At 363
[31] Ibid

> 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.'

Fundamental rights and freedoms are not absolute, and certain restrictions on rights are necessary in order to set appropriate boundaries to ensure that the rights of all individuals are protected, and also that certain legitimate needs of society (such as public safety, public order, health, and the needs of a democracy) are met. Section 36 is the mechanism for setting those appropriate boundaries and legitimate restrictions.[32] It is a general limitations clause, because it applies to all of the rights in the Constitution and not only to one particular right.[33]

In terms of s36, a law may only limit a right in the Bill of Rights if it is a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[34] Reasonableness is a key requirement for a limitation to be justifiable. The law must not infringe the right any further than is necessary to achieve the intended purpose. The purpose must be constitutionally acceptable, and there must be proportionality between the harm done by the law in infringing the fundamental right(s), and the benefits which it is intended to achieve.[35]

In *S v Makwanyane and Another*,[36] Chaskalson P formulated the approach (which has since been referred to many subsequent Constitutional Court cases when the limitation clause is considered) as follows:

> 'The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an

[32] De Waal, Currie and Erasmus,144
[33] At 146
[34] At 147
[35] At 155
[36] 1995 (3) SA 191 (CC), para 104

> assessment based on proportionality. This is implicit in the provisions of s33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.

It was noted by Ackerman J in the case of *De Lange v Smuts NO and* Others[37] that although s36(1) of the Constitution differs in certain respects from s33 of the IC, the proportionality analytical process is still applicable.[38] A balancing of interests still takes place.[39] The relevant considerations which were noted in the balancing process set out in *S v Makwanyane* above are now expressly stated in s36(1) of the Constitution in paras (a)—(e). He expressed the view that the approach in *S v Makwanyane* is essentially still applicable, with the exception that para (e) requires that account be taken in each limitation evaluation of 'less restrictive means to achieve the purpose (of the limitation)'.[40]

He summarized the balancing process as follows:[41]

> 'The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the

[37] 1998 (3) SA 785 (CC)
[38] At para 86
[39] At para 88
[40] At para 86
[41] At para 88

> other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.'

In examining the nature of the right in terms of para (*a*), the court will consider the importance of the right which is being infringed in the Constitution.[42] In *S v Makwanyane*, for example, the rights to life and dignity were identified by the Constitutional Court as being the most important of the human rights and the source of the other rights in the Bill of Rights. The Constitutional Court emphasized that very compelling reasons would have to be provided to justify limiting those rights.[43]

In examining the importance of the purpose of the limitation in para (*b*), the court must consider whether the purpose of the limitation is sufficiently important, and whether or not the purpose is consistent with an open and democratic society based on human dignity, equality and freedom.[44] In *S v Makwanyane,* for example, the Constitutional Court held that the purposes of the death penalty of deterrence and the prevention of recurrence of crime were sufficiently appropriate purposes, but the purpose of retribution was not an appropriate purpose in the open and democratic society based on human dignity, equality and freedom that that was envisaged in the Constitution.[45]

In considering the nature and extent of the limitation in para (*c*), the court would consider whether the infringement is a serious or a relatively minor one. This relates to the aspect of proportionality in the narrow sense, which requires that the infringement must not be more extensive than is justified by the importance of the purpose which is sought to be achieved.[46]

Examining the relation between the limitation and its purpose as required by para (*d*) relates to the suitability aspect of proportionality, because it requires that the limitation must actually achieve the desired purpose, otherwise the limitation cannot be justifiable. In *S v Makwanyane,* for example, the Constitutional Court held that there was a rational

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[42] De Waal, Curie and Erasmus,156
[43] *S v Makwanyane,* supra, para 144 (Chaskalson P)
[44] De Waal, Currie and Erasmus, 158
[45] *S v Makwanyane,* supra, para 185 (Didcott J)
[46] De Waal, Curie and Erasmus, 160

relation between the death penalty and the purpose of preventing the recurrence of crime. The Constitutional Court held, however, that a rational relation had not been shown between the death penalty and the purpose of deterrence.[47]

Determining whether there are less restrictive means to achieve the purpose as required by para (*e*) relates to the aspect of proportionality in the narrow sense, because the limitation of the right should not be greater than necessary to achieve the desired objective. The limitation of the right must result in benefits which are proportionate to the costs resulting from the limitation. If there are other means which could achieve the desired result while infringing the right to a lesser degree, then the limitation will not be justifiable.[48] In *S v Makwanyane,* for example, the Constitutional Court found that the purpose of preventing the recurrence of crime could be achieved by the less drastic means of imposing a life sentence, as opposed to the death penalty.[49]

From the above, it is clear that the courts are frequently engaged in proportionality analysis and the balancing of various interests which it entails. The courts are therefore appropriately experienced to be able to engage in proportionality analysis in relation to review for unreasonableness in terms of s33 of the Constitution.

5.3 Proportionality as an Aspect of Review for Unreasonableness at Common Law

The concept of proportionality has also been applied by the Courts when conducting review for unreasonableness in a number of South African cases. De Ville has argued that the South African Courts have experience in dealing with the aspects of the principle of proportionality.

An example of a case where a court applied the element of suitability was in *Staatspresident v Lefuo*,[50] where the court found that the Act of the State President was unlawful, as it would never lead to the attainment of 'the promotion of Black self-

[47] *S v Makwanyane,* supra, para 184 (Didcott J)
[48] De Waal, Curie and Erasmus,161-162
[49] *S v Makwanyane,* supra, paras 123, 128 (Chaskalson P)
[50] 1990 2 SA 679 (A)

government and independence by means of tribal 'national states'.' The action was therefore unsuitable for achieving the stated purpose.[51]

In *Smith v Germiston Municipality,*[52] Solomon J stated that in applying the *Kruse v Johnson* test for unreasonableness, the inquiry to be engaged in was—

> 'whether the regulation prohibiting trade is one reasonably calculated to attain the object which the legislature had in view, namely, the effectual supervision of the location, or whether it is clearly unnecessary for that purpose, and so utterly unreasonable that it cannot be supported by a court of justice. In other words, is it or is it not a reasonable use of the power of the Lieutenant Governor?' [53]

Solomon J then discussed the definition of unreasonableness in *Kruse v Johnson* and applied it, concluding that in that case, the regulation in question did not involve 'such oppressive or gratuitous interference with the rights of those subject to the regulation as could find no justification in the minds of reasonable men.' The regulation was not so unreasonable (capricious or oppressive) as to justify setting it aside.[54] In applying this approach, Solmon J engaged in a consideration of both the aspects of suitability and proportionality in the narrow sense.

An example where a court applied the element of necessity was in *United Democratic Front (Western Cape Region) v Van der Westhuizen*,[55] where the applicant argued that a decision of the Divisional Commissioner of Police prohibiting a meeting should be set aside on the basis that the Commissioner had failed to consider any of the alternatives to an outright prohibition of the meeting. The applicant submitted that- [56]

> '(I)t was unreasonable to prohibit outright the holding of the meeting in question when the objectives which the respondent had in mind and for which provision was made in reg. (1) could have been less onerously achieved by the imposition of conditions designed to safeguard and ensure those very objectives....'

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[51] De Ville, 374-376
[52] 1908 TS 240
[53] At 250
[54] At 251
[55] 1987 4 SA 926(C)
[56] At 930G-931B; De Ville, 374-376

The Cape Provincial Division of the High Court accepted this argument. De Ville has asserted that this decision is clearly based on the principle that an infringement of a fundamental right is lawful only when it is necessary to achieve the stated objective, and that no lesser form of interference is possible. If there is more than one suitable measure for achieving the purpose, the one that will infringe fundamental rights the least must be chosen.[57]

In *Municipality of East London v Umvalo*,[58] a by-law which permitted the municipality to 'take away any sticks from natives when it may think fit to do so' was found to go beyond 'what was reasonably required for the good government of the Municipality.' [59] The potential interference with the individual's property was disproportionate to what was required to maintain good government. While it might have been reasonable for the Municipality to impose some restrictions on the size of stick that a person could carry (and possibly to impose a moderate fine to enforce the restriction), or to allow seizure of a stick if there was a reasonable threat of harm being caused, the by-law in question was beyond the powers of the Municipality.[60] It seems that in this case, the by-law did not meet the requirement of necessity, as less onerous means could have been employed to achieve the purpose that was sought to be achieved. It was, therefore, disproportionate and unreasonable.

In a number of cases, in conducting review for unreasonableness, the courts have considered the aspect of proportionality in the narrow sense. In these cases, the courts have examined the impact of the provision under consideration on the affected individual, and have been willing to find that the provision is unreasonable if the provision has an oppressive or unjust effect on the affected individual. In *Sinovich v Hercules Municipal Council*,[61] Schreiner JA described the analysis required for review for unreasonableness as follows:

> 'In investigating an issue of unreasonableness one would, on this view ask oneself at the outset whether in the light of the proved facts the by-law is unreasonable in the sense of being manifestly unjust or highly oppressive, and then, if this question were answered in

[57] At 930A; De Ville, 74-376
[58] (1892) 9 SC 463
[59] At 466; Baxter, 477
[60] At 466-467
[61] 1946 AD 783, 802-3

> the affirmative, one would consider in the next place how far such 'unreasonableness' could be said to be authorised by the enabling provision.' [62]

Schreiner JA emphasised that if a by-law is unreasonable, it can only be upheld if the enabling provision provides that it should still be valid.[63] Schreiner JA went on to state that—

> 'The law does not protect the subject against the merely foolish exercise of a discretion by an official, however much the subject suffers thereby. But the law does protect the subject against stupid by-laws, however well intended, if their effect is sufficiently outrageous.'[64]

The assessment of unreasonableness in terms of this approach, therefore, involves examining the proportionality of the effect of the by-law on the individual in relation to the importance of the purpose sought to be achieved and the benefit to the public of the by-law. The court engages in a balancing of interests.

In *R v Slabbert and Another*,[65] the court was called upon to consider a regulation promulgated by the Governor-General which regulated the right of qualified Europeans to give paid legal advice. The regulation encroached on the rights of both Europeans and Africans: it prevented Europeans from providing legal advice; and it placed a restriction on the right of blacks to receive legal advice. While the provision ostensibly sought to provide protection to Africans from exploitation, the protection provided was not in proportion to the rights which were taken away. The ability of an individual 'to do and say what he pleases subject only to the state of the substantive law and to the legal rights of others' was seriously infringed. The restriction on the rights by the provision was found by the Court to be a 'radical interference' that 'no reasonable man would approve of'. The court found the regulation to be unreasonable and *ultra vires*.[66]

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[62] At 802; See also Plasket and Furman 'Subordinate Legislation and Unreasonableness: the Application of *Kruse v Johnson* [1898] 2 QB 91 by the South African Courts' 1984 (47) *THRHR* 416, 419-420
[63] At 802
[64] At 802-803
[65] 1956 (4) SA 18 (T)
[66] At 22

In this case, a balancing of interests was engaged in—although it happened that the interests sought to be protected and those infringed happened to belong to the same individuals!

In *American Swiss Watch Co Ltd v Minister of Finance,*[67] it was emphasised that 'statutory powers should, generally speaking, be exercised in such a way . . . to bear equally upon all subjects, in the absence of express or implied indications to the contrary.'[68] This means that there must be consistency in the application of the law between similar cases— it should not place a disproportionately oppressive burden on anyone. The burdens placed on the public should not be inconsistent, and there should not be variation between individual cases.[69] The principle of proportionality is clearly linked to the maintenance of equality under the law between persons.

As was previously noted in chapter 2, Baxter has asserted that the 'manifest injustice' and 'oppressive or gratuitous interference with rights' aspects of the *Kruse v Johnson* formulation of unreasonableness indicate that proportionality is an aspect of unreasonableness.[70] In applying the *Kruse v Johnson* formulation, the courts have been applying proportionality in a long line of cases. While not explicitly mentioning or discussing the concept of proportionality, the courts were in fact applying the principle of proportionality when conducting review for unreasonableness.

Review for unreasonableness, and proportionality as an aspect of review for unreasonableness provided mechanisms for promoting equality in some cases at common law in the pre-constitutional era. Unreasonableness was a means by which courts in some cases struck down legislation which promoted racial discrimination, as the law could not impact upon people unequally where there was not an express indication in the statute.

It is apparent that prior to the advent of the Constitution, the South African courts had experience in conducting review for unreasonableness, and that proportionality was an aspect of the analysis engaged in by courts when conducting review for

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[67] 1977 (1) SA 876 (C)
[68] At 885F-H
[69] Burns, 183
[70] Baxter, 527

unreasonableness. Review for unreasonableness and proportionality provided a mechanism in some cases for protecting the rights of individuals at common law (at a time when there were very limited means available for protecting rights). Some protection was provided to individuals from oppressive interference by the authorities.

