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UNREASONABLENESS AS A GROUND FOR JUDICIAL REVIEW IN THE SOUTH AFRICAN ADMINISTRATIVE LAW

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Submitted in Partial fulfillment of the requirements for the degree of
Masters of Laws

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October 2007

TABLE OF CONTENTS

	PAGE
Declaration	V
1. Introduction	1-4
2. Common Law Perspective	5-12
3. Unreasonableness under Constitutional Democracy	12-21
3.1. Unreasonableness under Promotion of Administrative Justice Act	22-31
4. Synthesis and Conclusion	31-39
5. Bibliography	40-42
6. Table of Cases	43-46
7. Table of Statutes	47

1. INTRODUCTION

The history of the concept of 'unreasonableness' as a ground for judicial review is characterised by metamorphosis in the South African judicial system. Before 27 April 1994, the South African administrative law was primarily based on common law. Despite early judicial decisions which indicated that unreasonableness might be a ground for challenging administrative action,[1] since 1894 Courts have often appeared inclined to discard any power to set aside administrative action on the ground of unreasonableness.[2]

Legislative administrative action was however reviewable on the ground of unreasonableness.[3] A different standard of unreasonableness[4] applied to non-legislative administrative action because such action would be reviewable in this respect only if it was found to be grossly unreasonable.[5]

The Roman-Dutch authorities lend support to the notion that administrative decisions may be set aside on the ground of unreasonableness as emphasised by Beyers JA in *Minister of Posts and Telegraphs v Rasool*,[6] who concentrated his judgment on this legal

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[1] Examples are *Hildebrandt v The Attorney-General* (1897) 4 OR 120*; Homberger v The Mining Commisioner of Johannesburg* (1897) 4 OR 199; *Mail, Trotter & Co v Licencing Board, Escourt* (1903) 24 NLR 447, 452; *Ovenstone v Durban Licencing Board* (1913) 34 NLR 104, 110. Other examples which show that unreasonable was already well established ground of review in case of by-laws, see *Cradock Municipal Commissioners v Du Plessis* (1881) 2 EDC 407 (Dec 1879), in which a municipal regulation was found to be unreasonable. Also *Municipality of East London v Umvalo* (1892) 9 SC 463, a by-law which arbitrarily prohibited 'natives' from carrying sticks was found to be unreasonable and invalid. Thus it is shown that unreasonableness was a well-established ground of review in the case of by-laws, but the extent of this ground of review was woolly and unpredictable.

[2] See *Clark v Town Council of Cape Town* (1894) 4 CTR at 42.

[3] See *Swarts v Pretoria Municipality* 1920 TPD and *Kharwa v Inspector of Police Durban* 1931 NLR 197.

[4] However, see Rose-Innes "Judicial Review of administrative Action" (1963) at 217-223 where he argues that the test for the unreasonableness of delegated legislation also applies to non-legislative action. If regard is had to the way which was applied in for example, *Omar and Others v Minister of Law and Order and Others; Fani and Others v Minister of Law and Order and Others; State President and Others v Bill* 1987(3) SA 859(A) at 892 B-8930, it has to be argued that the same standard of unreasonableness could be used for both legislative and non-legislative administrative acts in spite of the difference in wording between the two tests.

[5] See *Jorge v Minister van Ekonomiese Sake en Tegnologie en 'n Ander* 1990(1) SA 549(T) at 522B-D. See also LC Steyn "Die Uitleg van Wette" 5th edition (1981) at 243 where he regards unreasonableness as described here as a collective noun for other independent grounds for review.

[6] 1934 AD at 167,177-8 where the court stated that the formulation of unreasonableness as applied in the South African judicial system was substantially the same as that expressed by Voet (*Voet* 1.3.5), namely

System.

Divergent views on this essentially contested concept was not only evident in the Courts' rooms, but also afflicted the South African law literature. The views of eminent jurists are an indication of how unreasonableness as a ground for judicial review was difficult to comprehend. Several earlier South African writers argued that administrative acts should be reasonable and that unreasonableness should be a ground for judicial review[7]. However it is only under the 1993 constitutional dispensation that the Constitution required an administrative action to be 'justifiable.'[8] The 1993 Constitution came as the result of protracted and difficult political negotiations. Chapter 2 of the 1996 final Constitution introduced a Bill of Rights that gave everyone a right to administrative action that is lawful, reasonable and procedurally fair.[9] The specific inclusion of the element of reasonableness in the 1996 Constitution meant that it was no longer necessary to search for judicial decisions to support the argument that reasonable administrative action is a requirement for administrative legality.

The enactment of the Promotion of Administrative Justice Act, an offspring of the 1996 Constitution, confirmed unequivocally the introduction of 'unreasonableness' as a ground for judicial review in the South African judicial system.[10] But what exactly is the meaning of reasonableness in administrative law? "Reasonable administrative action implies a decision that is structured in a rational fashion. It means, broadly, that a decision must be supported by the evidence and information before the administrator and the reasons given for it."[11] It must also be objectively capable of furthering the purpose

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that laws should be just and reasonable, that they should preserve equality and bind citizens equally, and be of general, not individual application.

[7] Examples are Van Aswegen 'Onredelikheid as Selfstandige Administratiefregtelike Hersieningsgrond' (1974) 37 THRHR 49; D Oliveira 'Diskresie, Regsdwaling en die Hersieningshof: Redelikheid in die Administratiefreg' (1976) 39 THRHR 211, 220; Franklin 'Two Days in the Appellate Division: Reasonableness, Review and Discretionary Administrative Acts' (1977) 2 Natal ULR 76 and Dugard 'The Human Rights Clauses in the United Nations Charter and South African Law' 1980 *De Iure* 297.

[8] Section 24 (d) of Act 200 of 1993.

[9] Section 33 (1) of Act 108 of 1996.

[10] Section 2(6) (h) of the Promotion of Administrative Justice Act 3 of 2000 specifically deals with unreasonableness as a ground for judicial review.

[11] See Cora Hoexter "The New Constitutional & Administrative Law" vol 2 (2003) at 181.

for which the power was given and for which the decision was purportedly taken.[12] Reasonableness therefore involves scrutinizing a discretion of the administrator to ensure that an administrative decision is objectively balanced.

Prominent legal writer of earlier times Lawrence Baxter[13] divides reasonableness into two facets namely the dialectical and substantive reasonableness. He described 'dialectical reasonableness' as involving the procedural manner through which the administrative decision was arrived at and the 'substantive reasonableness' as relating to the substance of the administrative decision.[14] It may not be problematic to judicially review the procedural reasonableness of an administrative action, but the same cannot be said about substantive reasonableness given the wide divergence of belief, policies, objectives, prejudices and opinions in any modern society. The criteria by which acts are adjudged unreasonable should generally be accepted by the public, judges and lawyers alike.[15]

According to Oxford Dictionary,[16] 'reasonableness' means 'moderate; neither more or less than seems right or acceptable, fair and not absurd' while Collins Dictionary[17] defines reasonableness as 'fair, just, right, acceptable, moderate, equitable, justifiable, sensible, sound.' The correct comprehension of this term is of cardinal importance as it

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[12] A formulation of rationality in similar terms was embodied in clause 7(1)(f)(iii) of the draft Administrative Justice Bill (the South African Law Commission Draft Bill) appended to the South African Law Commission's Report on Administrative Justice of August 1999. See also Etienne Mureinik 'Reconsidering Review: Participation and Accountability' in TE Bennet etal(ed) Administrative Law Reform (1993) 35,41 where the author argues that rationality review 'requires the reviewing body to ask whether (a) the decision-maker has considered all the serious objections to the decision taken, and has answers that plausibly meet them; (b) the decision-maker has considered all the serious alternatives to the decision taken, and has discarded them for plausible reasons; and (c) there is a rational connections between premises and conclusion; between the information before the decision-maker and the decision that is reached.

[13] Lawrence Baxter "Administrative Law" 1984.

[14] At 485-486.

[15] In *Fibrosa Spolka Akyjna v Fairbairn Lawson Combe Ltd* (1943) AC at 70 Lord Wright said "the court is thus taken to assume the role of the reasonable man, and decides what the reasonable man would regard as just on the facts of the case. The hypothetical "reasonable man" is personified by the court itself. It is the court which decides." The principle in this case was quoted with approval by Joubert JA in *Weber v Santam Versekerings Maatskappy Bpk* 1983 (1) SA 381(A) at 411.

[16] Oxford Advanced Learner's Dictionary of Current English tenth impression 1979 by A.S Hornby with assistance of AP Cowie and J Windsor Lewis at 713.

[17] Collins Concise Thesaurus Dictionary, Edition 2003, by Harper Collins Publishers at 688.

has been shown more often than not that the status of unreasonableness as a ground for judicial review depends in part upon the relative activism or restraint of the Court before which it is raised.[18] Undoubtedly there was hostility from the Courts in applying this concept as a ground for review which appeared to be largely instigated by the perception that it would obliterate the distinction between appeal and review.[19] The principal source of this inconsistency by the Courts during the common law period and after the dawn of the new constitutional dispensation appears to emanate from inadequate grasp of how the concept of unreasonableness is employed in legal reasoning. The problem is compounded by the fact that unreasonableness is closely intertwined with the terms of 'rationality,' 'justifiability' and 'proportionality.' The concept of unreasonableness is further complicated by the discretionary powers which is accorded to the administrators and this results in creating a difficult task for the Courts as to whether a discretion by the administrator may be declared reasonable or unreasonable.