5.4 Proportionality in the Constitutional Era

5.4.1 Proportionality in relation to s24(d) of the IC

De Ville[71] has argued that s24(d) of the IC incorporated the principle of proportionality into the Constitutional regime,[72] and it has also introduced 'proportionality as a requirement of legality in administrative law.' Administrative action must be 'suitable, necessary, and proportional.' This requirement is appropriate to incorporate in a constitution, which seeks to establish a constitutional state or *Rechtsstaat*.[73] He has asserted that proportionality is a fundamental aspect of a constitutional regime.[74] De Ville has argued persuasively that the text of s24(d) of the IC supports such an interpretation as follows:

> 'The word 'justifiable' in subsection 24(d) is very open ended. The fact that a right to justifiable administrative action is recognized in addition to the right to lawful administrative action (subs 24(a)), suggests an intention to create and entrench a new requirement of legality. It is submitted that no requirement will better serve the purpose of subsection 24(d) than proportionality. Only administrative action which is suitable and necessary to attain the statutorily prescribed purpose and which does not result in harm to an individual(s) which is out of proportion to the gains to the community can indeed be said to be 'justifiable.' '[75]

De Ville further asserted in support of his argument that-

> 'The desire expressed in the preamble to establish a (material) constitutional state (the principle of proportionality being a formal principle upon which such a state is based),

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[71] De Ville, at 362- 364
[72] Ibid
[73] De Ville, 'The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution' 1995 (11) *SAJHR* 264, 272
[74] De Ville, 'Proportionality as a Requirement for Legality in Administrative Law in Terms of the New Constitution', 362-364
[75] At 365

> strengthens the argument for an interpretation of section 24(d) which demands proportionality when an individual's rights are affected or threatened by administrative action.' [76]

In *Qozoleni v Minister of law and Order,*[77] Froneman J. discussed the requirements of reasonableness and justifiability in the limitation section of the Bill of Rights, and the proportionality test developed by the Canadian courts in conducting limitation analysis. He asserted that proportionality was an aspect of both s24(d) of the IC and s33(1) of the IC (the limitation provision). He noted[78] that the Canadian case of *R v Oakes*[79]—

> 'provides that, to satisfy the Canadian Charter's limitation clause (which differs from section 33(1), but also refers to reasonableness as a criterion for limitation), the interest underlying the limitation must be of sufficient importance to outweigh the right that was infringed, and the means used to protect that interest must be proportional to the object of the limitation. This formulation, or at least the second portion thereof, echoes the provision of section 24(d) of the Constitution.'

This seems to suggest that s24(d) of the IC, like the limitations clause, incorporates proportionality into the constitutional regime.

In *Roman v Williams NO*,[80] Van Deventer J. stated that s33 read with item 23(3) of Schedule 6 of the Constitution 'imports the requirement of proportionality between means and end and that the role of the courts in judicial reviews is no longer limited to the way in which an administrative decision was reached but now extends to its substance and merits.' [81] He later continued:[82]

> 'Like the test of reasonableness, the new constitutional test of justifiability 'in relation to the reasons given for the decision' must obviously be an objective one.

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[76] Ibid
[77] 1994 (1) BCLR 75 (E)
[78] At 90D-F
[79] (1986) 24 DLR (4th) 200 (SCC), 227
[80] 1997 (9) BCLR 1267 (C)
[81] At 1275E-F
[82] At 1276 B-C

> In this respect I am in agreement with the dictum of Spoelstra J in *Kotze v Minister of Health* 1996 (3) BCLR 417 (T) that the essence of justifiability is that the decision must be capable of objective substantiation.
>
> Administrative action in order to qualify as justifiable in relation to the reasons given must meet the three requirements of suitability, necessity, and proportionality.'

He defined the process of review which was required under s24(d) of the IC, and stated,[83]

> 'Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness....
>
> The constitutional test embodies the requirement of proportionality between the means and the end. The role of the courts in judicial review is no longer confined to the way in which an administrative decision was made but extends to its substance and merits as well.'

This review process involves testing the administrative action for reasonableness, and Van Deventer J firmly adopted the view that the 'gross' unreasonableness standard of review no longer applies.[84] Van Deventer J clearly adopted the view that 'justifiability in relation to the reasons given' incorporates 'reasonableness,' and also 'proportionality' as an aspect of reasonableness. It is made apparent that such review does not involve a subjective consideration by the court of the decision, and the substitution of the views of the court for that of the decision-maker.

In the Constitutional Court case of *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*[85], Mokgoro J and Sachs J in their dissenting judgment noted that the right to administrative action 'that is justifiable in relation to the reasons given for it' incorporates the principle of proportionality, which is a fundamental aspect of a constitutional regime. Ordinarily, proportionality requires that the effects of

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[83] At 1278 H-I
[84] At 1278 H-I
[85] 2002 (3) SA 265 (CC)

the action be proportionate to the objective sought to be achieved. It therefore involves an element of substantive review.[86]

In setting out the requirements of a justifiable decision, Mokgoro J and Sachs J emphasized that proportionality is an important aspect of a justifiable decision as follows:[87]

> '. . . the decision-making process must be sound, and the decision must be capable of objective substantiation by examination of the facts and the reasons for the decision. Put another way, there must be a rational and coherent process that would tend to produce a reasonable outcome. The suitability and necessity of the decision are to be examined, and in this regard, a number of factors might have to be considered: the nature of the right or interest involved; the importance of the purpose sought to be achieved by the decision; the nature of the power being exercised; the circumstances of its use; the intensity of its impact on the liberty, property, livelihood or other rights of the persons affected; the broad public interest involved. It might be relevant to consider whether or not there are manifestly less restrictive means to achieve the purpose.'

Mokgoro J and Sachs J summed up the critical inquiry to be undertaken, and emphasized the importance of proportionality in the process, as follows: [88]

> 'In our view, the question to be asked is whether, bearing in mind such factors described above, the decision can be defended as falling within a wide permissible range of discretionary options. In this respect the principle of proportionality is particularly relevant. Ultimately, the issue is a robust one of basic fairness and proportionality, necessitating a contextualised judicial determination of whether the decision is a defensible one on the basis of the reasons given, or whether it is so out of line and tainted with unfairness as to demand judicial intervention.'

This judgment of Mokgoro J and Sachs J is very supportive of the view that proportionality is an aspect of s24(d) of the IC. The majority of the Constitutional Court did not express a view on this point.

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[86] At 314-315, para 162
[87] At 316, para 165
[88] At 315-316, para 164

5.4.2 Proportionality in relation to s33(1) of the Constitution and s6(2) of the PAJA

The recognition in the judgment of O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[89] that review for unreasonableness in relation to s33(1) of the Constitution and s6(2)(h) of the PAJA involves a substantive as well as a procedural aspect does not preclude that proportionality may be applied as an aspect of review for unreasonableness in terms of s33(1) of the Constitution and s6(2)(h) of the PAJA. It is also notable that O'Regan J describes the factors to be taken into account when considering whether or not a decision is reasonable will involve 'the range of factors relevant to the decision….the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.'[90] Her description of the analytical process involved includes a proportionality analysis, even though O'Regan J does not specifically refer to proportionality in her judgment. This judgment provides some support for an argument that s33(1) of the Constitution and s6(2)(h) of the PAJA must incorporate a proportionality element.

Hoexter and Lyster argue that reasonable administrative action in s33(1) of the Constitution implies reasonable effects, or proportionality.[91] The arguments made by commentators regarding proportionality in relation to s24(d) of the IC should apply with at least equal force in respect of s33(1) of the Constitution. Proportionality, therefore, would need to be incorporated within the grounds of review in the PAJA, as the PAJA must be interpreted in light of the constitutional right.

5.5 Conclusion

Proportionality is a fundamental principle underlying the law in general, and in particular areas of the law such as the criminal law, delict, and most importantly, constitutional law. Proportionality is a fundamental principle underlying the constitutional regime, as a means of balancing competing rights in the Bill of Rights. It is therefore appropriate that proportionality is an aspect of the right to reasonable administrative action. Proportionality was in fact an aspect of unreasonableness applied by the courts at common law, even through it was not necessarily explicitly identified as a principle that

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[89] 2004 (4) SA 490 (CC)
[90] At 513, para 45
[91] Hoexter and Lyster, 182

was being applied. Unreasonableness has been described by various commentators and in some case law decided in terms of s24(d) of the IC as incorporating an aspect of proportionality. There is some indication in the recent Constitutional Court judgment in *Bato Star*[92] that proportionality is an aspect of the right to reasonable administrative action in terms of s33(1) and s6(2)(h) of the PAJA.

[92] Supra, 513, para 45

CHAPTER 6: REVIEW FOR UNREASONABLENESS AND PROPORTIONALITY IN THE PROMOTION OF ADMNISTRATIVE JUSTICE ACT

6.1 Introduction

Having gained an understanding of review for unreasonableness and proportionality though a consideration of the common law, discussions by commentators, and most particularly the constitutional jurisprudence, it is now possible to examine the PAJA and consider the extent to which it gives meaningful effect to the right to reasonable administrative action, and in particular, review for unreasonableness and proportionality.

Consideration must first be given to the relationship between the Constitution and the PAJA. An examination of the drafting history of the relevant provisions of the PAJA relating to review for unreasonableness and proportionality is assistive in understanding the rationale behind the final formulation of the PAJA, and the content which was sought to be included (or possibly, excluded) from the scope of the Act.

It is necessary to consider a variety of interpretive factors when examining the content of the relevant provisions in the PAJA. A conclusion can then be made regarding whether or not the provisions under examination can be interpreted in a manner that is consistent with the constitutional right to reasonable administrative action. If it is found that it is not possible for the provisions of the PAJA to be interpreted consistently with the constitutional right, and if the provisions define the content of the right more restrictively than how the right is entrenched in the Constitution — if, in other words, the PAJA infringes the right to just administrative action— it is then necessary to assess whether or not the limitation of the right can be justified.[1]

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[1] In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC), 559C-F, 560AB/B, paras 23, 24, 26 560A/B - B, the Constitutional Court discussed the interpretation of legislation in light of the Constitution. The Constitutional Court noted that while judicial officers had to prefer interpretations of legislation that were constitutional over those that were unconstitutional, provided that such an interpretation could be reasonably ascribed to the provision, limits had to be placed on the application of that principle. A balance often has to be struck between the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible, and the duty on the legislature to pass legislation that was reasonably clear and precise, so that citizens and officials can understand what is required from them. There may be instances when a judicial officer may find that the legislation, though open to a meaning which would be unconstitutional, was reasonably capable of being read in conformity with the Constitution. Such an interpretation should not, however, be unduly strained. Where a legislative provision is reasonably capable of a constitutional meaning, that meaning should be used. Only if this is not possible should resort be had to the remedy of reading in or notional severance

6.2 The Relationship Between the Constitutional Provision and the PAJA

With the enactment of the PAJA, what is the status of the right to reasonable action in s33(1)? De Wall, Currie, and Erasmus assert that the requirement in s33(3) that the legislation must 'give effect to' the rights in s33(1) and (2) could be interpreted in two possible ways.[2] It could be interpreted to mean that the PAJA comprehensively defines the right to just administrative action, and the constitutional right in s33 can no longer be directly relied upon.

Another possible interpretation is that the PAJA gives effect to the rights in s33(1) by describing in some detail the content of the right to just administrative action and providing remedies for violations of the right. The purpose is to assist the public and decision-makers to understand the right. In the broad form the right is set out in s33(1) they may be difficult to understand how the right directly applies in particular situations. The PAJA is assistive in making the rights 'effective'. The constitutional right exists independently of the PAJA, and is not 'created' by or completely defined in terms of the PAJA. This means that it could be possible that the PAJA is unconstitutional to the extent that it is incompatible with the constitutional right to administrative justice in ss33(1) and (2) of the Constitution.

O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[3] importantly emphasized that the content of review for unreasonableness under the PAJA must be defined in light of the Constitutional right to reasonableness in s33(1) in the following statement:[4]

> 'The subsection [6(2)(*h*)] must be construed consistently with the Constitution and in particular s33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach.'

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[2] De Waal, Currie and Erasmus, 494
[3] 2004 (4) SA 490 (CC)
[4] At 513, para 44

The above passage clearly indicates that the constitutional right to reasonable administrative action exists indpendently of the PAJA, and that the PAJA must be interpreted consistently with the constitutional right. Potentially, it is possible that the PAJA could be challenged as being unconstitutional to the extent that it is incompatible with the constitutional right to administrative justice in ss33(1) and (2).

6.3 Review Under the PAJA

While the PAJA sets out the requirement for procedural fairness in detail, the provisions relating to lawfulness and reasonableness are phrased in broad terms. Courts will have to provide the necessary detail regarding review relating to lawfulness and unreasonableness, which I submit is quite appropriate, particularly with respect to unreasonableness. Section 6(2) sets out nine principal grounds of review of an administrative action, and 14 sub-grounds. Twenty grounds are listed in total. The list is not closed, as s6(2)(i) permits review on the ground that administrative action is 'otherwise unconstitutional or unlawful'.[5]

The grounds of review listed in s6(2)(e), rationality under s6(2)(f), and unreasonableness under s6(2)(h) seem to incorporate elements of unreasonableness as described by Jowell in his discussion of unreasonableness described earlier in chapter 2. This thesis, however, will focus on the unreasonableness clause, s6(2)(h). The wording of the provision in the PAJA differs from the wording of the provisions in several drafts of the Bill. While the provision specifically incorporating the requirement of rationality was retained in the PAJA, the provision incorporating unreasonableness was significantly changed, and the provision in the PAJA reads as follows:

> '**Judicial review of administrative action**
>
> 6.(2) A court or tribunal has the power to judicially review an administrative action if –
>
> ....
>
> (h) the exercise of power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was

[5] Currie and Klaaren, 152

> purportedly taken, is so unreasonable that no reasonable person could have so exercised that power or performed the function;'

6.3.1 Codification of the Common Law Grounds of Review

Currie and Klaaren assert that s6 of the PAJA constitutes a codification of the grounds of review. They note that 'a long line of literature has explored how the legislative process of codification both preserves and transforms the substantive content of the preceding law,'[6] and describe codification as 'putting old wine in a new bottle,' which seeks to 'identify and maintain the old substance by placing it in a new form.' [7]

In the *Bato Star* case, O'Regan J for the Constitutional Court clearly pronounced on the issue of whether or not the PAJA is a codification of the grounds of review as follows:[8]

> 'The provisions of s6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administrative action that do not fall within the scope of PAJA. As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.'