The critical issue is what the enquiry should be? Should it include considerations as to whether other more desirable or favourable measures could have been adopted or that the government could have spent its money more wisely? That is the situation where policy considerations come into play. The presence of various options in implementing policies by organs of state creates a discretion at the disposal of public officials that results in questions of its reasonableness or unreasonableness.

This study will analyse the development of the concept of 'unreasonableness' from the common law era up until during constitutionalism, exposing the legal interpretation and application of this controversial concept by the South African Courts. Various case study and literature review will be visited to determine the standpoint and application of this concept by the judges. Limited comparative study will also be undertaken as it is a well-

[18] This has been demonstrated in an interesting analysis by Professor Dean where the reported decisions relating to the discriminatory application of business licensing legislation in the Transvaal during the late 1920s and early 1930 are analysed: Dean 'Reason and Prejudice: The Courts and Licensing Bodies in the Transvaal' in Kahn (ed) *Fiat Justitia*.

[19] See Goldblatt E 1976 "Annual Survey" at 9-10.

known fact that foreign law especially the English law, had a profound influence on the South African administrative law.

2. COMMON LAW PERSPECTIVE

The status of unreasonableness as a ground for judicial review in common law was largely derived from judicial decisions, meaning that there was no statutory framework in this field of the law. The question has always been whether an administrative action which is valid in all other respects can be declared invalid on the ground that its effect or result is unreasonable. In other words, is an administrative action which complies with all the requirements relating to the administrator's powers, the enabling statute, the form and purpose of the act nevertheless invalid because of its unreasonable effect?

It has always been argued that the unreasonableness of an administrative decision falls into the area of substantive judicial review (the merits of the decision) and that judicial intervention would blur the boundary between appeal and review.[20] This approach was based on the principle of separation of powers between the executive and the judiciary and therefore judicial review of merits on a decision was a matter regarded as impacting on policy concerning which the administrative and executive branch of government have a prerogative and are accountable to the electorate from which they derive their mandate.[21]

The traditional common law perspective was that judicial review of administrative actions was characterised by what was called the symptomatic approach[22] in which the courts denied the existence of unreasonableness as an independent ground of review but rather its gross presence was regarded as proof of other grounds of invalidity like *mala*

[20] See footnote 19 above at 10.

[21] See Yvonne Burns "Administrative Law under the 1996 Constitution" 2nd edition 2003 at 243

[22] This descriptive term was coined by Jerold Taitz '*But* '*T was a famous victory*' 1978 *Acta Juridica* 109, 111 where he described unreasonableness as not itself an independent ground for review but was merely used to prove *mala fides*, ulterior motive or the failure of the official to apply his or her mind to the matter concerned. He gave an example where the consequences of an administrative act are unreasonable but the unreasonableness cannot be traced back to non-compliance with any of the specific requirements for the validity of an administrative action.

fides or ulterior motives.[23] In terms of this approach, it is not the unreasonable effect of the administrative action on the individual which is considered, but the unreasonable disposition of the administrator.[24] The test therefore is not on the consequences or effect but instead it examines the mental condition, psychological approach and morality of the administrator.[25]

The traditional common law approach was largely influenced by the English decision of *Associated Provincial Houses* v *Wednesbury Corporation*[26]. In this particular case Wednesbury Corporation had a discretionary power under the Sunday Entertainment Act of 1932 to grant licences to movie houses to open on Sundays, subject to such conditions

[23]The first well-known decision which rejected unreasonableness as a ground for review was that of *Union Government v Union Steel Corporation Limited* 1928 AD where the court made it abundantly clear that the presence of gross unreasonableness can only be an indication of *mala fides*, ulterior motive on the part of the administrator or the failure by the administrator to apply his mind to the matter. The decision set a strong precedent and was applied in subsequent decisions of *The Administrator, Transvaal and the Firs Investment (Pty) v Johannesburg City Council* 1971 (1) SA 56 (A) and *Johannesburg City Council v The Administrator, Transvaal and Mayofis* 1971 (1) SA 87 (A). The rejection of unreasonableness as a direct ground of review was shown also in the case of *National Transport Commission v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) where the court held that the decision has to be grossly unreasonable to so striking a degree as to warrant the inference on the part of the administrator to apply his mind. Again in the case of *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A), section 13(3) of the Motor Carrier Transportation Act 39 of 1930 came under attack. In terms of this section where a local board has refused a new certificate in terms of section 13(3) of the Act and the unsuccessful applicant appeals to the National Transport Commission, such appeal is rehearing in the fullest sense. The Commission has a discretion to grant or refuse the certificate just as the local board has and the Commission substitutes its own opinion for that of the local board. There is no appeal from the Commission to the Supreme Court. The legislature has appointed it as the final arbiter in its special field. Hence, right or wrong, for better or worse, reasonable or unreasonable, its decision in this field stands and it is not justiciable in a court of law, unless it is vitiated by proof on review in the Supreme Court that it failed honestly to apply its mind to the issues in accordance with the behest of the statute and the tenets of natural justice(at 887-888). In this matter the court held that it could not be said that the opinion of the administrator was disturbingly unreasonable to the point of warranting an inference of factors such as *mala fides,* arbitrariness, or caprice, indicating a failure on the part of the Commission to honestly apply its mind to the issue. Other decisions confirming this principle were *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A), *Voorsitter, Nasionale Vervoer*komissie *v Sonnex (Edms) Bpk* 1986(3) SA 70 (A), *Castel No v Metal & Allied Workers Union* 1987 (4) SA 795, *Theron v Ring van Wellington van die Sending Kerk in Suid Afrika* 1976(2) SA 1 (A) and the *Johannesburg Stock Exchange v Witwatersrand Nigel* 1988 (3) SA 132 (A).

[24] See G.E Devinish, K. Govender and D. Hulme "Administrative Law and Justice in SA"201 at 372.

[25] See in this regard *Northwest Township (Pty) Ltd v The Administrator, Transvaal* 1975(4) SA 1 (T). In *Bangatoo Bros v National Transport Commission* 1973(4) SA 667(N) Henning J concluded that if a tribunal was to relegate a factor of paramount importance to one of insignificance, and give another factor a weight far in excess of its true value, this would amount to a failure to apply the mind properly to the matter.

[26][1948] 1KB 223. For the impact of this decision on South African Administrative Law, see footnote no 24 at 372.

as the authority should think fit to impose. The authority introduced a condition that no children under the age of 15 should be admitted to Sunday performances. It was contended that this provision was *ultra vires* on the ground that it was unreasonable. From this judgement the requirement of gross unreasonableness was to emerge. The court stated "[I]t 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 courts can interfere. That I think is quite right, but to prove a case of that kind would require something overwhelming."[27] Though it was often said in the United Kingdom that the *Wednesbury's* approach no longer gives an accurate picture of English law, it however still enjoys considerable support, since by virtue of the doctrine of separation of powers, the social and political choices confronting the administration have been assigned to it by Parliament, and it is not for the courts to trespass on this function when exercising judicial review, more-over that the malleability of the *Wednesbury* criterion in English law has "helped it survive and it would be premature to make any pronouncement of its demise."[28]

The approach was however different as far as delegated legislation[29] was concerned because the Courts have always been clear that unreasonableness is a basis on which delegated legislation can be reviewed.[30] In this regard also the English decision of *Kruse v Johnson*[31] played a significant role in influencing the South African courts to recognise unreasonableness as a ground of review on delegated legislation.

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[27] At 226.

[28] See Craig "Administrative Law" (1999) at 565.

[29] See Hoexter C (footnote no 11 at 172) referring to Baxter L (footnote no 13 at 490-494) gives a good exposition of the different kinds of legislations and she indicates that the common law recognised not only the familiar distinction between original and delegated legislation but also distinguished between two categories of subordinate legislation. Original subordinate legislation that is provincial ordinances and the enactments of the 'homelands' assemblies were treated with particular respect because it emanated from elected legislative bodies which, though subordinate to Parliament, were themselves original legislations. It was virtually immune from attack except on purely formal grounds and in terms of the rule that such legislation could not be repugnant to an act of Parliament. Delegated subordinate legislation on the other hand, could be attacked on the grounds of unreasonableness, though it was said to be a doctrine of benevolent interpretation in respect of legislation emanating from elected bodies such as municipal councils.

[30] See footnote no 3 above.

[31] [1898] 2 Q B 91,99-100 where Lord Russel of Killowen said that 'if by-laws were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they involved

The recognition of unreasonableness as a ground for judicial review on delegated legislation was mainly evident from the legal challenges against legislations entrenching racial discriminations during apartheid. In *R v Carelse*,[32] for example, the Cape Provincial Division of the Supreme Court held that certain municipal regulations which prohibited people of colour enjoying and using the main beach in a particular area were unreasonable, in that it violated the requirement of equal treatment of different people as required by the common law.[33] In *R v Lusu*[34] the court in interpreting section 4 of Act 49 of 1949 held that the Railway Administration may not, when reserving railway premises or any portion thereof as waiting-rooms for the exclusive use of males or females of particular races or different classes of persons exercise unfettered discretionary rights and powers where the exercise of such rights and powers may result in partial and unequal treatment to a substantial degree as between such persons, races and classes.[35] In *S v Naicker,*[36] the appellant an Asiatic male, had been convicted of wrongly entering a part of the sea-shore reserved by the Minister of Lands for the exclusive use of members of the white group. This was allegedly in contravention of section 10 of the Sea Shore Act 21 of 1935 which empowered the Minister of Lands to make regulations, not inconsistent with the Act, which have the effect of a total prohibition to members of the non-white race of entry to the sea-shore. In this case the state did not lead any evidence that publication of the notice, as required under the regulations had been effected. The court held that the conviction should be set aside.[37]

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such oppressive or 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 a particular judge 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.'