It is notable, however, that the PAJA contains an open ended listing of grounds of review, the 'catch all' provision in s6(2)(i). Potential grounds of review which have not specifically been enumerated but must fall within the scope of the right to just administrative action in s33 of the Constitution could potentially be incorporated within the ambit of the PAJA through this provision. In the future, new grounds of review that might potentially come to be recognised by the courts could also be incorporated in this way. It therefore may be possible to argue that even if proportionality as an aspect of review for unreasonableness is not incorporated within s6(2)(h) of the PAJA, it should be interpreted by the courts as being incorporated within s6(2)(i), on the basis that it would

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[6] Currie and Klaaren, 154
[7] Currie and Klaaren,154

be an aspect of the right to reasonable administrative action which has not been properly incorporated within the other enumerated provisions of s6(2).[9]

6.4 The Legislative History of the PAJA

When examining the incorporation of unreasonableness as a ground of review in the PAJA, it is helpful to be aware of the drafting process of the Act. In particular, it is relevant to consider some of the discussions which took place during the drafting of the Act relating to the incorporation of unreasonableness, and the principle of proportionality as an aspect of review for unreasonableness, in the Act.

The origins of the legislation can ultimately be traced back to a project of the South African Law Commission that examined the courts' powers of review of administrative acts. This project produced two Working Papers,[10] and ultimately submitted a report to the Minister of Justice in November, 1992. In July, 1994, in light of the new constitutional dispensation and s24 of the IC, the Minister of Justice requested advice from the Commission as to whether or not he should proceed with the recommendations and legislation proposed in the 1992 Report. The Commission in a supplementary report in October, 1994 recommended that legislation should be enacted to complement and give effect to s24 of the IC. It suggested that the legislation should provide for the review of administrative action and 'an open-ended codification of the grounds for review', including the ground of unreasonableness. A draft bill was proposed.

In 1996, the Constitution was enacted which contained s33 that required national legislation to be drafted, as well as the transitional provision in item 23 of Schedule 6. Discussions commenced in August 1997 to draft a Bill to give effect to the constitutional requirement to enact legislation, and a proposal was submitted to the Minister proposing the establishment of a Project Committee in terms of the South African Law Commission Act 19 of 1973 to draft a Bill. The Project Committee was established in November,

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[8] *Bato Star,* supra, 506-507, para 25
[9] Hoexter and Lyster, 166
[10] South African Law Commission 'Working Paper 15: Investigation into the Court's power of review of Administrative Acts' 1986, and 'Working Paper 34' October 1991

1998, and it commenced its work in January, 1999.[11] Discussion paper 81 was circulated for comment in February 1999.[12] The Commission invited comments on the draft Bill, held workshops, and also presented the draft to international experts. A final revised draft Bill was published in the *Report on Administrative Justice* in August, 1999.[13]

In this Report, the Commission noted that in its work, it had taken into account the constitutional imperative under s33 of the Constitution, as well as recurrent concerns which were expressed in response to its working papers, and at workshops that it held. The Commission identified these concerns as follows:

> 'One has been the need to guard against imposing paralysing burdens on effective administration in South Africa. Another, however, has been the need to ensure that governmental agencies whose working methods are rooted in the pre-constitutional dispensation, reflect administrative justice. A third has been the question of cost and accessibility.'[14]

The Commission emphasized that it tried to balance these concerns, but that ultimately, '[t]he touchstone remains what the Constitution requires'. The Commission tried to take into account the potential financial impact on administrative agencies, 'without jeopardising the Bill's effect.' It stated that it should be possible to successfully balance these competing interests as follows:

> 'The Commission believes that a more just and efficient administration are mutually interdependent, and that greater administrative justice must ultimately result in savings to society. In the final analysis, moreover, the constitutional imperatives in section 33 must, as a matter of legal requirement, be met.'[15]

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[11] The history of the Commission's involvement in the drafting process is described in South African Law Commission 'Report on Administrative Justice' August 1999, Chapter 1, Introduction, available at http://www.law.wits.ac.za/salc/report/adminsum.html

[12] South African Law Commission 'Discussion Paper 81 Administrative Law' February 1999, available at http://www.law.wits.ac.za/salc/discussn/dpadminsum.html

[13] South African Law Commission, 'Report on Administrative Justice' August 1999

[14] At Chapter 3, para. 3.3

[15] At Chapter 3, para 3.4

6.4.1 The Evolution of the Provision Relating to Judicial Review in the Various Drafts

Examining the manner in which the provisions relating to judicial review (and review for unreasonableness and proportionality in particular) evolved through various draft bills prior to the final Act, and any reasons given by the legislative drafters for the changes made in the various draft bills and the final Act, can assist in interpreting the provisions relating to judicial review in the PAJA.

The first draft bill was produced by the Law Commission in 1992, and it provided in s3(1) as follows:

> 'Notwithstanding the provisions of any law, a court shall have the power to review a decision on any of the following grounds:
> (a) that the relevant principles of natural justice have been breached in connection with the making of the decision;
> (b) that a procedure or a condition required by law has not been complied with in the making of the decision;
> (c) that the organ which made the decision was not by law authorised to make the decision;
> (d) that the decision was not authorised by the provisions of the law in terms of which it purports to have been made;
> (e) that the decision was materially influenced by an error of law or fact;
> (f) that no reasonable organ could have made the decision;
> (g) that the decision was made for an ulterior motive or purpose;
> (h) that the decision was otherwise contrary to law.'[16]

The relevant provisions in the draft Bill and an alternative version which was submitted by the Chairman of the Commission read as follows:

> '1.) original version of clause 3 (1)
> 3 (1) Notwithstanding the provisions of any law, a court shall have the power to review a decision on any of the following grounds:

[16] Lange, 'Unreasonableness as a Ground of Judicial Review in South Africa- in the Past and Under the Promotion of Administrative Justice Act', unpublished study project presented in partial fulfilment of the requirements for the degree of Master of Laws at the University of Stellenbosch, June 2000, 45

> ...(f) that the decision was so unreasonable that no reasonable organ could have made the decision. [17]
>
> 2.) alternative version of clause 3 (1)
>
> 3 (1) Notwithstanding the provisions of any law, a court shall have the power to review a decision on any of the following grounds:
>
> ...(f) that no reasonable organ could have made the decision.'

Unreasonableness is incorporated in s3(1)(f). One submission that was made regarding these draft provisions was to suggest that the Bill provide additionally for the review of decisions that are disproportionately unreasonable in their effect on the individual. This proposal seems to have been taken into account in the formulation in the fifth draft of the Bill and in the Bill which was introduced to the National Assembly. However, this proposal in respect of the Draft Bill in the Project Report was rejected, on the basis that proportionality was implicitly incorporated as an aspect of reasonableness.[18]

In 1994, the Commission produced another draft Bill. Section 3 of this draft Bill was nearly identical to the 1992 draft Bill, except for the inclusion of another ground for judicial review, namely:

> '(h) that the decision is not justifiable in relation to the reasons given for it;
>
> (i) that the decision was otherwise contrary to law.'

It is interesting to note that s3(1)(h) is similar to the wording in s24(d) of the IC. The ground 'that the decision was otherwise contrary to law' means that these two provisions are open-ended, and there is the potential for other grounds of review to be applied or new grounds to be developed if in the future the courts find that there is a need. These provisions do not expressly incorporate proportionality, but it is possible that proportionality could be incorporated as an aspect of review for unreasonableness. The draft Bill included in Discussion Paper 81 in s4 sets out the grounds of review of administrative action. In contrast to the proposal in the Commission's Project Report of 1992, and in its Supplementary Report of 1994, which suggested that an open-ended list

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[17] Ibid

[18] South African Law Commission 'Report on the Investigation into the Courts' Powers of Review of Administrative Acts' 1992, 245; See also Lange, 45

of grounds for review should be included, s4 of the draft Bill in Discussion Paper 81 set out a closed list of grounds:[19]

'**4. Grounds of review**

(1) A court has the power to review administrative action if:-

. . . .

(d) the action was taken:-

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations not considered;

(iv) because of rigid adherence to a standard;

(v) because of the dictates of another person or body; or

(vi) arbitrarily, capriciously or without properly considering the matter; or

. . . .

(f) the action itself:-

(i) contravenes the law or is not authorised by law;

(ii) is uncertain;

(iii) is not rationally connected to:-

(aa) the purpose for which is was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the organ of state; or

(dd) the reasons given for it by the organ of state or natural or juristic person concerned; or

(iv) is unreasonable, taking into account all relevant factors, including:-

(aa) the adverse effect of the action;

(bb) the relationship between that effect and the benefits of the action; and

(cc) any less restrictive means to achieve the purpose for which the action was taken.'

Sections 4(1)(d) and (f) set out grounds of review which Jowell has described as being aspects of *Wednesbury* unreasonableness,[20] including decisions based on ulterior

[19] South African Law Commission 'Discussion Paper 81: Administrative Law' February 1999, available at http://www.law.wits.ac.za/salc/discussn/dpadminsum.html; see also Lange, 38

[20] Jowell 'Judicial Review of the Substance of Official Decisions' 1993 *Acta Juridica* 117, 120

purpose[21], irrelevant considerations[22] and decisions made arbitrarily or without properly considering the matter.[23] The grounds listed in s4(1)(d) relate to a failure of the decision maker to properly apply his or her mind to the matter. The grounds listed in s4(1)(f)(iii) relate to irrationality.

Section 4(1)(f)(iv) explicitly sets out unreasonableness as a ground for review, and the factors which are listed as being relevant to consider are aspects of proportionality analysis— assessing the impact on the individual against the benefits of the action, and determining whether or not there are less restrictive means for achieving the objective. Proportionality was clearly conceived of as being an aspect of review for unreasonableness.

Unreasonableness and irrationality were separately incorporated in the discussion paper draft as grounds for review. A number of submissions to the Commission criticized this approach, arguing that irrationality should be treated as an aspect of unreasonableness.[24] A few comments submitted to the Commission concerning the incorporation of review for unreasonableness suggested that the test for proportionality could be an appropriate means to provide for judicial review.[25]

Submissions were made urging the incorporation of an open-ended provision which would allow the Bill to meet the need for review in other circumstances.[26] The Commission initially argued that it would be good to have a closed formulation which would provide administrators with a clear conception of the constraints on their

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[21] Section 4(1) (e) (ii)
[22] Section 4(1) (e) (iii)
[23] Section 4(1) (e) (vi)
[24] Klaaren 'Some initial reactions' 284-285; Liebenberg '(University of the Western Cape – Community Law Centre) Comments on SALC Discussion Paper 81' 304-307; Van Wyk 'Brief Comments on the Draft Administrative Justice Bill' 595; all are printed in SA Law Commission *Administrative Law Project 115 Committee Paper 720* April 1999; see also Lange, 42
[25] Philippe, 'Submissions on Discussion Paper 81', 105; Birkinshaw 'Comments' 108; Cape Town Municipality 'Submissions'; all are printed in South African Law Commission *Administrative Law Project 115 Committee Paper; 720* April 1999, 636- 639; See Lange, 4
[26] See, for example, Birkinshaw 'Comments' 108; Black Sash 'The Black Sash's Perspective on the Right to Just Administrative Action' 124; South African Human Rights Commission 'Comments' 262 -265; Johannesburg Bar Council 'Submissions' 577; Webber Wentzel Bowens 'Submissions' 625- 628; IBA 'Response to the Administrative Justice Bill' 648; General Bar Council of South Africa 'Comments on Draft Administrative Justice Bill' 687; all are printed in SA Law Commission *Administrative Law Project 115 Committee Paper 720* April 1999

discretion, and the grounds on which their decisions could be reviewed.[27] Ultimately, however, the Commission supported the inclusion of an open-ended formulation.[28] In its Project Report of August 1999, the Commission in its overview of the draft Bill it presented, stated:[29]

> 'Chapter 4 focuses on the grounds of review, and the procedure for obtaining it. Clause 7 is a vital part of the Bill, specifying the grounds of review established at common law, adapted in the light of recent formulations in South Africa and in other countries with a similar review jurisdiction. Two features are important: the distinction between review and appeal is retained, and the list (by virtue of clause 7(1)(h), reinforced by clause 3) is not a closed one. In this way, the opportunity exists for the courts to continue to develop and to define the South African law of review, in the spirit of section 8(3) of the Constitution.'