[32] 1943 CPD 242.

[33] In effect the Court was giving expression to the common law presumption against discrimination, which was perceived to be unreasonable. See also *R v Abdurahman* 1950(3) SA 136(A); *Bindura Town Management Board v Desai & Co* 1953(1) SA 358(A); the minority judgment of Schreiner JA in *Mustapa v Receiver of Revenue* 1958(3) SA 343(A); *Metal and Allied Workers Union v Minister of Manpower* 1983(3) SA 238(N); *Williams and Adendorff v Johannesburg Municipality* 1915 TPD 106.

[34] 1953 (2) SA 484 (A).

[35] At 496.

[36] 1963 (4) SA 610 (N).

[37] At 614.

Though delegated legislation might had been judicially declared unreasonable by the courts, there are instances where it may not be possible because of the expressed or implied authorization by the legislature.[38] In deviation from this approach the Court held in *Vereeniging City Council v Rhema Bible Church Walkerville*[39] that the council powers on town planning scheme was not sufficient to legislative discrimination.

The above examples of *Kruse's* formulation were subsequently applied with approval in a 'long train of decisions'[40] in the South African Courts. It has already been indicated above that the primary reason for the Courts to be cautious when applying unreasonableness as a ground for review in common law was to maintain a distinction between appeal and review. The question is, if gross unreasonableness and ordinary unreasonableness on delegated legislation are accepted as grounds for judicial review, is it not also going to tarnish the distinction which the Courts long wanted to sustain? In this respect there were different viewpoints from academic writers in as far as the role of this concept is concerned.

Lawrence Baxter[41] criticised the South African judicial system for its rejection of unreasonableness as a ground for judicial review. The basis of his criticism is on his distinction between procedural and substantive unreasonableness. According to him, there is no basis to discard unreasonableness as a ground for judicial review in cases where the unreasonable decision was arrived at unprocedurally, and that such review is also compatible with the doctrine of *ultra vires*.[42] He concedes however that as far as

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[38] See the case of *Minister of Interior v Lockat* 1961 (2) SA 587 (A) where Holmes JA approved the discriminatory nature of the Group Areas Act 77 of 1957 because it was implicit in the Act that the legislature wanted to invoke such discrimination. Similarly in the case of *Omar v Minister of Law and Order* (see footnote no 4 above) the Appellate Division found that a regulation that allowed Minister of Law and Order to arrest and detain a person without a notice fell within the powers conferred on the State President to deal with emergency.

[39] 1989 (2) SA 142 (T) at 135.

[40] Baxter (footnote no 13) at page 479 gave the following long list of decisions *in R v Jopp* 1949 (4) SA 11 (N), *Smith v Germiston Municipality* 1908 TS 240, *Bunu v Grahamstown Municipality* 1910 EDL 346, *MacRobert v Pretoria City Council* 1910 TPD 540*; Moses v Boksburg Municipality* 1912 TPD 659, *Sinovich v Hercules Municipal Council* 1946 AD 783*, R v Ngati* 1948 (1) SA 596 (C), *Arenstein v Durban Corporation* 1952 (1) SA 279 (A), *R v Seedat* 1957 (1) SA 27 (N), *S v O'Malley* 1976(1) SA 469 (N), *S v Meer* 1981 (4) SA 604 (A) *and Mandela v Minister of Prisons* 1983 (1) SA 938 (A).

[41] See footnote no 13 above.

[42] At 489.

substantive unreasonableness is concerned, it falls within the specialist knowledge of the administrator which a judicial officer does not posses and therefore inappropriate for judicial review. He indicated that the distinction is imperative to maintain a distinction between appeal and review.[43]

Though Baxter's argument appears to be logically sound to a certain extent, it is not without shortcomings. Firstly it must be remembered that the general purpose of all administrative actions is the promotion of public interest, and thus an administrator acts unreasonably where he or she fails to take relevant factors into consideration, ignore the rules of natural justice or pursues an improper purpose. The problem with Baxter's approach is that where it is glaring from the facts that the substance of the administrative decision is not reasonable, like in instances mentioned above, the Courts should not interfere because it falls within the special expertise of the administrator. According to Baxter, Courts should only interfere where it involves process adopted. If that approach is accepted, there will be absolutely no proper checks and balances to ensure that what the administrators are executing are reasonable and in accordance with justice. It may even lead to some administrators abusing their discretion because of the 'unquestionable' special knowledge they possess.

Wiechers[44] on the other hand brought a different argument in that the effect or consequences of an administrative decision should be a distinquishing feature from other factors such as the formal and procedural aspects of the administrative decision, meaning that it is the effects of the administrative decision that the law should require to be reasonable.[45] According to Wiechers, an administrative decision may be attacked on its unreasonableness only where the administrator exercised a discretion, and that it is not possible to raise unreasonableness in cases where the administrator made a decision strictly on a legislative prescripts.[46] The approach however takes a different dimension in cases where it is conspicuous that the administrator's decision is based on bad faith. In

[43] At 489-490.
[44] See Wiechers M 'Adminsitrative Law' (1985) at 234-254.
[45] At 244.
[46] At 245.

such cases, whether the decision is unreasonableness or not is irrelevant and the decision can be set aside based on bad faith or ulterior motive.[47] According to Wiechers, to keep good checks and balances, it is imperative to recognise reasonableness as an independent requirement for the validity of the action and that the state must be held responsible for the unreasonable acts of its officials.[48] It is submitted that the opinion by Wiechers that only those cases where the administrative organ is in a position to exercise a choice may be attacked is not without substance. It is correct that an administrative action can only be declared unreasonable where a discretion is exercised. Obviously where the administrator is obliged to implement certain unreasonable action because of a statutory imperative or legislation, it will be the legislation which would be unreasonable because it brought an unreasonable effect and not necessarily the administrative action itself. The administrator will be implementing a legislative obligation not exercising a discretion. Wiechers could have put it clearly and simply as suggested above. However his viewpoint has merit.

Despite the turbulent stages unreasonableness as a ground for judicial review went through during common law era, both Baxter and Wiechers contributed critical legal writings not only on this aspect of unreasonableness but on administrative law jurisprudence in general.

The application of unreasonableness as a ground for judicial review on a limited scale by the South African judicial system was however not generally well accepted. It came as no surprise when organisations like the South African Law Commission made submissions dating far back from 1986 suggesting that administrative actions be reviewed on the ground of unreasonableness.[49] In this report, the South African Law Commission proposed that an administrative decision be reviewable if such decision is 'unfair or unreasonable.'[50] Various comments were generated by this clause and as the result unreasonableness as a ground for review was rephrased by the Commission so as to

[47] At 246.
[48] At 134.
[49] "Investigation into Courts' Powers of Review of Administrative Acts" (1986).
[50] Clause 3(1)(h).

provide for review if 'the decision was so unreasonable that no reasonable organ could have made the decision.'[51] Though the proposals were never finally adopted as legislation, they however played a pivotal role in the development of unreasonableness as a ground for judicial review later during the constitutional era.[52]

Despite the various shortcomings, the common-law history of unreasonableness as a ground for judicial review played a critical role as an interpretative tool in the subsequent codified administrative law jurisprudence of the constitutional dispensation discussed hereunder.[53]

3. UNREASONABLENESS UNDER CONSTITUTIONAL DEMOCRACY

In 1994 the Interim Constitution of the Republic of South Africa came into operation and gave every person a right to "administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."[54] According to several academic writers,[55] section 24(d) of the Interim Constitution brought unequivocally the fact that the Courts were able to review administrative actions on the grounds of unreasonableness of some kind. Section 24(d) used the term "justifiable" rather than the word "reasonable". The critical question was how the Courts would interpret the former in relation to unreasonableness as a ground for judicial review.

[51] South African Law Commission Project 24 "Investigation into the Courts' Powers of Review of Administrative Acts" working paper 34(October 1991).

[52] The proposals by the South African Law Commission gave birth to another working paper number 34 dated October 1999 called South African Law Commission Project 24 "Investigation into the Courts' Powers of Review of Administrative Acts." It came during constitutional democracy.

[53] In terms of section 39 (3) of Act 108 of 1996, the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law to the extent that they are not inconsistent with the Bill.

[54] See footnote no 8 above.

[55] See footnote 24 above at 384, Jonathan Klaaren "Administrative Justice" in Mathew Chaskalson et al Constitutional Law of South Africa (revision 5, 1999) at 25-20 points out that the intention of the original proposers was to cover the same ground as the term "reasonable" and he himself suggests that "justifiable" is a synonym for "reasonable". Johan de Waal, Iain Currie and Gerhard Erasmus in the 'Bill of Rights Handbook' 3ed (2000) at 473 adopt a similar approach and according to the three writers, section 24(d) ushered in "full blown rationality review which for so long had been resisted by the courts.' Michael Asimow in 'Towards a South African Administrative Justice Act' (1997) 3 Michigan Journal of Race Law at 1, 13-14 for example, read the requirement in section 24(d) as preventing 'irrational action'.

Interesting court decisions soon after the codification of the Interim Constitution impacted greatly on this judicial ground for review and the most vital being the following:

In *Standard Bank of Bophuthatswana Limited v Reynolds,*[56] the Court had to enquire into the content of the concept of unreasonableness in the light of the new constitutional order, a less stringent approach to the review of unreasonable administrative action was adopted. The Court said:

> The test of 'gross unreasonableness' in view of the testing rights given to the Courts in the Constitution of the Republic of South Africa Act, 1993 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 facts performed during the operation of the Constitution. From the aforegoing it is necessary that the courts adopt the less stringent test of 'unreasonableness' rather than the more restricted one of gross unreasonableness[57].

This was one of the first decisions made under constitutional democracy which confronted gross unreasonableness as an outdated stringent requirement which did not fit in the codified administrative law system. It was however not made without some drawbacks. The problem with this judicial pronouncement is that it does not give a complete or authoritative answer to the status of unreasonableness as a ground for judicial review. It does not elaborate as to how less stringent should this ground be applied nor giving a more expanded explanation of what would constitute a reviewable unreasonableness. It is submitted that several decisions made after the new democratic dispensation came into operation were somewhat controversial.[58]

Section 24(d) of the 1993 Constitution however influenced greatly the concept of unreasonableness as a ground for judicial review in the South African legal system. In its Supplementary Report, the South African Law Commission in considering the impact of

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[56] 1995(3) SA 74(B). It is one of the first decision under Constitutional democracy where the Courts hinted a departure from 'gross unreasonableness'.
[57] At 96.
[58] See Ross R Kriel 'Administrative Law 1998 Annual Survey' 89 at 95.

section 24(d) of the 1993 Constitution on its previous proposals, held the view that unreasonableness should be retained as a ground for review in its Draft Bill.[59] The right to justifiable administrative action also received varied interpretation by the Courts and academics. Whereas some have relied on the section to import a test for reasonableness for all administrative actions, others have regarded the term as introducing a requirement of rationality or proportionality.[60] It was a great relief when the final Constitution came into being with unambiguous phrasing of this concept.

The final Constitution came into operation on the 27 April 1996 and it brought along a section which specifically deals with administrative justice. It reads as follows: Section 33 (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.

(3) National legislation must be enacted to give effect to these rights, and must:
Provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;

(a) Impose a duty on the state to give effect to the rights in subsection (1) and (2) and

(b) Promote an efficient administration.

There were 'transitional arrangements' under Schedule 6 of the 1996 Constitution which are relevant and very important to mention here and read as the following:

Item 23(1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the Constitution took effect.

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[59] South African Law Commission Project 24 'Investigation into the Courts' Power of Review of Administrative Acts' Supplementary Report (October 1994).

[60] See Etienne Mureinik 'A Bridge to where? Introducing the Interim Bill of Rights 1994 SAJHR 31 at 40-41, Cachalia 'Fundamental Rights' 1994 at 74, Davis 'Fundamental Rights' 1997 at 161 and also *Afrisum Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599(T), *Derby Lewis and Another v Chairman of the Committee on Amnesty of the TRC and Others* 2001 (3) SA 1033(C).

(2) Unless the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted,

(a) Section 33(1) and (2) must be regarded to read as follows:

"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 that 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"

In terms of the transitional arrangements under Schedule 6, the provisions of section 33(1) and (2) of the 1996 Constitution were suspended until legislation envisaged in section 33(3) of the final Constitution is enacted. It effectively meant that the requirement of justifiability in relation to the reason given was extended even after the dawn of the final Constitution and the requirement of reasonableness was kept in abeyance until the legislation envisaged above was enacted. There were several important decisions however impacting on unreasonableness as a ground for review after the enactment of the final Constitution which are worth noting. The following are examples of some of the important decisions:

In *Nel v Suid Afrikaanse Geneeskundige Raad,*[61] Van Dijkhorst J held that in the absence of *mala fides*, fraud or incompetence on the applicant's work, it would be difficult to justify the setting aside a decision of a disciplinary tribunal,[62] and thus Court applying the

[61] 1996 (4) SA 1120(T). see also *Moodley v Minister of Safety and Security* 1995 (2) PH M10 (N). Another important decision is that of *Kotze v Minister of Health* 1996 (3) BCLR 417. In this case at 425 F-G, the court held that in accordance with the 1993 Interim Constitution "it must appear from the reasons that the action is based on accurate findings of fact and a correct application of the law.

[62] At 1130 G-H.

outdated principles of symptomatic unreasonableness. It is quite astonishing why the Court took this approach because this particular decision was made at the time the final Constitution was already in operation. The test should have been whether the Director General's action was justifiable in relations to the reasons given.

Another startling example is in the case of *Marais v Interim Nasionale Mediese en Tandheelkundige Raad van Suid Afrika*.[63] In this matter the Court held that the test for setting aside an administrative finding is where a decision was grossly unreasonable to so striking degree as to warrant the inference of the failure to apply mind.[64] Again this line of reasoning provokes many questions to this decision because the 1996 Constitution laid down the requirements for validity of administrative action, and for the Court to set aside an administrative action on the basis of something which was not specifically outlawed by the Constitution itself would pose serious problems. There is nowhere in the final Constitution where 'gross unreasonableness' as a requirement for judicial review was mentioned, instead it required administrative decisions to be "justifiable" in relation to the reasons given."

It is also interesting to note the decision taken in the case of *Maharaj v Chairman, Liquor Board*.[65] In this matter the applicant's basis for review was in terms of the Liquor Act 27 of 1987 which provides that the Court can set aside an administrative decision if the administrator has *inter alia* exercised the power in an arbitrary manner, has exercised it in a *mala fide* manner or has exercised it in a grossly unreasonable manner.[66] Nicholson J said "given the test in section 24(d) of justifiability, the tests for review in section 131 are much narrower and, to the extent that they limit an applicant's rights to review the present respondent are inconsistent with the said provisions of the Constitution. For reasons which appear later in this judgement I am of the view that the respondent exercised his powers in a grossly unreasonable manner. Even if I am wrong or whether the respondent exercised his powers in a grossly unreasonable manner, he manifestely

[63] [1997] 4 All SA 260 (0).
[64] At 265 g-h.
[65] 1997(1) SA 273(N).
[66] Section 131 (a).

cannot justify his decisions with the reasons furnished 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."[67] It is clear that even though the Court considered section 24(d) as the test for review for administrative action, the reasoning or the basis for judicial review by the Court in this matter was gross unreasonableness on the part of the administrator. The provisions of section 24(d) of the Interim Constitution were only used as an alternative in case the Court was not satisfied that there was no gross unreasonableness. This is a wrong approach and again the test in this instance should have been whether the administrator's decision could be justified with the reasons given.

According to the decision in *Roman v Williams*,[68] section 24(d) established reasonableness as an independent ground for review.[69] In this matter the powers of the Commissioner of Prisons to re-imprison an offender in terms of Correctional Services Act[70] came into question. The Court found that for an administrative decision to satisfy the requirements of section 24(d) of the Interim Constitution, it must stand the requirements of suitability, necessity and proportionality.[71] The Court found that gross unreasonableness was no longer a requirement for judicial review and that the role of the Courts in judicial reviews was no longer confined to the way in which an administrative decisions was reached but extends to its substance and merits as well.[72] There is no doubt that this decision poses a very serious threat to the principle of separation of powers between the judiciary and the executive because if the judiciary is to be allowed to enquire into what falls within the special knowledge of the administrators that may result in usurpation of functions by the judiciary from the executive. It also means that there may be no distinction between appeal and review as the Courts would be able to

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[67] At 277 D-E.
[68] 1998 (1) SA 270 (C).
[69] At 284 H-I.
[70] Section 84 (B) (1) of Act 8 of 1959.
[71] At 284 C.
[72] At 284 I.

review merits which is the position in the case of appeal and not in administrative reviews.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council,*[73] the Constitutional Court decided on the reviewability of legislation by provincial councils and legislation enacted by municipalities. O'Reagan J indicated that prior to the enactment of the Interim Constitution, legislation enacted by provincial Councils was regarded as original and not delegated and therefore it could not be challenged on the ground of unreasonableness, or any of the other grounds on which the exercise of delegated legislative power could be reviewed by the Courts.[74] However legislation enacted by municipalities were treated differently in that their power to make laws was characterised as delegated power and therefore exposed to judicial review.[75] The Court indicated that under the interim and the 1996 Constitutions, local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself and that whilst it might not have served any useful purpose under the previous legal order to ask whether or not the action of a public authority was 'administrative,' it is a question which must now be asked in order to give effect to section 24 of the Interim Constitution and now section 33 of the 1996 Constitution.[76]

The Constitutional Court in *Fedsure's* case said that since Parliament is no longer reigning supreme after the enactment of the Interim Constitution, its legislation, and the legislation of all organs of state, are now subject to constitutional control.[77] The Court said local council is a deliberative legislative body whose members are elected and that legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate.[78] O'Reagan said whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-

[73] 1999(1) SA 374(CC) Para 27 (laws by functionaries which have been given the power to do so by the legislature are 'administrative action', while laws made by deliberative legislative bodies are not; but both can be reviewed for constitutionality).
[74] At 392F-H.
[75] At 392 para 31H.
[76] At 394 para 37A-H.
[77] At 393 para 32I.
[78] At 395 para 41A.

laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by 'every person' affected by them on the ground, contemplated in section 24(c) and (d) of the Interim Constitution.[79] The Court indicated that it is a power that is exercised by democratically elected representative after due deliberations and therefore such action of the municipal legislatures in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds, cannot be classed as administrative actions as contemplated by section 24 of the Interim Constitution.[80] It is submitted that this decision brought an important clarity as far as the status of local governments are concerned. It is true that legislations by local authorities are done by elected officials and their task is based on policy formulation and further, the Interim Constitution recognised and made provision for three levels of government being national, provincial and local. Each level of government derived its powers from the Interim Constitution.[81] Setting aside a legislative function of elected officials on the ground of unreasonableness by the Courts would undoubtedly result in Courts usurping policy issues which the Constitution conferred on the local authorities. The decision also advises of the fact that is the type of power exercised to determine whether it is an implementation of a legislation and therefore an administrative action or a political act which is legislative.