There were several subsequent drafts of the Bill. The grounds set out in section 4 were not altered in the second draft of the Administrative Justice Bill,[30] but there were changes made to the provision relating to review for unreasonableness which was incorporated in the fifth draft of the Bill,[31] and was retained in the sixth draft Bill in the Law Commission Report of August 1999.[32] The provision in these later drafts provided as follows:

> '**Grounds of Review**
>
> **7.**(1) A court has the power to review administrative action if:-
>
> . . . .
>
> (e) the action was taken:-
>
> (i) for a reason not authorized by the empowering provision;
>
> (ii) for an ulterior purpose or motive or in bad faith;
>
> (iii) because irrelevant considerations were taken into account or relevant considerations not considered;
>
> (iv) because of too rigid an adherence to a standard;

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[27] South African Law Commission 'Administrative Justice Revised and annotated Administrative Justice Bill' May 1999, fn 11

[28] See s7(1)(h) of the fifth draft of the Bill (30 July 1999) which has been maintained also in the PAJA (s6 (2)(i)); See fn 20 in the fifth draft of the Bill and South African Law Commission 'Report on Administrative Justice' August 1999, available at http://www.pmg.org.za/aj/SALCReport.htm); see Lange, 39-41

[29] South African Law Commission, 'Report on Administrative Justice', August 1999, Chapter 6, para 6.7

[30] Drafted in May 1999

[31] Drafted in July 1999

[32] South African Law Commission, 'Report on Administrative Justice', August 1999, Annexure A; see also Currie and Klaaren, 8 and 172

(v) because of the unauthorized or unwarranted dictates of another person or body; or

(vi) arbitrarily, capriciously or without properly considering the matter;

(f) the action itself:-

. . .

(iii) is not rationally connected to:-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the effect of the action is unreasonable, including any:-

(i) disproportionality between the adverse and beneficial consequences of the action;

(ii) less restrictive means to achieve the purpose for which the action was taken; or

(h) the administrative action is otherwise unconstitutional or unlawful.'

Section 7(1) entrenches rationality review,[33] and provides for review for the application of proportionality.[34] Proportionality was mentioned expressly in the Bill as a ground for review.[35] Section 7(1)(g)(i) can be described as incorporating the aspect of proportionality in the narrow sense as it is described in German Administrative Law.[36] Section 7(1)(g)(ii) can be viewed as incorporating the aspect of necessity, since a decision cannot be said to be necessary if there is a less restrictive means to achieve the intended purpose.

After the publication of the Law Commission's Report in August 1999, and prior to the introduction of Bill 56 of 1999 in Parliament, there was considerable activity. According to Professor Sarkin, cabinet was not satisfied with the draft presented by the Law

[33] Which is incorporated in the PAJA as s6(2)(f) (ii)
[34] South African Law Commission 'Report on Administrative Justice' August 1999, Annexure A; Currie and Klaaren, 8
[35] Lange, 43
[36] De Ville 'Proportionality as a requirement of the legality in administrative law in terms of the new Constitution' 1994 *SA Public Law* 360, 366-367

Commission, because new structures were created and the bill was too detailed. The Minister of Justice then requested Professor Sarkin to prepare a draft.[37] He adopted quite a different approach to the Law Commission, setting the grounds out in terms of a 'positive' requirement for administrative action which decision makers must meet, rather than as 'negative' grounds on which the court can hold the action to be invalid. He set out the grounds for review in the following provision:

'**Standards for administrative action**

8. (1) Administrative action shall comply with the following:-

. . . .

(c) the reason for which the administrative act is taken must be authorised by the empowering provision and must not be for a purpose or motive ulterior to that authorised by the empowering provision;

. . . .

(f) all findings of law must be based on a correct interpretation of the empowering provision and may not be taken arbitrarily or capriciously;

(g) all findings must be based on reasonable and sufficient evidence in support of those findings or conclusions;

(h) the administrator must take into account all relevant considerations and disregard all irrelevant considerations in reaching its conclusion;

(i) the administrator may not, without good cause, deviate from a standard, or adhere to a standard, if such deviation or adherence shall cause prejudice;

(j) administrative action must be taken free from the influence or dictates of another person, organ or body whose influence or participation is not permitted or required by law;

. . . .

(l) the grounds upon which administrative action are based must be rationally connected to-

[37] Letter from Professor J Sarkin to B Kali, Justice Portfolio Committee, 15 November 1999, cited in Lange,

(a) the purpose for which the action was taken;
(b) the purpose of the empowering provision;
(c) the information before the administrator;
(d) the reasons given by the administrator;

(m) the administrator action must be reasonable. In determining the reasonableness of the action-
(a) the administrator must weigh all interests directly involved;
(b) the administrator must consider all reasonable less restrictive means to achieve the purpose for which the action is taken and endeavour to follow the less burdensome possibility;
(c) the administrator must weigh up the adverse effect of the administrative action which may not be disproportionate to the benefits of the action;
(d) the administrator must weigh up the nature of the rights involved, especially a right contained in the Constitution.'

Like the provisions in the drafts by the Commission, this formulation also has distinct provisions relating to rationality and reasonableness. The provision relating to reasonableness sets out the process required for decision-making in significant detail, and this process is envisaged as incorporating proportionality. This draft, however, was not accepted by the Department of Justice, and the Department decided to draft its own Bill.[38]

Some submissions made before the Portfolio Committee discussing the Administrative Justice Bill 56 of 1999 (the 'Cabinet draft') which was eventually presented to Parliament referred to the above draft by Professor Sarkin and advocated Professor Sarkin's approach of incorporating the provisions in 'positive', rather than 'negative' terms. It was submitted that that would give administrators and the public a clear conception as to what is expected of administrative action, and would promote the accessibility of the legislation to administrators and the public.[39] It was also submitted that the above formulation would usefully infuse legality into the standard for administrative action.[40]

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[38] Ibid
[39] See, for example, Cosatu 'Submissions on the Administrative Justice Bill' 30 November 1999, para 8.1
[40] IDASA 'The Administrative Justice Bill: Submissions from Idasa', paras 27, 28; The Human Rights Committee 'The Human Rights Committee's Submission to the Portfolio Committee on Justice and

The Administrative Justice Bill 56 of 1999 was introduced by the Minister of Justice in Parliament.[41] Interestingly, the Bill prepared by the Department contained the provision relating to grounds of review which was included in the draft in the Law Commission Report of August 1999, including a provision entrenching rationality review,[42] and another providing for review for unreasonableness and the application of proportionality.[43]

6.4.2 The Submissions to the Portfolio Committee

The Bill was considered by the Portfolio Committee on Justice and Constitutional Development, where some further significant changes were effected,[44] with the intention, it has been suggested, of limiting the scope of judicial review.[45]

Some of the submissions presented to the Committee regarding the Bill discussed the wording of the provision relating to review for unreasonableness, and the inclusion of the principle of proportionality. General concerns about the grounds of review were raised[46]. The Black Sash set out a proposed provision in positive terms as follows:

> 'Every administrator must respect, protect, promote and fulfil the rights contained in the Bill of Rights except to the extent reasonable and justifiable in an open and democratic society.
> and
> A failure to do so constitutes a ground of review, on the basis that the administrative act was unreasonable.'[47]

Constitutional Development and the Select Committee for Security and Constitutional Affairs concerning the Administrative Justice Bill [B56-99]' 20 November 1999, para 4.1

[41] Available at http://www.polity.org.za/govdocs/bills/b56-99.pdf

[42] Which is incorporated in the PAJA as s6(2)(f) (ii)

[43] Available at http://www.law.wits.ac.za/salc/discussn/dpadminsum.html; Currie and Klaaren, 8

[44] The Committee presented an amended Bill to Parliament as the Promotion of Administrative Justice Bill 56B of 1999, available at http://www.polity.org.za/govdocs/bills/1999/b56b-99.pdf

[45] Currie and Klaaren, 9; See the Minutes of the Portfolio Committee on Justice and Constitutional Development, which are available at http://www.pmg.org.za

[46] South African Council of Churches 'Legislative Submission to the Administrative Justice Bill (B56-99)' 20 November 1999,1

[47] Black Sash 'The Black Sash Submission in Response to the Administrative Justice Bill B 56-99 as Introduced in the National Assembly as a Section 75 Bill'

This provision, in echoing the wording of the limitation provision in the Constitution, s36, which has been found to incorporate proportionality, arguably links proportionality to unreasonableness as a ground for review.

The South African Police Service suggested that the wording of s7(1)(g), specifically mentioning 'disproportionality' was unclear, and suggested that the wording of s36(1) of the Constitution should be employed.[48] The Department of Land Affairs presented submissions which suggested that clause 7(1)(g) 'appears to invite the courts to make decisions on policy matters.' The Department stated further:

> 'Proportionality and seeking 'less restrictive means' are appropriate tests where the executive is seeking to justify a limitation of constitutional rights. But it is difficult to see why courts, which are not politically accountable, are better placed than a politically accountable executive to decide on the best way to balance competing interests and determine priorities. How does a court weigh how 'beneficial' and how 'adverse' the consequences of an action are? That is a matter of political judgment. And considering whether the balance is right, involves taking a view on which interests are more important than others, and how much more important. This is an even more political judgment- in Laswell's famous phrase, politics is precisely about 'who gets what, when and how'. It seems to me that courts are not well equipped for this role, either institutionally or in terms of their expertise.
>
> The argument has even more force in relation to the test of 'less restrictive means'. Less restrictive of what? The language is inappropriately borrowed from the situation where the action is a limitation of constitutional rights.
>
> In saying this, I do not wish to suggest that we should go back to the 'bad old days' of the *Chetty* case, where it was held that before a decision would be reviewable, it had to be so grossly unreasonable as to warrant the inference that the decision-maker had abused his or her discretion.

[48] Suggesting that the general limitation clause in s36 of the Constitution should be incorporated in the Bill instead of the chosen wording (South African Police Service 'Comments on the Administrative Justice Bill, 1999' 19 November 1999, 3; See also Law Society of South Africa 'Submission on the Administrative Justice Bill 1999' 20 November 1999, 4, available at http://www.pmg.org.za/aj/LSSA.htm

> I would suggest that a more appropriate test be introduced- for example, the test of rationality, or of whether the action is justifiable, in the sense of being capable of rational justification.
>
> It is worth noting that Clause 7 applies to *all* administrative action and not only administrative action which affects rights or interests. This is surely correct- but it should also give rise to caution in setting an appropriate threshold for judicial intervention.'[49]

As will be seen from concerns expressed during Committee deliberations which will be discussed below, these concerns seemed to be quite prevalent among government—that proportionality would mean placing the courts in the policy-making arena. It seems clear that rationality or 'justifiability in relation to the reasons given' are seen as being less extensive that 'reasonableness'.

The Law Society of South Africa in its submissions asserted with respect to s7(1)(g):

'1. This clause does not make sense and should be amended to provide administrators with certainty as to the constraints within which they must function.

2. It is unclear how one is to measure the 'disproportionality between' the 'consequences' of the administrative action, as clause 7(1)(g)(I) would seem to require. If it is meant that a court may find that the effect of the action is unreasonable if the adverse consequences of the action outweigh its benefits, then the word 'disproportionality' should not be used.

3. Moreover, clause 7(1)(g)(ii) seems to require that a court reviewing administrative action for unreasonableness should *take account of* the fact that there were less restrictive means *available* to an administrator to achieve the purpose for which the action was taken, but important words which would convey this meaning have been left out of the clause.

4. It is submitted that clause 7(1)(g) should be amended as follows:

   'the effect of the action is unreasonable, <u>taking into account all relevant factors,</u> including:

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[49] Budlender 'Submissions on the Administrative Justice Bill, 1999', 3-4

i. the extent to which the adverse consequences of the action outweigh its benefits, and

ii the availability of less restrictive means to achieve the purpose for which the action was taken.'[50]

While not explicitly incorporating proportionality, this suggested formulation does incorporate proportionality into the analysis for review for unreasonableness.

Some submissions, however, were supportive of the provision in the draft. The South African Law Commission's Project Committee on Administrative Justice made extensive and cogent submissions justifying the provision as follows:

'7.3 Concern has been expressed that clause 7(1)(g), which provides for review where the effect of the action is unreasonable, would enable reviewing courts to intervene too readily. This concern is particularly acute in relation to political or social choices, for example, whether funds should be allocated in one way and another. There is a further concern that the proportionality clause (clause 7(1)(g)(i)) and less restrictive means (clause 7(1)(g)(ii)) factors will exacerbate the problem.

7.4 For the following reasons however, we believe that the current formulation of clause 7(1)(g) will not give rise to difficulties of this sort.

7.5 Firstly, section 33(1) of the Constitution, by entrenching the right to reasonable administrative action, prohibits unreasonable administrative action.

7.6 Secondly, the standard established by clause 7(1)(g) is the standard specifically set out in section 33 itself, namely unreasonableness.

7.7 Thirdly, the effect of administrative action, including disproportionality between the adverse and beneficial consequences of administrative action and the availability of less restrictive means, is clearly relevant to any assessment of its (un)reasonableness.