In *New National Party of South Africa v Government of the Republic of South Africa,*[82] Yacoob J writing the majority decision contrary to dissenting viewpoint of O'Reagan J said "decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of Courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so if they are satisfied that the legislation is not rationally connected to a

[79] At 395 para 41C.
[80] Section 174(1) of the Interim Constitution imposes constitutional obligation on the 'competent authority' to establish local government, section 174(3) also provides that a local government shall be autonomous and within the limits prescribed by or under law, shall be entitled to regulate its affairs.
[81] The distinction of layers of government are extensively expounded in Chapter 6, 9 and 10 of the Interim Constitution.
[82] 1999(3) SA 191 (CC) at Para 24.

legitimate government purpose."[83] In contrast O'Reagan J said: "the proper approach is to require legislative regulation of the right to vote reasonable. As a test, it is less difficult to implement than the test adopted by the majority."[84]

It is abundantly clear from the *New Nationl Party's* decision above that the Court exercised judicial deference for the purpose of respecting the doctrine of separation of powers. It must however be borne in mind that it does not mean that the court cannot interfere and set aside a legislative act based on its unconstitutionality. It is important at the same time for the Courts to exercise restraint on legislative issues as it is a function constitutionally meant for politicians. But what is important is that if there would be any interference by the Court, it will be based on constitutional illegality rather than administrative unreasonableness.

The role and status of common law under the Constitutional era came into the picture in the case of *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd: Commissioner of Customs and Excise v Rennies Group Ltd t/a RenFreight.*[85] In this case the Supreme Court of Appeal scrutinised the role of common law administrative review in distinction with constitutional administrative review prescripts. Hefer JA found that though the Constitutional and common law criterion of judicial review are two different approaches the question in each case is whether the action under consideration is in accordance with the behest of the empowering statute and the requirements of natural justice.[86] The above Supreme Court of Appeal approach was however rejected in the case of *Pharmaceutical Manufacturers Association of SA*: In re *Ex parte President of the Republic of South Africa.*[87] Chaskalson P asserted:

> There are no two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. This is only one system of law. It is shaped by the Constitution which is the supreme law, and all law including the common law, derives its force from the Constitution and is subject to constitutional control.

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[83] At 206 para 23C-D.
[84] At 242 para 126F.
[85] 1999 (3) SA 771 (SCA). This decision attempted to clarify the role of common law review grounds under constitutional democracy.
[86] At 786 para 20A.
[87] 2000 (2) SA 674 (CC).

> The common law principles that previously provided the grounds for judicial review of public power 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.[88]

This judgment means that constitutionalism has shifted from the realm of common law to the prescripts of the written Constitution. The common law supplements the provisions of the Constitution, but derives its force from the Constitution. The effect of this judgment on unreasonableness is that if "gross unreasonableness" was a ground for judicial review in common law, it is now subsumed into the final Constitution in as far as it is not inconsistent with it. The final Constitution provides for a "reasonable" administrative action.[89] The insistence on "gross unreasonableness" would obviously go against the spirit, purport and object of the Constitution including the Bill of Rights. The exercise of public power must conform to constitutional principles including public authorities which must comply with specific duties and obligations in the exercise of their discretionary powers, the state and its administrators must obey the law to ensure good and fair administration.

Section 33(1) of the 1996 Constitution is very concise in as far as the right to administrative justice is concerned. There is no exaggeration of unreasonableness as it was the case in common law. There is absolutely no warrant for insisting on gross unreasonableness as Friedman JP pointed out in *Standard Bank of Bophuthatswana Ltd v Reynolds NO*[90] that gross unreasonableness is egregious and thus incompatible with the Bill of Rights.

As section 33(1) of the 1996 Constitution was suspended and section 24 of the Interim Constitution applied as per item 23 of Schedule 6 of the final Constitution until the organic legislation was enacted, the suspension ceased to exist when the Promotion of Administrative Justice Act was promulgated during the year 2000.

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[88] At para 33.

[89] See footnote no 9 above. The question is whether this section introduces a test of substantive reasonableness. It has already been said that the Courts have traditionally been reluctant to intervene in the substance of administrative decisions holding that it will result in fiddling with policy objectives.

[90] See footnote 56 above at 96.

3.1. UNREASONABLENESS UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

The promulgation of PAJA was to give effect to the provisions of section 33(1) of the 1996 Constitution that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. [91]

The majority party in the National Assembly, the ANC was opposed to the inclusion of unreasonableness as a ground for judicial review because of obvious reasons that it would result in Courts making decisions on policy issues and also that it would obscure the distinction between appeal and review.[92]

After a long and difficult political engagements, PAJA was finally assented to by the State President on the 03 February 2000 and its date of commencement was the 30 November 2000.[93]

Section 6 of the Act addresses the issue of the grounds in terms of which administrative action can be judicially reviewed. There are various judicial review grounds in this Act that appear to be overlapping to a greater extent. The examples are the grounds of rationality, bias, bad faith and arbitrariness.[94] Section 6(2) (h) specifically deals with unreasonableness as a ground for judicial review. It reads as follows:

> A court or tribunal has the power to judicially review an administrative action if (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

The legislature has limited the ground of unreasonableness to the requirement of action which "is so unreasonable that no reasonable person" could have so exercised it. The

[91] The same Constitution made an obligation to the legislatures to enact this Paja in terms of section 33(3).
[92] See JR de Ville "Judicial Review of Administrative Action in South Africa" Revised 1st Edition 2005 at 209.
[93] See *Proclamation R 73 GG 218086* of 29 November 2000.
[94] See section 6(2)(iii)(b)(ii)(iii)(v) and (vi) of the Act.

critical question is, what does this phrase mean? Does it exclude judicial review of substantive unreasonableness? International jurisprudence especially English law appears to be influential in this respect because the content of the case of *Associated Provincial Picture Houses v Wednesbury Corporation*[95] seems to have its features on a serious note in this legislation. In this decision, the concept of unreasonableness was interpreted in similar fashion as it was done during common law era in the South African judicial system because its presence was identified by the presence of other factors like *mala fide* and improper purpose. Again it adopted almost similar phrasing as seen in PAJA in that administrative decision "will be set aside if it is so unreasonable that no reasonable body could have made it."[96] It is submitted that the legislature has committed a serious injustice to the Constitution in borrowing similar formulations as it is in *Wednesbury's* case above and inserting it in PAJA because the formulations require an extreme form of unreasonableness which was clearly not envisaged in the 1996 Constitution.[97] This formulation is non different to the common law. This submission will however become much clearer later in this study. The similarities in couching unreasonableness as a ground for review in PAJA and the *Wednesbury's* decision is one of the many examples of how foreign law especially English law influenced the South African approach.

Despite the similar expression of the concept of unreasonableness in *Wednesbury*'s decision and PAJA, it must however be remembered that the latter derives its force and effect from the 1996 Constitution which provided a 'reasonable' administrative action and therefore its interpretation must in all intents and purposes be in conformity with it. Any source appearing to be similar in structure may only be of interpretative assistance.

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[95] See footnote no 26 above. Lawrence Baxter (footnote no 13 at 497) referring to this case indicates that *mala fides*; improper purpose; improper motives; ulterior purposes; ulterior purposes; improper considerations, extraneous purposes, extraneous considerations and irrelevant considerations are all terms representing different conceptions of the common theme of unreasonableness. He says that they may satisfactorily be confined under the generic concept of unreasonableness.

[96] At 426.

[97] The smacks of gross unreasonableness in Wednesbury is also confirmed by the decision of *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 (HL) where the judge said the following "by irrationality I mean what can now be succinctly referred to as *Wednesbury* unreasonableness" meaning the decision would only be set aside if the "decision which is so outrageous in its defiance of logic or if accepted moral standards that no sensible person who had applied his mind to the question could arrived at it" at 410.

It is imperative to analyse the South African judicial decisions in regard to unreasonableness as a ground for judicial review after the promulgation of PAJA. The coming into being of PAJA meant the resuscitation of section 33(1) of the 1996 Constitution which was kept in abeyance by item 23 of the transitional arrangements in the final Constitution. It meant that "justifiable" administrative action was replaced by an administrative action that must be "reasonable". How should the concept of unreasonableness be contextually applied in the South African legal system?