7.8 Fourthly, when assessing the reasonableness of administrative action, courts have in the past been guided, and will in future be guided, by the nature of the administrative action

[50] Law Society of South Africa, 4. The underlining included indicates proposed additions to the existing provision

> in question and the constitutional relationship between the legislature, the executive, and the courts. As is apparent from the Constitutional Court's decision in the *SARFU* case, the more closely related discretionary powers are to the development of policy, the less likely the courts will be — or will be permitted by the Constitutional Court — to intervene under section 33 of the Constitution.'[51]

The Legal Resources Centre made submissions strongly emphasising that review for unreasonableness, and proportionality as an aspect of review for unreasonableness, are fundamental aspects of a constitutional regime, and that the South African courts have conducted review for unreasonableness and applied proportionality for a lengthy period. Review for unreasonableness does not entail an obliteration of the distinction between review and appeal, and the courts in many jurisdictions (including South Africa) have developed mechanisms of deference which enable the courts to conduct review for unreasonableness and the balancing process of proportionality appropriately.[52] In the end, however, this section was not retained in the Act, and was replaced with s6(2)(h), which does not make express reference to proportionality.[53]

From the various draft provisions which were prepared, and the submissions which were presented to the Committee, it seems that in general, proportionality was conceived of as being an important aspect of review for unreasonableness. Many of the submissions to the Committee were supportive of the incorporation of review for unreasonableness, though some suggested recasting the concepts in somewhat different terms than how they were set out in s7(1)(g) of the Bill. Only one submission to the Committee, presented by the Department of Land Affairs, expressed concerns about proportionality as an aspect of review for unreasonableness. This submission, however, seemed to find resonance with concerns held by a number of members of the Committee.

6.4.3 The Deliberations of the Committee

A great deal of discussion took place regarding review for unreasonableness and proportionality in the Portfolio Committee— it was one of the more controversial aspects

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[51] Gauntlett on behalf of the South African Law Commission's Project Committee on Administrative Justice, 'Supplementary Memorandum on the Administrative Justice Bill' 6 December 1999, 6-8
[52] Legal Resources Centre 'Submissions by the Legal Resources Centre to the Portfolio Committee on Justice and Constitutional Development' December 1999
[53] Currie and Klaaren, 172

of the Bill. Quite a number of potential amendments were considered to s7(1)(g) in the Administrative Justice Bill 56 of 1999 (the 'Cabinet draft'), and the ultimate provision in the PAJA was quite different than s7(1)(g) of the Cabinet draft. The options for amendment that were considered were as follows:[54]

'**Option 1**:

(g) the **[effect of the]** action is unreasonable/grossly unreasonable**[, including any-**

(i) disproportionality between the adverse consequences of the action; and

(ii) less restrictive means to achieve the purpose for which the action was taken;]

Option 2:

(g) the exercise of the power authorised by the empowering provision, in pursuance of which the action was purported to be taken, is so unreasonable that no reasonable person could have exercised the power;

Option 3:

(g) the effect of the action is unreasonable/ was not rationally justified in terms of the circumstances facing the administrator at the time when he or she or it took the action **[, including any-**

(i) disproportionality between the adverse consequences of the action; and

(ii) less restrictive means to achieve the purpose for which the action was taken;]

Option 4:

Omit Paragraph (g)'[55]

In a later draft,[56] the following option was additionally added:

'7(1)f **'(iv) is unreasonable;'**

[54] Words inside of brackets in bold are proposed deletions from the existing provision, and underlined words are proposed additions to the existing provision

[55] Draft (Adjust 4) as of 15/12/99, available through http://www.pmg.org.za, linked to http://www.jutastat.com

[56] Draft (Adjust 5), also retained in Draft (Adjust 7) , available through http://www.pmg.org.za, linked to http://www.jutastat.com

Option 2 above was amended to read:

> '(g) the exercise of the power ***or the performance of the function*** authorised by the empowering provision, in pursuance of which the action was purported to be taken, is so unreasonable that no reasonable person could have exercised the power ***or performed the function;***'

An optional amendment was added for (h):

> **'Option- substitute paragraph (h) with the following:**
> **(h) the administrative action is otherwise unreasonable, [unconstitutional or] unlawful or unconstitutional;**. . . '

In a still later draft, an entire additional s7 was added as an option, which contained the following :

> '**[(g)** the **effect of the** action is unreasonable**, including any-**
>
> **(i) disproportionality between the adverse consequences of the action; and**
>
> **(ii) less restrictive means to achieve the purpose for which the action was taken;** or]
>
> . . . .
>
> **(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purported to be taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or** . . . .'[57]

A radical change occurred between drafts 8 and 9: the earlier subsection (g) dealing with proportionality was removed, and the subsection (h) contained in the second optional provision contained in draft 8 was now incorporated as section 6(1)(h), which was proposed to read:

> '(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was

> **{[purported to be] purportedly}** taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function;'

This provision seems to echo the wording of the provision originally suggested in the Law Commission Report on the 'Investigation into the Courts' Powers of Review of Administrative Acts' of 1992.

There was considerable debate in the Committee regarding review for unreasonableness. In the Committee meeting of 11 January 2000, for example, much of the morning was spent discussing the provision incorporating review for unreasonableness. An examination of these minutes[58] sheds some light on the concerns of the committee members which ultimately had a significant impact on the drafting process.

The chairperson of the Committee emphasised that the grounds in s7 are review and not appeal grounds. There was lengthy debate about whether or not the standard of 'gross unreasonableness' should be incorporated, or whether s7(1)(g) as it was drafted originally by the Law Commission should be retained. The Democratic Party members on the committee were in favour of reasonableness being the standard, and expressed the view that the 'gross unreasonableness' standard would be unconstitutional. The chairperson expressed the view that if 'gross unreasonableness' was incorporated, the Constitutional Court would decide whether or not it was an unjustified infringement of the right. He advocated relating reasonableness only to the administrative action itself, and not to its effects, as examining the effects would allow the court to go too far into the merits and to make political decisions.

The chairperson believed that 'gross unreasonableness' was the present common law position, and referred to the Law Commission Report of 1994 in support of his position. He also emphasised that unreasonableness had only been applied in one area of South African law, delegated legislation. While he noted that the view has been put forward that the Constitution has imported the concept of unreasonableness to all areas of administrative law, it seems that he was not convinced of this. It seems that he would

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[57] Draft (Adust 7), retained in Draft (Adjust 8) , available through http://www.pmg.org.za, linked to http://www.jutastat.com

have preferred to have the 'gross unreasonableness' standard incorporated in the PAJA, and to let the Constitutional Court strike it down if it found that it was unjustified.

One of the Committee members, Mr. Lever, disagreed with utilising the 'gross unreasonableness' standard, stating that 'gross unreasonableness' harks back to the apartheid era, where the standard was used to restrict freedoms. He argued that the Bill was an attempt to move away from that, and to provide for the fair and just treatment of people. Other Committee members expressed the view that 'gross unreasonableness' might not meet the constitutional standard, and advocated that reasonableness had to be the standard.

An astonishing exchange took place at one point, when Mr. Delport stated that what was trying to be done with the Bill was not to expand or limit the right, but to give effect to it. The Constitution required administrative action which was reasonable, so that was the standard that had to be incorporated. He remarked that the limitations clause of the Constitution should not be used to prevent an aggrieved party from receiving redress if the administrative action is only unreasonable, but not sufficiently unreasonable so as to be 'grossly unreasonable.'

The chairperson disagreed, and stated that the Bill was not giving effect to the limitations clause (my emphasis), which is contrary to the express requirement in the Constitution. He repeated that it would be for the Constitutional Court to decide whether the 'grossly unreasonable' standard is a justifiable limitation of the right. He espoused the view that when the Constitutional Court interprets the Act, it will look at both the common law and international law. He added that '[j]ust because the word reasonable appears in the constitutional text does not mean that it cannot be limited'. Mr. Delport in response asserted that there is no reason to limit 'reasonable'.

There were discussions regarding the merits of options which would permit a court on review to examine only whether the action is unreasonable, and secondly, options which would also permit a court on review to determine whether the effect of the action was unreasonable.

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[58] Minutes of this and some other meetings are available at , available through http://www.pmg.org.za, linked to http://www.jutastat.com

The chairperson and the African National Congress members advocated that ‘the effect’ not be included, as it would go too far towards making review for unreasonableness an appeal ground.

Mr. Smith made an important remark that if an action is regarded as unfair, this is deduced from the effect of the action. It is difficult to conceive of an unfair action which does not have an unfair effect. The chairperson stated that there was a distinction. Looking at the effects of an action required going into the politics and the merits. If the courts were permitted to consider the effects, this would empower the courts to make political decisions. He argued that subsection (g) as it stood allows the courts to substitute their own opinions for those of the administrator.

Mr. Mathee argued that the legislation was required to give effect to the rights in ss33(1) and (2). The legislation should take the rights as they stand. Reasonable is used, not ‘grossly unreasonable.’ When the legislation is drafted, it is to give effect to the rights— the rights should not be in a limited form. The limitations clause is used later in the interpretation of the legislation.

Mr. de Lange observed that, while legislation is to give effect to the right, the right is not unlimited. He noted that a general right is being dealt with and that the limitations clause comes into play when Parliament is dealing with limitations. However, using ‘grossly unreasonable’ puts a general limitation on the right, and to place such a general limitation on the right may amount to a constitutional amendment.

The chairperson stated that he did not follow this line of reasoning and that he disagreed. Rights can be limited. He read out the limitations clause of the Constitution and mentioned the Constitutional Court’s approach to the clause. He stated that the argument that a right cannot be limited in a general way is incorrect. The question was where the line is to be drawn— at what point does the limitation become unjustifiable— and does using ‘grossly unreasonable’ go to far?

Some discussion occurred about whether or not reasonableness should be incorporated within s7(2)(f) dealing with procedural fairness, and whether or not that was appropriate,

or whether reasonableness had to be given effect to separately from procedural fairness. The chairperson stated that it did not have to be given effect to separately, as it was a concept which runs across the whole area of administrative action. (my emphasis). He argued that all that had to be provided was that the courts had the power to review. When the courts looked at the grounds of review, the concept of reasonableness must permeate them. It is interesting to consider that, while the chairperson was of the view that reasonableness was a concept which underlies all of administrative law, he was also of the view that such a fundamental concept, which was clearly required by the Constitution to be incorporated in the legislation, could be limited in a general manner, and to such a significant degree.

Mr. Delport noted that in some instances, even at common law, review does go to the merits: for example, with the ground that the administrator failed to apply his or her mind. This involves assessing whether the administrator dealt with factors which were relevant, and in such cases, the court is looking at the merits. The chairperson replied that merits in this context did not mean that the court was able to substitute its view when an official was given a discretion. A decision could only be set aside when a prescribed procedure was not followed. Merits here meant that even if the court thought that the decision was wrong, but the proper procedures were followed, it could not substitute its decision for that of the administrator. This was why words such as ‘alternatives’ (s7(2)) and ‘less restrictive means’ (s7(1)(g)(ii)) were problematic. These words authorise the court to substitute its opinion for that of the decision maker.

The discussions in the Committee meetings suggest that there was quite a significant difference of opinion among Committee members regarding the incorporation of review for unreasonableness. Some committee members seemed to be of the view that unreasonableness was clearly the standard required by the Constitution to be incorporated within the legislation, while others seemed to be of the view that it might be permissible to incorporate the ‘gross unreasonableness’ standard, and potentially to justify the limitation of the right under s36 of the Constitution. There were those on the Committee who seemed to adopt an approach towards review for unreasonableness similar to the approach adopted by the courts in their interpretation of s24(d) of the IC. Apparently, the majority of the members were very concerned about the possibility that review of the effects of administrative action would allow courts to go too far into

considering the merits of the decision, and were of the view that review should be strictly confined to the action itself. This seems to have been the motivation behind the rejection of the original formulation in s7(1)(g) in the original draft presented to the Committee by Parliament, and the adoption of the formulation which ultimately was incorporated in s6(1)(h) of the final draft which ultimately is to be found in the PAJA.

Lange argues that proportionality was not explicitly included in the wording of the final provision due to concerns in government[59] about the inclusion of proportionality, and of the test of less restrictive means in particular. There were fears that judges would be able to interfere unrestrictedly with policy decisions. There was a view that the drafters of the Bill were largely lawyers and legal academics, and were not public administrators or politicians.[60] The drafters were more concerned about providing mechanisms for the courts to control government power, instead of providing guidelines for the administration. The focus of the PAJA should be the support and the promotion of the working and functioning of the administration to carry out the necessary reforms in the South African society. Based on the conservative history of the judiciary in South Africa, and its composition, there were concerns that policy decisions taken in parliament to promote transformation and development might be hampered by the activism of conservative judges.[61]

Lange asserts that the formulation ultimately decided upon by the Committee was meant to be less restrictive than the former test of 'gross unreasonableness', without inducing the judges explicitly to consider less restrictive means and the other elements of the proportionality test. It was, however, admitted that the application of the proportionality test could not be completely avoided, as it is explicitly incorporated in the wording of the limitation clause in s36 that does include a test for proportionality with the requirement to consider less restrictive means.[62]

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[59] Lange, 45, reports that on 14 June, 2000 she discussed this problem in length with Advocate Johnny de Lange who was the Chairperson of the Portfolio Committee on Justice which was responsible for the said changes. She also had the opportunity to speak about the matter briefly on 5 June 2000 with John Jeffreys who was also a member of this Portfolio Committee. Claudia Lange reports that Johnny de Lange in particular was able to provide insights in the discussions in the Committee which assist in understanding the reasons for the changes in the last stage of the discussions about the PAJA which did not seem to be in line with the former drafts. The following explanations are based on these two discussions

[60] Klaaren 'Some initial reactions', 2

[61] Lange, 45

[62] Section 36 (1) of the Constitution reads as follows:
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that

6.5 Interpreting s6(2)(*h)* of the PAJA

As a starting point for interpreting s6(2)(h) of the PAJA, which is giving effect to the constitutional right to just administrative action, it is relevant to bear in mind the principles which have been set out by the Constitutional Court for interpreting constitutional provisions and fundamental rights.