Several writers attempted to define the role of reasonableness under the Constitution and in PAJA. Asimow[98] suggests that after examining the evidence that both supports and opposes the agency decision, a Court must conclude that a reasonable person could have arrived at the agency's conclusion.

The application of this concept was also made in the South African Courts.[99] Focus will now be made specifically on interpretation and application of section 6(2)(h) of PAJA as applied in conformity with section 33(1) of the final Constitution by the South African judicial system.

The case of *Government of the Republic of South Africa v Grootboom*,[100] contains a very important decision in as far as the interpretation of reasonableness in socio-economic rights was concerned. In its judgement the Constitutional Court stated with no uncertain terms that it would be improper for the Court to enquire whether other desirable measures could have been applied, or whether public money could have been better spent.[101] The Court indicated that it is important to recognise that a wide range of possible options could be adopted by the state to meet the obligations, and that many of these might meet

[98] Asimow (footnote no 55 above at 14) was citing *Universal Camera Corp v NLRB US 474 (1951)* as the leading case. This test 'does not allow a Court to reweigh the evidence and overturn the decision merely because it prefers the conclusion different from the agency's.

[99] See *Municipality of the City of Port Elizabeth v Prut* No 1997 (6) BCLR 828 (SE) at 825B and also *Ferreira v Premier, Free State* 2000(1) SA 24(0) at 251J-252A.

[100] 2001 (1) SA 46 (CC). In this case the right to housing enshrined in the Bill of Rights was under the spotlight.

[101] At 66 D.

the requirement of reasonableness.[102] The essence of this decision is that the Courts should as far as possible not substitute decisions emanating from government policies because of its substantiveness, even if the Court finds itself not entirely agreeing with the decision. It is undoubtful that the test applied in this case is not whether the decision is correct to the Court before which the decision was brought for review, but whether the decision, objectively speaking is within the confines of acceptable grounds relied upon when the decision was made. The decision goes a long way in respecting the separation of functions between the judiciary and the executive. It promotes judicial deference and encourages interference only where decision is contrary to government objective. It is a good decision because it restricts the judiciary from usurping functions which are solely within the competence of politicians and administrators.

The decision taken in *Mafongosi and Others v United Democratic Movement and Others*[103] is very intersesting. The Court started with the correct approach by indicating that any decision which is unreasonable falls to be set aside as not complying with the Constitutional requirement.[104] Astonishingly however, the Court went on and insisted that it must also be justified and the justification can only be determined by the reasons given.[105] It said justifiability it meant that the decision had to meet standard of suitability, necessity and proportionality.[106] To substantiate this viewpoint, the Court quoted Van Deventer J in *Roman v Williams*[107] who said "an administrative decision could be justified only by the reasons underpinning it and justifiability he meant that the decision had to meet a standard of suitability, necessity and proportionality." This particular decision was made on the 14 March 2002. On this date, section 33(1) of the 1996 Constitution and its offspring section 6(2)(h) of PAJA were in operation. Jafta AJP applied the provisions of section 24(d) of the interim Constitution as if they were the

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[102] The Court declined to define reasonableness, saying merely that it was something to be determined on the facts of each case (Para 92). However, the government's policies and programmes would have to be reasonable both in their conception and their implementation. Furthermore, measures which overlooked those most in need would be unlikely to meet the standard of reasonableness.

[103] 2002(5) SA 567(TKH) at 573-574. In this case the Court made a distinction of unreasonableness during common law and in constitutional dispensation.

[104] At 575 A.

[105] At 575 B.

[106] At 575 D-E.

[107] See footnote no 68 above at 284 J-285A.

same as those enshrined in section 33(1) of the 1996 Constitution and in PAJA. Section 33(1) requires a reasonable administrative action whilst section 6(2)(h) sanctions review of an administrative action if it is so unreasonable that no reasonable person could have exercised the power or performed the function. That is the approach which should have been adopted in this particular case. The principle applied in *Roman v Williams* above which was done during the operation of the Interim Constitution cannot therefore be applied when section 33(1) of the 1996 Constitution and section 6(2)(h) of PAJA are in existence. Section 24(d) requires justifiability in relation to reasons given and therefore different to the final Constitution.[108]

In *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa,*[109] the Supreme Court of Appeal dealt with the standard of review of administrative action set out in section 33(1) of the 1996 Constitution. In this case the appellant, Trinity Broadcasting, had applied for and been granted a renewal of its community television broadcasting licence by the respondent. However, in granting the renewal the respondent had declined to extend the appellant's area of operation and had made the licence subject to certain conditions. Pending the granting of the renewal, the Premier of the Eastern Cape had addressed a letter to the respondent in which he expressed his view and the provincial government's strong support for the application. On application in a Provincial Division of the High Court for review and setting aside of the conditions, the appellant was unsuccessful.[110] It then proceeded on appeal where the court held that the applicable standard of review was to be found in section 33(1) of the 1996 Constitution read with section 6(2)(h) of PAJA Act.[111] Howie P further held that in requiring reasonable administrative action, the Constitution did not intend that in review proceedings such action had to be tested against the reasonableness of the merits of the action, in the same way as in an appeal.[112] The action did not have to be substantively

[108] See footnote no 54 above.
[109] 2004(3) SA 346(SCA). In this matter, the Court entertained the application of the grounds for review in section 6(2) of Promotion of Administrative Justice Act as read with section 33(1) of the 1996 Constitution.
[110] At 347 F.
[111] At 353 D.
[112] At 353 I-J.

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.[113] The Court said that instead, the review threshold was rationality and that the test was an objective one, it being immaterial if the functionary acted in good faith, that the action had been rational.[114] The Court indicated that rationality was one of the criteria laid down in section 6(2)(f)(ii) of PAJA and therefore reasonableness could be a relevant factor where the question was whether the action was so unreasonable that no reasonable person would have resorted to it. Howie P concludes that in applying this test, the reviewing Court would ask: was there a rational objective basis justifying the connection made by the administrative decision-maker between the material available and the conclusion arrived at?[115]

It is without question that the Supreme Court of Appeal in *Trinity's* case wanted to exercise great caution in as far as dealing with administrative action was concerned. However the question is whether the exercise of this glaring judicial deference is not inconsistent with the Constitution. The essence of this decision is that only rationality test should be applied in judicial review of administrative action and reasonableness can only be considered if the action is 'so unreasonable that no reasonable authority would have arrived at it.' The problem with this approach is that it purports to relegate the constitutional requirement of 'reasonable' administrative action to the same status of 'gross unreasonableness' found in common law. The expression of 'so unreasonable that no reasonable authority would have arrived at it' leaves no doubt that as per finding of Howie P, it requires an extreme form of unreasonableness.[116] The Constitution did not make mention of this exaggerated type of unreasonableness, it simply requires a 'reasonable' administrative action. The form of unreasonableness envisaged in the offspring legislation, PAJA should not be given a leverage contrary to the intentions of its

[113] At 354 A.
[114] At 353 B.
[115] At 358 H, 359 H, 360 G and 361 B.
[116] At 354 B.

mother Act, the 1996 Constitution. Besides, unreasonableness and rationality are two independent grounds for judicial review, none being a substitute to the other.[117]

In *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management,*[118] the application was directed in reviewing and setting aside that portion of the decision of the first respondent in terms of which the separate fishing quota allocated for pilchards and anchovies was replaced by a single percentage quota for both.[119] The gist of the complaint was that the quota had been allocated separately from 1984 to 2001, but in 2002 was allocated as a single pelagic fishing quota, split between pilchards and anchovies, in accordance with complicated mathematical formula.[120] As a rights holder in the pelagic fishing business, the applicant, which trades as 'Marine Products', avers that the new allocation was arbitrary and unreasonable, and demonstrated a failure by the first respondent to apply his mind properly to the decision made in this regard.[121] The Court as per Van Zyl J held that there was no merit in the suggestion that respondent had not applied his mind in making the decision or that his decision was arbitrary or unreasonable as the respondent had gone to a great deal of trouble to develop a system of allocating permits and had made use of expertise of the highest order.[122] The Court held that this was one of those cases in which due judicial deference had to be accorded to a policy-laden and polycentric administrative act that entailed a degree of specialist knowledge and expertise that very few if any judge could be expected to have.[123] This decision demonstrates the sensitivity which the Court approached administrative actions. Whilst the decision acknowledged the need of the Courts to interfere in unreasonable administrative actions, it at the same time expressed that it would be critical to exercise judicial deference especially where special expertise was applied.

[117] In this regard see footnote no 24 at 392.
[118] 2004 (5) SA 91 (CPD). In this case the Court indicated the circumstances under which judicial deference should be exercised.
[119] At 193 C-D.
[120] At 193 D.
[121] At 193 E.
[122] At 110 G
[123] At 110 G-I.

There is merit in this approach by Van Zyl J but there must always be a balance in applying the concept of unreasonableness and judicial deference, the one must not be over-emphasised at the expense of the other. The Constitution gave a mandate to the Courts to ensure that administrative actions are reasonable and therefore lack of specialist knowledge should not sway the Court's focus from pursuing this constitutional obligation. If the Courts are to intervene only in less complicated administrative decisions, it would mean that complicated cases may go unchallenged despite being unreasonable. It is the duty of the Courts to satisfy itself with the reasonableness of an administrative actions, and if need be, seek expert opinion. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.