The important starting point for interpretation is the text. The language of the text must be respected, and be given appropriate attention.[63] The Constitutional Court has expressed strong support for giving a purposive interpretation to fundamental rights, which looks at the purpose of the right— the interests which the right is meant to protect.[64] The Court has also advocated the importance of giving a generous interpretation, which seeks 'to give individuals the full measure of the rights and freedoms referred to'.[65]

A useful approach for interpreting provisions of the PAJA, such as s6(2)(h) that relates to unreasonableness, was set out in *Minister of Land Affairs v Slamdien*[66] where the Land Claims Court provided a discussion of the purposive approach to legislative interpretation of the Restitution of Land Rights Act 22 of 1994, which gives effect to the Constitutional right of access to land. The court set out the approach, which could also be applicable to interpreting the PAJA, as follows:

> '(i) in general terms, ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so,
> (ii) have regard to the context of the provision in the sense of its historical origins;

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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.

[63] *S v Zuma* 1995 (2) SA 642 (CC), para 17 (Kentridge AJ)
[64] *S v Makwanyane* 1995 (3) SA 391 (CC), para 9; *S v Zuma*, supra, para 15
[65] *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC), 328-9 (Lord Wilberforce)
[66] 1999 (4) BCLR 413 (LCC), paras 14-16; see also *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), paras 10-11

(iii) have regard to its context in the sense of the statute as a whole, the subject matter and broad objects of the statute and the values which underlie it
(iv) have regard to its immediate context in the sense of the particular part of the statute in which the provision appears or those provisions with which it is interrelated
(v) have regard to the precise wording of the provision; and
(vi) where a constitutional right is concerned, as is the case here, adopt a generous rather than a legalistic perspective aimed at securing for individuals the full benefit of the protection which the right confers….'

A purposive approach still allows reference to the maxims and presumptions of statutory interpretation.[67] The drafting history of the constitutional provision and of the legislation may be significant.[68]

Currie and Klaaren emphasise that the PAJA is Parliament's interpretation of the constitutional right to administrative justice, and 'some deference should be given to the interpretation of Parliament with respect to the enforcement mechanisms of the constitutional right, although not with respect to its content'[69] (my emphasis). This is very significant. Greater deference will be due to the legislature with respect to the procedures and mechanisms which it puts in place, as that is more of a policy aspect which the legislature is perhaps better placed to determine what is appropriate than the courts, than with respect to the interpretation of the right. The legislature is no better placed than the courts to determine the content of the right, and it is quite properly the province of the courts. That, after all, is precisely what the separation of powers envisages.

6.5.1 Looking at the Purpose of the Provision

It is also crucial to bear in mind that the right to just administrative action is absolutely fundamental to the Constitution's legal control of public power. Reasonableness and proportionality are, in turn, vital aspects of the right to just administrative action. Administrative law is, 'an incident of the separation of powers under which courts regulate and control the exercise public power by the other branches of government. It is

[67] *Minister of Land Affairs v Slamdien*, supra, paras 14-16
[68] Currie and Klaaren, 14

built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them.'[70]

The right to just administrative action is meant to ensure that the legislature and the executive are constrained within their appropriate areas of activity, and that they are not able to unduly restrict the role of the courts in their protection of constitutional rights, which could result in severely negative consequences for the realisation of fundamental rights.

The PAJA, as with the Constitutional right, seeks to establish an administration with sufficient power to govern while ensuring that the power is not abused. The Constitutional right and the Act both seek to define the proper scope of administrative power in a democracy so as to reconcile individual rights with state power.[71] Because there is no inconsistency between the objectives of the right and the legislation giving effect to the right, it should not be necessary for the legislation to define the right more restrictively than the Constitutional provision.

I submit that the importance of the right to just (and particularly reasonable) administrative action is highlighted by the past history of government action in South Africa, and that the need for effective control of administrative action in order to properly protect people's fundamental rights is of absolutely crucial significance, and of greater concern than the possibility of conservative activist judges hampering efficient administration and implementation of policies.

In the jurisprudence of the constitutional era, which has now spanned nearly 12 years, there does not seem to be evidence of conservative judges setting out to undermine policies seeking to promote transformation and effective administration. The Constitutional Court and the Supreme Court of Appeal also have the potential to play a role of correcting any judgments handed down by the lower courts where the lower court may have erred in some respect in the interpretation or the application of the law.

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[69] Klaaren 'Constitutional Authority to Enforce the Rights of Administrative Justice and Access to Information' 1997 (13) *SAJHR* 549, 551-554

[70] *Pharmaceutical Manufacturers Association of SA: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); Currie and Klaaren, 15-16

In the preamble of the PAJA, it is noted that the legislation was required to be enacted in order to 'give effect to' the right to administrative action that is lawful, reasonable, and procedurally fair, and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. It is noted that s33(3) of the Constitution requires that the national legislation provide for review of administrative action by a court or another independent and impartial tribunal. The legislation must impose a duty on the state to give effect to those rights. Section 33(3) also requires the legislation to promote an efficient administration.

Based on the interpretation of the phrase 'give effect to' in the right of access to information in the *First Certification judgment*, [72] Currie and Klaaren argue that this phrase 'should be interpreted to mean 'make effective', 'promote', or 'implement'. The Act seeks to define the nature and limits of the right, and to set out procedures for its enforcement. The Act should, as far as possible, be read as co-extensive with the constitutional rights to just administrative action.'[73]

If the PAJA is silent on a matter, the Act should be read consistently with relevant provisions of the Constitution. A more restrictive interpretation would involve a limitation on the constitutional administrative justice rights, which should be avoided.[74] It is crucial to bear in mind the fundamental importance of the rule of law, which the right to just administrative action and the PAJA seeks to give effect to. The doctrine of legality and the doctrine of non-arbitrariness are fundamental, as emphasized in the *Pharmaceutical Manufacturers* decision.[75]

The preamble emphasizes that the Act is intended to promote the core constitutional values of an efficient administration, good governance, accountability, openness and transparency, values which are found in s195 of the Constitution as the basic values and principles of the public administration. The goals of efficiency, effectiveness, and

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[71] Currie and Klaaren, 17
[72] 'The transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed and complex provisions defining the nature and limits of the right and the requisite conditions for its enforcement.' *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), para 83
[73] Currie and Klaaren, 17
[74] *Investigating Directorate: Serious Economic Offences v Hyundai*, supra; Currie and Klaaren, 17
[75] *Pharmaceutical Manufacturers,* supra, para 84; Currie and Klaaren, 18

legitimacy are very prominent. Currie and Klaaren note that '[e]fficiency looks at convenience, rapidity of decision-making, and cost-effective use of resources. Effectiveness focuses on the results of the process, and at the process itself- its rationality. Legitimacy focuses on lawfulness and democratic legitimacy, and focuses on the process, and the understanding of administrative action. Accountability and participation are emphasized.'[76]

Currie and Klaaren note that these goals 'tend to pull in opposite directions'. Seeking efficiency can be at cross-purposes to seeking legitimacy, and vice versa. While there certainly may be tensions, I would submit that it is necessary to examine these concepts not in isolation from each other, but in relation to each other. Seeking efficiency as an end in itself has little meaning: efficiency must be linked to other objectives- such as effectiveness. The aim of realizing people's rights as effectively as possible is an important objective, and efficiency promotes the effectiveness of realizing rights. However, the assessment of the benefits of efficiency must be done in relation to the other objectives. Pursuing effectiveness beyond a certain point may cause legitimacy to be impaired, and thus people's civil and political rights may be impaired. The administration may then not in fact be as effectively realizing people's rights as it might be. It is also important to bear in mind that legitimacy also is not so much an end in itself: it seeks to ensure that power is not abused, so that the enjoyment of peoples' rights are not diminished. If all of these qualities are not present in an administrative system— efficiency, effectiveness, and legitimacy— then the system will suffer severe problems. An inefficient system will be ineffective, and vice versa. An illegitimate system cannot be effective in realizing peoples' rights, and an inefficient or ineffective system will not be viewed by the people as being legitimate, because there will inevitably be people whose rights are being infringed unjustifiably.

The Black Sash (which has had extensive experience in dealing with issues of administrative justice affecting the most vulnerable in society) in its submissions to the Portfolio Committee highlighted failures in efficiency, effectiveness, and legitimacy in the delivery of social assistance to their clients, 'many of whom are extremely poor, exhibit low levels of literacy and rely, to a large extent, on state administered social assistance

[76] Currie and Klaaren,18-19

for their daily survival. This means that they depend for their daily existence on the efficiency and fairness of the state bureaucracy.' It further stated:

> 'The state bureaucracy has consistently failed our clients' in the routine denial of their rights to just administrative action as illustrated in the following examples. In making application for benefits such as disability grants, our clients, who represent only a minute percentage of people in similar predicaments, regularly encounter:
>
> 1. Inordinate delays. It is quite common for applications to take in excess of a year to process. Delays of this length can have catastrophic consequences for the applicant who often has recourse to no other means, and amount to a breach of the right to procedurally fair administrative action.
> 2. Arbitrary refusals of applications, despite clear compliance with the legislatively stated qualifying criteria in contravention of their rights to lawful and reasonable administrative action.
> 3. A failure by the relevant official to conduct an appropriate investigation or inquiry into the facts of the matter at hand, prior to refusing an application on the alleged ground that the applicant failed, on the facts, to comply with the stated criteria. For e.g., refusing an application for a disability grant supported by a report by a district surgeon testifying to the applicant's medical disability, on the ground that the applicant is medically fit- without a further medical examination of the applicant.
> 4. Personnel within the same department adopting different interpretations of the stated qualifying criteria and what is required to satisfy same.
> 5. Refusal of applications without furnishing any reasons.
> 6. Failure to make payment of benefits for lengthy periods after an application has succeeded.'[77]

These examples starkly illustrate that problems in efficiency, effectiveness, and legitimacy cumulatively have severely hindered the realisation of the right of access to social assistance in s27 of the Constitution. In order to effectively realise the right, there needs to be efforts to improve in all of these aspects, *in tandem*. These examples also suggest that the greatest obstacle to the realisation of socio-economic rights and administrative justice may not lie in reactionary courts getting in the way of the implementation of vital social programmes- it seems rather to lie in problems within the

[77] Black Sash 'Submission in Response to the Administrative Justice Bill 56-99 as Introduced in the National Assembly as a Section 75 Bill', 1

administration which mean that the administration is inefficient, ineffective, and lacks legitimacy.

The Black Sash emphasised this most emphatically, and stated that, while the constitutionalisation of the right to just administrative action is very important, 'the mere Constitutionalisation has not been sufficient to ensure administrative justice for our clients. There has been no material difference in their dealings with the state bureaucracy which continues, despite the Constitutionalisation of the right, to run roughshod over our clients' rights to just administrative action.'

It proceeded to say:

> 'Instances of abuses of their rights such as those listed above remain the norm rather than the exception, and our intervention and appeal to our clients' rights to just administrative action has met with little success. The reasons for this are many. On the one hand, many of the administrators with whom our clients deal are ignorant of our clients' rights to just administrative action, as are our clients. As a result, when we intervene on behalf of our clients, our pleas for justice fall on deaf ears. Often, the administrative agency will deny that their conduct amounts to a breach of any of the rights to just administrative action, if they respond to our appeals at all. The only available route upon such denial is a costly and time consuming application to the High Court for a pronouncement of our clients' rights. In most instances such an application cannot be made because of the prohibitive cost, and should it be made, takes a number of months to be heard, leaving our clients with no income in the interim.
>
> The Administrative Justice Act which is required in terms of the Constitution to give effect to the rights to just administrative action and to impose a duty on the state to give effect to those rights, presents the ideal opportunity to remedy the routine administrative injustice which has become a part of our clients' lived experience. It presents the ideal opportunity for the practical realisation of the ideals embodied in section 33 of the Constitution.'[78]

It is precisely because of these factors and objectives which must be balanced and considered, that proportionality is a particularly important concept in administrative law. Judicial review and legislated procedural requirements are necessary to ensure that the

administration gives proper attention to the rights and interests of individuals and groups in order to ensure democratic legitimacy.[79] For example, proportionality is important for determining when considerations of efficiency and the public good go too far, and have a disproportionate or oppressive impact on particular individuals, which negates the overall effectiveness of realizing people's rights. Proportionality also requires it to be established that the objective sought to be achieved by the government action will in fact be achieved— that there will be effectiveness. Proportionality also examines whether there may perhaps be other means which can achieve the objective, which would impair the individual's rights less, which also promotes effectiveness. Efficiency is promoted, because resources will also not be wasted pursuing objectives which in fact the programme proposed by the government will not in fact be able to achieve. By refusing to permit violations of rights beyond what is absolutely necessary in order to achieve an objective which is sufficiently important, the principle also promotes the legitimacy of the system with the people.