The above-mentioned critical viewpoint is vindicated by the decision of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.[124] The Constitutional Court indicated that what will constitute a reasonable administrative decision will depend on circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case.[125] The Court said that 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 interest involved and the impact of the decision on the lives and well-being of those affected.[126] The Court said that although the review functions of the Court now have a substantive as well as procedural ingredient, the distinction between appeals and reviews continues to be significant and that the Courts should take care not to usurp the functions of administrative agencies.[127] It said its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.[128] The Court said that in treating the decision of administrative agencies

[124] 2004(4) SA 490 (CC) at 513. O'Reagan J gave a standpoint on approach to complex matters and the extent of judicial review regarding the concept of unreasonableness.
[125] At 513 B.
[126] At 513 C.
[127] At 513 D.
[128] At 513 D-E.

with the appropriate respect, a Court is recognising the proper role of the executive within the Constitution.[129] A Court should thus give due weight to the 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 those considerations will depend upon the character of the decision itself, as well as the identity of the decision-maker. O'Reagan J said that often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal.[130] In those circumstances a Court should pay due respect to the route selected by the decision-maker. The Court said that this does not mean, however that where this decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision.[131]

It is submitted that since the dawn of the 1996 Constitution, the *Bato Star Fishing's*[132] decision should be singled out as the best authority as far as the role of the judiciary is concerned in dealing with the constitutional concept of unreasonableness. It is interesting to note that in this decision, the Constitutional Court made it abundantly clear that administrative review under section 33(1) of the 1996 Constitution now includes substantive ingredient. The Courts are now required to review the substance of an administrative decision as to whether it falls within the confines of the constitutional requirement of reasonableness. Unlike in the *Trinity's* case above, the Constitutional Court did not base its ground of review on an egregious form of unreasonableness that the action must be 'so unreasonableness that no reasonable authority would have resorted to it'. Instead the Constitutional Court adopted the approach followed in English case of *R v Chief Constable of Sussex Ex parte International Trader's Ferry Ltd*[133] in which Lord Cooke said that the 'simple test to be used throughout was whether the decision in question was one which a reasonable authority could reach.'[134] The Constitutional Court

[129] At 514 G.
[130] At 515 A-B.
[131] At 515 B-C.
[132] See footnote no 25 above.
[133] [1999] 1 All ER 129. In this case the Court criticised Lord Greene formulation in *Wednesbury's* case as extreme and tautologous.
[134] At 157.

said that in determining the proper meaning of section 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides a sound guidance.[135] There is no doubt that this approach made a serious blow to section 6(2)(h) and the approach in *Trinity's* case which both purported to emphasise an exaggerated form of unreasonableness. It is also interesting to note that in this decision, 'reasonableness' which played a second fiddle to 'rationality test' in the *Trinity*'s case was given its rightful constitutional status and further that complexity of an administrative decision was put unequivocally clear as not a factor for the Courts not to test the reasonability of administrative actions. The *Bato Star Fishing's* decision above, more lucidly harmonised reasonableness in the Constitution and section 6(2)(h) of PAJA which never happened in earlier decisions. It gave the correct interpretation of section 33(1) of the Constitution though that was not the case in respect of PAJA because impliedly, the extra-ordinary form of unreasonableness in section 6(2)(h) was downplayed in favour of a less stringent form of unreasonableness.

The various stages of the concept of 'unreasonableness' as a ground for judicial review have been visited and what remains to be addressed is the conclusion on the proper status of the concept in the South African judicial system.

4. SYNTHESIS AND CONCLUSION

It is conspicuous from this study that unreasonableness as a ground for judicial review had given the South African Courts torrid moments. The interpretation and application of this controversial concept was continuously inconsistently applied in the Courts, some vying for a complete judicial deference and others in favour of the scrutiny of the merits. The problem started during the common law era and it persisted in constitutional period. The problem of the concept of unreasonableness is that it is 'intolerably ambiguous and subjective' as Watermeyer CJ said in *Sinovich v Hercules Municipality*[136] that

[135] At 514.

[136] See footnote no 40 at 789. The Court said "in investigating an issue of unreasonableness one would … 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 is answered in the

reasonableness is not an abstract and independent quality which can be measured by a fixed standard. Those whose interests have benefited by a particular by-law may regard it as reasonable while those whose interests are prejudiced may regard it as unreasonable. In fact unreasonableness is a relative term.

Its cluster term 'rationality' is equally illusive. In his famous typology of rational behaviour Max Weber[137] said that what is rational can depend entirely upon one's personal values, aim, emotions while according to C Lucas what is 'reasonable' is a question which contains moral overtones and that it is a social concept which relies on an appeal to reasons accepted or recognised by others.[138] It is against this background that for decades the South African Courts were reluctant to implement unreasonableness as a ground for judicial review. The fear accompanying review of the substance was because it could have resulted in usurping administrative functions, a danger which influenced many Courts to refrain from testing the reasonableness of administrative decisions.

The conclusion would go through various instances namely, the extent of reviewing the substance of the merits, and if judicial deference is applicable, what is the correct form of its applicability. Lastly a conclusion will be drawn on how 'unreasonableness' as a ground for judicial review impacted on distinction between appeal and review.

4.1 UNREASONABLENESS OF SUBSTANCE

It is unquestionable that the concept of unreasonableness in administrative actions involves the scrutiny of the substance by the Courts on administrative decisions.[139] It

affirmative, one would consider in the next place how far such "unreasonableness" could be said to be authorised by the enabling provision."

[137] *Wirtschaft and Gesellschaft* 2 ed (1925) 12 (in translation: Max Rheinstein (ed) Max Weber on 'Law in Economy and society' (1954) 1-2); and, for critical analysis, 'Morris Law, Reason and Sociology' (1958) 107 U Pa L Rev 147, Andreski 'Understanding, Action and Law in Max Weber' in Podgorecki & Whelan (eds) Sociological Approaches to Law (1981) 45, 60 ff.

[138] "On Justice" (1980) at 37. The author describes these as '*omni-personal*' as opposed to '*first-personal*' reasons.

[139] See Cora Hoexter *in* 'The future of Judicial Review in South African Administrative Law' (2000) 117 SALJ at 512. In this article the author says 'review for reasonableness or justifiability does entail scrutiny of the merits of administrative decisions. It is impossible to judge whether a decision is within

does not matter whether the unreasonableness is gross or not, but what is critical is that the test on this concept on any of its forms cannot be successfully prosecuted without analysing the substance of an administrative decision. This viewpoint is vindicated by the following Court decisions starting during the common law era:

The full bench of the Appellate Division in *The Administrator, Transvaal and the Firs Investment (Pty) Ltd v Johannesburg City Council*[140] stated that gross unreasonableness is purely evidence of arbitrariness or failure to apply mind at all to the matter and that the inference must be weighed in conjunction with all the other evidence to determine whether an official's mind was as a fact honestly brought to bear upon the matter.[141] It is undoubtedly a clear case of scrutiny of the substance of an administrative decision. The same viewpoint was arrived at by the same Court in *Johannesburg City Council v The Administrator, Transvaal and Mayofis*[142] which stated that suggestion of 'gross unreasonableness would suggest an enquiry of the merits of an administrative action.'[143]
Though section 33 of the 1996 Constitution did not give a detailed exposition of the legal context of 'reasonableness,' it concisely stated that administrative action must be reasonable. The PAJA brought the concept of unreasonableness in a different expression of 'so unreasonable that no reasonable person could have so exercised the power or performed the function.' It is submitted that there is a glaring difference in terms of the extent of the requirement of unreasonableness in the two provisions, the former expressing a relaxed form of unreasonableness and the latter providing a gross form of unreasonableness. The submission is based on the fact that *Oxford Advanced Learner's*

the limits of reason without looking carefully at aspects such as the information before the administrator, the weight given to various factors and the purpose sought to be achieved by the decision. But this has always been so, and qualification such as '*gross'* cannot hide the fact that judges engaged in such review have inevitably entered into the merits.' See also footnote no 124 above at 514.

[140] See footnote no 23 above. Where the Court indicated that a challenge of an administrative action on a ground of unreasonableness enjoyed limited success, although the Courts would intervene in special circumstances, that is, where the discretion had been exercised in a 'grossly unreasonable manner,' that is *mala fide*, or for an ulterior purpose, or where the administrator had failed to apply its mind to the matter.

[141] At 86.

[142] See also footnote no 23 above. The Appellate Division also indicated that though the Court must consider various factors in determining 'gross unreasonableness,' the Courts will not however prescribe the weight to be accorded to each relevant consideration.

[143] At 100.