6.5.2 Looking at the Political and Legislative History

It is relevant to bear in mind South Africa's political history, especially the history of abuse of power, and the inadequate control of power under apartheid. This is particularly relevant in considering the content of the right to just administrative action, and of review for unreasonableness and proportionality. The incorporation of the right is a response to that history.[80]

Looking at the history of the drafting of the constitutional and the legislative provision, it is clear that there was definite nervousness in the Portfolio Committee regarding review for unreasonableness, and proportionality as an aspect of review for unreasonableness, and there seems to have been an intention to limit the scope of review for unreasonableness and to try to exclude proportionality as an aspect of review for unreasonableness from the PAJA. However, I submit that deference should not be given to the legislature regarding the content of review for unreasonableness, as noted above.

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[78] Ibid
[79] Currie and Klaaren, 20
[80] See Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 (10) *SAJHR* 31, where he emphasizes that the Bill of Rights seeks to create a culture of government no longer based on authority and coercion but on justification and persuasion: the administrative justice clause plays a prominent role in this project

Further, in light of the fact that review for unreasonableness and proportionality bear within them significant deference to the legislature and to the administrative decision-maker, it is unnecessary to restrict the right in that manner. This is borne out by the manner in which the courts under the Constitution have approached review for unreasonableness.[81]

6.5.3 Looking at Presumptions of Statutory interpretation

The PAJA is incorporating in legislation common law rules and principles of administrative law, which are being constitutionalised in the process. There is a presumption of statutory interpretation that Parliament does not intend to diminish existing rights, which is particularly important to bear in mind here. [82] If the constitutional right has been interpreted by the courts as incorporating review for unreasonableness and proportionality, there is a presumption that the legislation was not intended to restrict review for unreasonableness and proportionality. This presumption could be supported by the requirement in the Constitution that the legislation give effect to the right to reasonable administrative action. Parliament would be presumed to have intended to carry that requirement out.

There is also a presumption that Parliament does not intend to change the common law, which is important to bear in mind.[83] The *Pharmaceutical Manufacturers* case makes it clear that under a system of constitutional supremacy, judicial review of administrative action is now derived from the Constitution and not the common law. Legislation can no longer provide for departures from the fundamental principles of legality, fairness, and reasonableness unless it complies with s36.[84] Therefore, if the PAJA provided for a departure from the principle of reasonableness as established under the constitutional jurisprudence, that would violate the principle of reasonableness which is fundamental to the constitutional order, and that provision of the Act would be invalid.

Section 6(2)(h) does not make express reference to proportionality. However, the lack of explicit reference to proportionality or the inclusion of wording incorporating various

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[81] *S v Makwanyane* 1995 (3) SA 391 (CC), paras 17-18; Currie and Klaaren, 16
[82] Currie and Klaaren, 20
[83] Ibid
[84] At 25

aspects of proportionality does not necessarily preclude interpreting the section as permitting proportionality review.[85] If it is clear that review for unreasonableness has been interpreted by the courts under the Constitution as incorporating proportionality, that would provide a basis for interpreting s6(2)(h) as incorporating proportionality. Additionally, the fact that the grounds for judicial review were entrenched in an open-ended list in the PAJA may provide an opportunity for the judiciary to apply the proportionality test 'through the back-door' of s6(2)(i). [86] The formulation of s6(2)(h) is similar to the *Wednesbury* test, which refers to a decision 'so unreasonable that no reasonable authority would ever come to it'. Currie and Klaaren, however, note that the wording is different, and they argue, in light of the introductory wording of the provision, that 'the provision must be interpreted as different from the *Wednesbury* standard and from the rational connection test in s6(2)(f) in order to provide for review of the substance of a decision.'

Hoexter has observed that in the PAJA, 'certain well-established grounds of review which were incorporated in drafts presented by the Law Commission were discarded. One was proportionality, or unreasonable effect. Rationality, which is an aspect of unreasonableness, is retained. Unreasonableness itself is mentioned.' She notes that 'the degree of egregiousness required has a strong flavour of *Wednesbury:* the conduct must be 'so unreasonable that no reasonable person could have so exercised the power or performed the function'.' She is firmly of the view, however, that this is not the same as the old test of 'symptomatic' or 'gross' unreasonableness. Unreasonableness is clearly a ground of review on its own, and is not viewed as a symptom of some other reviewable defect.[87]

The provision in the PAJA differs from the *Wednesbury* test, in that *Wednesbury* requires a decision so unreasonable that no reasonable authority could 'ever' come to it, while the formulation in s6(1)(h) of the Act requires that no reasonable person 'could have' come to the decision. While efforts could be made to argue this distinction in court, Hoexter states that courts will likely interpret them as being essentially the same standard. It can be argued that the provision in the Act really does not alter the present understanding of unreasonableness. An unreasonable action is axiomatically something

[85] Currie and J. Klaaren, 172; Hoexter and Lyster, 186
[86] Hoexter and Lyster, 186

that no reasonable person or authority could perform, so simply the term unreasonable by itself could have been used, and provided the same meaning.[88]

Hoexter asserts that the unreasonableness clause proposed by the Law Commission would have been preferable to s6(1)(h) of the Act, because it was explicit, which would be helpful to lawyers and judges. It recognized the role of proportionality, and it clearly placed the emphasis of analysis on the effects of administrative action, preventing the conflation of proportionality and rationality. It also did not suggest that an exaggerated degree of unreasonableness was required for review.[89] Hoexter argues that the formulation in s6(1)(h) of the Act does not assist judges to focus on the relevant factors which should be considered, and there is the danger that it will perpetuate an approach that maintaining the distinction between appeal and review depends on a 'gross' sort of unreasonableness.[90]

Currie and Klaaren note that it may be argued that the formulation of s6(2)(h) seeks to reintroduce the 'symptomatic unreasonableness' standard which held sway in the pre-constitutional era, but they assert that the introductory phrases of s6(2)(h) clearly reject the doctrine of symptomatic unreasonableness. Such an interpretation would make review for unreasonableness a matter of last resort, as it would be easier to establish almost any of the other grounds of review. Such a reading should be avoided, and the provision must be interpreted purposively. It is intended to give effect to the constitutional right to reasonable administrative action. Since an unreasonable action is 'axiomatically something that no reasonable person or authority would perform,' saying that no reasonable person or 'organ' could have performed it means merely that it is unreasonable. It certainly does not require an interpretation that it be 'grossly, horribly, or vilely unreasonable to be reviewable.'[91]

Happily, O'Regan J in the *Bato Star* case[92] has indicated that s6(2)(h) should be interpreted as providing that an administrative decision would be reviewable if it is one that a reasonable decision-maker could not reach, and that the provision does not

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[87] Hoexter 'The Future of Judicial Review in South African Administrative Law' 2001 (18) *SALJ* 484, 518
[88] Ibid
[89] Hoexter, 518-519
[90] At 519
[91] Currie and Klaaren, 173
[92] Bato Star, supra, 513, para 44

require some sort of extreme standard of unreasonableness. This seems to address concerns that a 'gross unreasonableness' standard will be able to be applied in respect of s6(2)(h).

When interpreting the provision, the common-law and constitutional interpretation of review for unreasonableness must be taken into account, and it is important to bear in mind that the constitutional right has incorporated the common law within it.[93] Currie and Klaaren argue that the purposive interpretation which is appropriate to the interpretation of the Act as a whole certainly should be applied to the grounds of review. While, 'in some areas, the PAJA clearly departs from the common law, there is no indication of such a purpose in s6(2).' (my emphasis) The statutory grounds essentially incorporate the common-law grounds of review, in their constitutionalised form.[94] This fundamental change must be taken into account, and it is particularly relevant in interpreting review for unreasonableness in the Act. It is therefore incorrect, as the chairperson of the committee seemed to consider, that the pre-constitutional position relating to review was still the standard for review currently applied by the courts. It was also not recognized that even prior to the advent of the Constitution, the courts seemed to have been gradually moving away from the 'gross unreasonableness' standard. Currie and Klaaren argue that:

> 'Despite the Act's studious avoidance of the term, s6(2)(h) thus should be interpreted as permitting a test of substantive proportionality. The substance of the administrative action must be examined in its own right. As Craig states, '[a]t a general level proportionality involves some idea of balance between competing interests and objectives and that embodies some sense of appropriate relationship between means and ends'.'[95]

It should be possible for s6(2)(h) to be interpreted so as to require simply 'unreasonableness', as opposed to 'gross unreasonableness'. It should also be possible for the principle of proportionality to be incorporated within the PAJA, either within s6(2)(h), or via s6(2)(i). If it is possible to interpret s6(2) of the PAJA in such a manner

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[93] *Pharmaceutical Manufacturers,* supra, para 33
[94] Currie and Klaaren, 153-154
[95] Craig, 414; Currie and Klaaren, 173

as to properly incorporate unreasonableness and proportionality, then I submit that it would be necessary for the courts to do so.

6.6 The Possibility of Launching a Constitutional Challenge

If it were not possible to successfully argue for an interpretation of s6(2)(h) and (i) that meaningfully incorporates unreasonableness (as defined in the constitutional jurisprudence prior to the advent of the PAJA) and proportionality, would it be possible to launch a constitutional challenge to the validity of the PAJA?

6.6.1 When can s33(1) be relied upon directly?

With the PAJA in place, the constitutional right to just administrative action can be directly relied upon only in certain circumstances. This is consistent with the principle of avoidance, where 'remedies should be found in common law or legislation before resorting to constitutional remedies,' as well as the principle that 'norms of greater specificity should be relied upon before resorting to norms of greater abstraction.'[96] When can the constitututional right to just administrative action in ss33(1) and (2) be relied upon directly?

(1) The Constitutional provision can be relied upon to challenge the provisions of the PAJA. If a definition in the Act is too narrow, and does not properly give effect to the constitutional right, for example, then that would be a limitation of the constitutional right. Such a limitation would have to be justified under the limitation clause, or it would be unconstitutional.[97]

Section 33(3) of the Constitution requires that national legislation must be enacted that gives effect to the constitutional rights and at the same time, promotes an efficient administration. It might be argued that some limitation by the PAJA of the rights in ss33(1) and (2) which seek to promote efficiency as mandated by s33(3) are not impermissible limitations of the right. It is possible to interpret the phrase 'promote an efficient administration' 'downwards' to mean that the legal burdens on the

[96] De Waal, Currie, and Erasmus, 495
[97] At 495-496

administration should be reduced in order to promote efficiency. However, the phase can also be interpreted 'upwards' to require that the administration be accountable, participatory, and engage in rational, effective, and responsive decision-making, which is the most efficient and effective means to provide services to people, and realize their constitutional rights.[98]

I would argue that this latter interpretation is preferable to the former. The first interpretation focuses on the ability of government to do what it sees fit as efficiently as possible with as little hindrance as possible (by focusing on the administration as the *locus* for determining 'efficiency'). The second interpretation focuses on the people whom government is ultimately serving, and how effectively and efficiently those programmes and services are being delivered to people. It is quite possible for government to be doing what it wants very efficiently indeed, and be very satisfied with it, while people are being served very poorly and inefficiently. An appropriate question to ask would be, how effectively and efficiently are the socio-economic rights in the constitution being realized?

Suppose, for example, that in the interests of efficiency and budgetary savings, the government decides that the best way to get rid of the problem of 'ghost' beneficiaries on a pensions database, which results in fraud on the system, is to just remove people that it considers to be suspect beneficiaries from the database, and require them to re-apply, without any notice of this beforehand, or any opportunity to provide any representations as to why their grant should not be cancelled. From the perspective of the administration, this might indeed be an efficient way about dealing with the problem.

However, from the perspective of people who are removed from the system, who have properly been receiving grants (they are the people whom the Social Assistance Act is intended to benefit), this is a disastrous consequence. They are deprived of their livelihood, which is retrogressive in terms of realizing the right to social assistance. From the perspective of programme delivery to individuals and realization of the rights in the Constitution (which is stated to be the reason why the government wants an efficient administration— to be able to effect socio-economic transformation), this strategy is extremely inefficient. The purpose of government is to serve the people, and to realize

[98] Klaaren, 561

their fundamental rights to the fullest extent possible. Constitutional supremacy means that all branches of government's fundamental purpose is to realize the rights in the Constitution. Thus, the administration must define efficiency in terms of what maximizes the realization of the Constitutional rights to the people it serves.

Some external factors seem to support an interpretation that an 'efficient administration' should be interpreted as being one that maximizes service delivery to the people. There is currently a drive by government to improve service delivery throughout the public administration. The Department of Public Service and Administration seeks to change the values driving the public service. The *White Paper on Transforming Public Service Delivery* (1997) (the 'Batho Pele White Paper') identified key 'transformation priorities,' which are principles on which the transformation of the public service is to be based.[99] The eight principles deal with consultation, service standards, access, courtesy, information, openness and transparency, redress and value for money. Citizens should be consulted about the level and quality of the public services they receive and, whenever possible, should be given a choice about the services that are offered. They should be told what level and quality of public services they will receive so that they are aware of what to expect. All citizens should have equal access to the services to which they are entitled. They should be treated with courtesy and consideration. They should be given full, accurate information about the public services they are entitled to. They should be told how government departments are run, how much they cost, and who is in charge. If the promised standard of service is not delivered, citizens should be provided an apology, a full explanation, and a speedy and effective remedy. When complaints are made, citizens should receive a sympathetic, positive response. Public services should be provided economically and efficiently in order to give citizens the best possible value for money.[100] These principles clearly interpret efficiency in terms of effectiveness of service delivery to the people. Currie and Klaaren assert that the 'Promotion of Administrative Justice Act can be seen as another way to advance the Batho Pele principles and should be interpreted as far as possible as complementary to those principles.'[101]

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[99] GN 1459 of 1 October 1997, available at http://www.polity.org.za/govdocs/white_papers/transform.html
[100] Government of the Republic of South Africa 'Batho Pele Principles' in the *White Paper on Transforming Public Service Delivery* (1997), GN 1459 of 1 October 1997, available at http://www.polity.org.za/govdocs/white_papers/transform.html

In the pre-constitutional era, the 'gross unreasonableness' standard had incorporated within it the maximum degree of deference. It is now necessary to develop a doctrine of deference which provides an appropriate doctrine of deference that permits the courts to properly take into account the nature of the administrative discretion involved, as well as the institutional competence of the courts to determine the reasonableness of the exercise of public power.

It is also arguable that unreasonable administrative action is by definition arbitrary and capricious, and it is difficult to see how arbitrary and capricious action can be said to promote efficiency.

(2) To the extent that the PAJA's definition of the right to just administrative action is more narrow than that in the Constitution, the s33 rights could be directly relied on to challenge the validity of administrative action that falls outside the scope of the PAJA. If the right can be used as a 'safety net' that provides protection for matters not sufficiently covered in the Act, it may not then be necessary to find that the PAJA is an unconstitutional restriction of the right.[102] If the incorporation of review for unreasonableness is narrower than the concept of review for unreasonableness developed in the constitutional jurisprudence under s24 of the IC and s33(1) of the Constitution prior to the enactment of the PAJA, then it might be possible to 'supplement' the right as defined in the PAJA by relying upon the constitutional right directly to 'fill in' the aspect of the right which has not been incorporated in the PAJA. Proportionality might be argued to be protected as an aspect of review for unreasonableness through this means.

Currie and Klaaren do not support this approach, as they argue that it does not appropriately give weight to the intention of the PAJA to give effect to the right. The PAJA resulted from Parliament's exercise of its mandate to give comprehensive and general legislative form and content to the right. If the Act draws the scope too narrowly, then a challenge must be brought that the legislation is an unconstitutional infringement of the right. If a provision of the PAJA was found to be unconstitutional, the provision of

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[101] Currie and Klaaren, 13
[102] De Waal, Currie, and Erasmus, 495-496

the PAJA would then be struck down, or the unconstitutional aspect would be severed, or an appropriate provision would be 'read in'.[103]

I would submit that this approach of 'supplementing' is not particularly problematic, and that it is really not that different in effect than 'reading in.' I do not think that it shows less respect to the legislature than striking down a provision or severing an unconstitutional aspect of a provision. I would suggest that it is a less drastic approach than striking down or severance.

6.6.2 Challenging the Act

The constitutional provision can be relied upon to challenge the provisions of the PAJA. In challenging the validity of the provision of the PAJA relating to review for unreasonableness, challenges might be made on three bases, which Currie and Klaaren characterize as the 'fundamentalist' challenge, the 'underinclusive' challenge, and the 'over-restrictive' challenge.[104]

6.6.2.1 The Fundamentalist Challenge

The 'fundamentalist' challenge would argue that any restriction of the right to just administrative action by the PAJA is impermissible, as Parliament is mandated to 'give effect to' the right, and not to limit it. In contrast, in s32 of the Constitution, which relates to the right of access to information, the wording of the section uses the language of 'reasonable measures' and 'alleviating' the burden on the state, which can be argued to be language permissive of limitation of the right.[105]

Currie and Klaaren do not support this approach, because the PAJA seeks to give effect to the right by providing specific rights and duties and establishing procedures and remedies for their enforcement. They argue that the Act can define the right in a manner that is more limited than how it has been defined under the constitution, subject to justification under s36.[106]

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[103] Currie and Klaaren, 29
[104] Ibid
[105] Ibid
[106] At 30

There seems to be an assumption that there is something problematic with how the courts have defined the constitutional right, which needs to be rectified. There does not seem to be evidence that prior to the implementation of the PAJA, the judiciary was being meddlesome and placing severe impediments to the progress of transformation by placing administrative roadblocks. The Act was not needed to 'reign in' the judiciary and an overexpansive interpretation of the constitutional right. Rather, it was particularly needed to assist administrators and the public to gain some understanding of the content of the right to just administrative action, and the requirements which administrators must fulfil.

I also do not think that it is likely that judges are going to start embarking on frolics of their own and throw spanners into the works of government. Klaaren and Currie, for example, in discussing review for unreasonableness in the PAJA, do not seem to find anything exceptionable with how the courts have interpreted the right to action 'justifiable in relation to the reasons given for it' under section 24(d) of the IC and the transitional wording in place under the final constitution prior to the enactment of the PAJA. An examination of the jurisprudence does not reveal this to be the case. The courts have always been cognizant of the need for efficiency in administration. They have taken that into account when interpreting the right to just administrative action, and have incorporated that understanding into the interpretation of the right itself. The concepts of unreasonableness and proportionality have significant deference incorporated within them. There should therefore really be no need for the legislation to restrict the right, as the right has been thoughtfully and carefully defined in the jurisprudence.

It is important to bear in mind that this legislation is different from almost all other legislation which undergoes constitutional scrutiny, because this legislation is seeking to define the right. Normal legislation which is analysed in justification analysis is not intended to define the right, but rather is intended to carry out governmental objectives, which have impacts on rights. When these impacts infringe rights, the infringement is analysed to determine if it is justifiable. The legislature does not play a role in defining the right. By saying that the legislature can restrict the definition of the right to just administrative action within the range of justifiability under the limitations clause, this takes away the role of defining the constitutional right from the courts, and places it with

the legislature, which is problematic in terms of separation of powers. The courts are the interpreters of the Constitution, not the legislature. This role of the courts is particularly important with respect to the right to just administrative action, which is intended to prevent the abuse of power by the other branches of government.

I submit that if it is not possible to interpret unreasonableness in s6(2)(h) in a manner consistent with the constitutional jurisprudence that incorporates proportionality, or to rely upon s33(1) of the Constitution directly to 'supplement' the PAJA and provide appropriate content to the right to reasonable administrative action (including proportionality), then it might be possible to launch a fundamentalist challenge.

6.6.2.2 Challenges based on Underinclusiveness and Overinclusiveness

A challenge based on under-inclusiveness would argue that the PAJA in some respect is too narrow in its coverage, and does not cover all of the area that it must in order to give meaningful effect to the right, or does not provide enough detail. Klaaren and Currie note that it may be possible to attack the PAJA for underinclusiveness on the basis that the Act fails to give detailed effect to the right to reasonable administrative action, as it is only dealt with indirectly in the list of review grounds in s6.[107] If, for example, the definition of review for unreasonableness in the Act is too narrow, and does not properly give effect to the constitutional right to reasonable administrative action (for example, if proportionality is not incorporated as an important aspect of the right), that would be a limitation of the constitutional right which would have to be justified under the limitation clause, or it would be unconstitutional. What should the criteria be for justification? [108] What should be the interaction between s33(3) and s36? Klaaren argues that—

> 's33(3) modifies the operation of the general limitations clause in its application to legislation limiting the constitutional right to administrative justice. Considerations of cost and institutional convenience may be appropriate in examining Parliament's choice regarding implementation procedures and institutions.'[109]

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[107] At 30-31
[108] Klaaren, 559-564
[109] At 549, 561

Currie and Klaaren urge that the courts be careful not to hastily add supplemental content or procedures to what Parliament has mandated, particularly as the PAJA is concerned with the effective working of government. However, they recognize that the courts 'have a duty to ensure that violations of the right are diligently examined and properly addressed.'[110]

6.6.2.3 Intensity of Review

In assessing whether or not it may be justifiable to define the right to reasonable administrative action in a more restrictive manner than it has been defined in s33(1) or in the constitutional jurisprudence, Hoexter raises an aspect which is important to bear in mind: the PAJA may be interpreted as attaching different standards of review to different grounds of review, or the standard may differ with respect to different subject-matter at issue. Different standards can be characterised as having different intensities of review. The standard may take into account factors such as the competence of the administrative decision-maker. This would provide a means for flexibility to deal with a wide range of administrative action, which is very important.[111]

Hoexter argues that an appropriate level of deference in judicial review can be achieved by applying variability in intensity of review. She emphasizes that 'deference does not necessarily call for the severe pruning of the ambit of 'administrative action' or for narrowing the requirement of reasonableness.' She also critiques the efforts at entrenchment of grounds of review in the PAJA by stating that 'in their attempts to reduce the burdens imposed by s33 of the Constitution and to limit the scope of judicial intervention in administrative matters, they have given effect to a misguided idea of deference. They have got it wrong'.

In answer to the argument that the right may justifiably be restricted as it is necessary in order to permit the administration to run effectively, it can be asserted that it is not necessary to restrict the right. The possibility for varying intensities of review to be adopted in the courts in different types of cases would permit a nuanced approach to be

[110] Currie and Klaaren, 32
[111] At 156

developed which would ensure that the administration is not unduly impeded, while ensuring that the right to reasonable administrative action is given meaningful effect to.

6.7 Conclusion

If the Act is assessed in light of how well it 'gives effect' to the Constitutional right to just administrative action, a significant issue arises if it is found that the Act does not deal meaningfully with all aspects of the right.

In light of the importance of reasonableness and the principle of proportionality in the South African legal system, if the Act does not properly incorporate the application of the proportionality principle as an aspect of reasonableness, it may be argued that the Act is unconstitutional for failing to give proper effect to the fundamental right to reasonable administrative action. The Act should be interpreted to give meaningful effect to reasonableness and proportionality. This is a particularly important issue, and is a challenge which must be effectively addressed.

Based upon the understanding of review for unreasonableness and proportionality gained from the comparative study of other jurisdictions and from the examination of South African law prior to the advent of the PAJA, and after careful examination of the wording of item 23(2)(b)(d) of Schedule 6 of the Constitution (which has been critical for determining the content of the constitutional right to reasonable administrative action prior to the Act), conclusions can be drawn as to what is required to ensure that review for unreasonableness and the principle of proportionality are given proper effect to by the PAJA.

From the various draft provisions which were prepared, and the submissions which were presented to the Portfolio Committee, it seems that in general, proportionality was conceived of as being an important aspect of review for unreasonableness. Many of the submissions to the Committee were supportive of the incorporation of review for unreasonableness, though some suggested recasting the concepts in somewhat different terms than how they were set out in s7(1)(g) of the Bill.

Looking at the history of drafting of both the constitutional and legislative provisions, it is clear that there were reservations expressed regarding review for unreasonableness and proportionality as an aspect of review for unreasonableness. There also seems to have been an intention on the part of the Portfolio Committee to limit the scope of review for unreasonableness in the PAJA and to try to exclude proportionality as an aspect of review for unreasonableness. However, I submit that deference should not be given to the legislature in regards to the content of the right to reasonable administrative action.

In this case, the legislature had a special mandate to give effect to s33 of the Constitution by passing legislation. Reasonableness has a meaning and a content in South African administrative law, and also in the law of other jurisdictions. It must be assumed that the legislature intended that meaning, because there are no indications in the PAJA to the contrary and that meaning is consistent with the Constitution.[112]

It is relevant to bear in mind the purpose of the incorporation of the constitutional right that the PAJA is required to give effect to. The incorporation of the right to just administrative action arises out of South Africa's political history, in particular the history of abuse of public power, and the inadequate control of public power under apartheid, as noted above.[113] It is also crucial to bear in mind that the right to just administrative action is absolutely fundamental to the Constitution's legal control of public power.

It is arguable that it should be possible, and therefore it is necessary, for s6(2)(h) to be interpreted so as to require simply unreasonableness (and not 'gross' or 'symptomatic unreasonableness'). It should also be possible to interpret the PAJA so as to incorporate the principle of proportionality, within either s6(2)(h) or via s6(2)(i). The Constitutional Court in the *Bato Star* case has interpreted s6(2)(h) as requiring unreasonableness only, and recognized that review for unreasonableness involves a substantive aspect.[114] The Constitutional Court has provided some appropriate and very welcome direction regarding the interpretation of s6(2)(h) of the PAJA, and the possibility of the PAJA being interpreted as incorporating 'gross unreasonableness' seems to have been dispelled.

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[112] *Investigating Directorate: Serious Economic Offences and Others v Hyundai,* supra
[113] See, for example, Mureinik
[114] Bato Star, supra, 513, paras 44- 45

There is also some indication in the *Bato Star*[115] judgment that proportionality is an aspect of the right to reasonable administrative action in terms of s33(1) of the Constitution and s6(2)(h) of the PAJA, as the description given of the process to be followed when assessing whether or not a decision is reasonable incorporates a proportionality analysis. This seems to provide some credence for advancing an argument that s6(2)(h) of the PAJA should be interpreted as incorporating proportionality.

If it is not possible for the provision to be interpreted as appropriately incorporating unreasonableness and proportionality, then it might be possible to rely directly upon s33(1) of the Constitution to 'supplement' the PAJA, in order to ensure that the right to reasonable administrative action is given an appropriate content (which includes proportionality). If that could not succeed, then it might be possible to either make a fundamentalist challenge to the PAJA or a challenge based on the underinclusiveness of the PAJA. I submit that it would be difficult to justify a limitation of the right to reasonable administrative action on the basis of promoting an effective administration. It might, for example, be held that the promotion of an effective administration could be produced through less drastic means.

[115] At 513, para 45

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