Dictionary of Current English defines the word 'so' as '1. to do something to such a great degree. 2. very, extremely.'[144] Clearly the word 'so' operates as an adverb to determine the pattern or extent of a noun. An example, the grandfather was 'so' happy for his grandchild that he bought him a bicycle. The word 'so' in this context is an expression of an extra ordinary happiness. Therefore the word 'so' in PAJA purported to regulate the degree of a noun being unreasonableness which, it is submitted, was never envisaged by section 33(1) of the final Constitution. Cora Hoexter[145] acknowledges this viewpoint. She writes "the Paja does not resurrect symptomatic unreasonableness, and nor does 'gross' unreasonableness feature explicitly in section 6(2)(h); but all the same, egregiousness seems to be envisaged here just as it is in the *Wednesbury* test. In fact, one could argue that 'gross' is not enough: that only a decision which is utterly and completely unreasonable will be so unreasonable that no reasonable person could have arrived at it."[146] She hailed the interpretation adopted by the Constitutional Court in *Bato Star Fishing's* case.[147]

The Constitutional Court ruled in no uncertain terms in *Bato Star Fishing*'s[148] case that the constitutional dispensation of 'unreasonableness' brought the 'substantive ingredient' of review in administrative actions. Review is no longer only concentrated on the procedural aspect. The determination of reasonableness is objective and thus all relevant factors which led to the decision are taken into consideration and also the reasons given for that particular decision. There is no doubt that the principle applied in this case cast a bleak future on the constitutionality of section 6(2)(h) of PAJA, because this section purports to bring a more egregious or extra-ordinary form of unreasonableness which the 1996 Constitution did not propagate.

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[144] By AS Hornby 7th Edition 2005 at 1397.

[145] Cora Hoexter "Administrative Law in South Africa" 2007.

[146] At 314.

[147] At 315.

[148] See footnote 124 above where O'Reagan J said that 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.

Burns[149] also acknowledges that the literal interpretation of section 6(2)(h) provokes a limited view of unreasonableness and that it would be argued that it re-introduced 'gross' unreasonableness or symptomatic unreasonableness.[150] She indicated that it may be argued that section 6(2)(h) unduly restricts the Constitutional right to administrative justice contained in section 33 of the Constitution.[151] She submitted however that section 6(2)(h) must be given a wide interpretation and not limited to gross unreasonableness.[152] The writing by Burns exposes the discrepancy poses by section 6(2)(h) of PAJA. Regrettably, despite acknowledging the serious implications of gross unreasonableness requirement in section 6(2)(h), she nevertheless insisted that the interpretation should not be limited to gross unreasonableness as that would be contrary to the spirit of the Constitution. If the suggestion by this writer is not anything to go by, section 6(2)(h) should be interpreted as if it is section 33(1) of the Constitution. Why this particular approach? Why can't it be deleted from the statute books once and for all, and an appropriate version be inserted?

According to Hoexter[153] again, section 6(2)(h) of PAJA is 'a surprising choice on the part of the drafters and according to her, the section:

> Does nothing to advance the debate about intervention and non-intervention. It does nothing to focus the judicial mind on the factors that are or should be relevant. Instead, it is an unhelpful formulation, questioned in its home country, and is likely to perpetuate the idea that the distinction between appeal and review depends on a "gross" sort of unreasonableness.[154]

Cane[155] correctly remarked that taken literally, this sort of standard is so stringent that an unreasonable decision will be a very rare occurrence in real life.

The constitutionality of section 6(2)(h) should therefore be seriously challenged. There is no doubt that the section cannot pass constitutional muster considering that the

[149] See footnote no 21 above.
[150] At 250 first paragraph.
[151] At 250 fourth paragraph.
[152] At 250 fourth paragraph.
[153] See footnote no 11 at 185.
[154] At 185. In this regard see also JR de Ville (footnote no 92) at 210.
[155] Peter Cane "An Introduction to Administrative Law" 5ed (1996) at 209.

Constitutional Court in *Bato Star's* case did not give a ruling based on the fact that the administrative action purportedly taken 'is so unreasonable that no reasonable person could have so exercised the power or performed the function' as prescribed by section 6(2)(h). Instead the Court imported a foreign law in *R v Chief Constable of Sussex Ex parte International Trader's Ferry Ltd's*[156] decision that administrative decision will be reviewable if 'it is one that a reasonable decision-maker could not reach it.' If section 6(2)(h) was deficient in the Court's view why did it not use its Constitutional powers to rectify it instead of relying on foreign jurisprudence. In fact the Constitutional Court committed a notable disservice to the South African administrative law jurisprudence by not declaring section 6(2)(h) unconstitutional in *Bato Star's* case. The sooner the constitutional challenge on this section the better. This study however subscribes to the standpoint adopted by the Constitutional Court that the test should be whether the action is one that a reasonable decision-maker could reach. If not, it cannot stand because as it was indicated above, the section purported to justify judicial review only on certain extent of unreasonableness.

4.2 UNREASONABLESS AND JUDICIAL DEFERENCE

If the concept of separation of powers between the executive and the judiciary is to be taken seriously, a more balanced vision must be embraced on the role of unreasonableness as a ground for judicial review in the South African legal system. Judicial activism is not only an inadequate credo for administrative law in the constitutional era, it is also an ethos that creates the problems of democracy and legitimacy already adverted to. It enables judges to encroach on the territory of administration, and if they are so minded, to stifle social and economic reform.

Administrative functions were conferred to the administrators by the Constitution in recognition of the special knowledge and expertise they possess and therefore their decisions need to be treated with respect. The judiciary on the other hand serves as a watchdog to ensure that the power is exercised within the constraints of the law. As

[156] See footnote no 133 above.

stated in *Logbro Properties C C v Bedderson NO and Others*[157] that a judicial officer must demonstrate:

> '... a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of need for- and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.'[158]

The message derived from this quotation need not however be misconstrued. It ought not imply abstentionism or total submissiveness to the other branches of government, evoking old South Africa's nightmares of judicial prostration to the dictates of the executive. The Courts therefore must always bear in mind that whilst adhering to judicial deference, they must at the same time ensure that administrative decisions are reasonable as required by the Constitution. As impressively espoused in the same *Logbro*'s decision above that 'judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function.[159] It simply manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary. It does not matter how complicated the administrative decision is, the Courts' primary role is to ascertain reasonableness. The role of the judiciary should not be invoked without taking into account the separation of functions envisaged in the Constitution between the Courts and the executive. If that is to be respected, there will be no harm at all. A harmless balance is dependent on the manner the judicial review power is exercised.

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[157] 2003(2) SA 460 (SCA). This particular quote was borrowed from Hoexter Cora in her article 'Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ at 484.
[158] At 471A-D.
[159] At 472.

4.3 UNREASONABLENESS ON DISTINCTION BETWEEN APPEAL AND REVIEW

The Constitutional Court has already ruled in *Bato Star Fishing*'s[160] case that judicial review of unreasonableness involves scrutiny of the substance of an administrative decision. The objective of review of unreasonableness is not to determine whether the administrative action is wrong, right or perfect as it is in the case of appeal, but to establish as to whether the action is reasonable and thus it does not matter whether the decision corresponds with the judge's opinion or not.[161] The test is solely reasonableness as Chaskalson P stated in *Bel Porto School Governing Body and Others v Premier, Western Cape and Another*:[162]

> 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.[163]

It appears there is no source which attempted to explain this principle more lucidly than the article by Hoexter C,[164] when she stated "it is impossible to judge whether a decision is within the limits of reason (or defensible) without looking carefully at aspects such as the information before the administrator, the weight given to various factors and the purpose sought to be achieved by the decision. Close scrutiny even of the merits is not harmful. It is not the scrutiny that threatens the distinction between appeal and review, but judicial overzealousness in setting aside administrative decisions that do not coincide with judge's own opinion. What is important is that the judges should not use the

[160] See footnote 124 above at 513B-D.

[161] See *Carephone (Pty) Ltd v Marcus 1999 (3) SA 304 (LAC) at 316 A-B.* Though this decision was discussing the concept of rationality which according to it included venturing into the merits of the case, Froneman J said that as long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but in order to determine whether the outcome is rationally justifiable, the process will be in order.

[162] 2002 (3) SA 265 (CC) at 290. In this judgment Chaskalson CJ emphasised that in administrative action, distinction is always made between procedural fairness and substantive fairness and that while procedural fairness is strictly upheld substantive fairness is treated differently. This viewpoint contradicts with those of Mokgoro J and Sach J in the same case. Both reckon that administrative making process must be sound and the decision must be capable of objective substantiation by the examination of the facts and the reasons of the decision.

[163] At 292 Para 87.

[164] See footnote no 139 above.

opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal."[165]

Therefore the conclusion is that there is no problem if merits are scrutinised, but that should not be done with the aim of substituting the administrator's decision, but only to determine reasonableness.

It is hoped that the critical role played by the Constitutional Court in *Bato Star Fishing's*[166] case will go a long way in peeling this legal hot potato and the uncertainty which prevailed in the South African Courts.

[165] At 512.
[166] See footnote 124 above.

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	PAGE
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2. *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 233	6,23,30
3. *Arenstein v Durban Corporation* 1952(1) SA 279 (A)	9
4. *Bangatoo Bros v National Transport Commission* 1973(4) SA 667(N)	6
5. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004(4) SA 490 (CC)	29,30,35,36,38,39
6. *Bel Porto School Governing Body and Others v Premier, Western Cape* 2002(3) SA 265(CC)	38
7. *Bindura Town Management Board v Desai & Co* 1953(1) SA 358(A)	8
8. *Bunu v Grahamstown Municipality* 1910 EDL	9
9. *Carephone (Pty) Ltd v Marcus* 1999(3) SA 265(CC)	38
10. *Castel NO v Metal & Allied Workers Union* 1987(4) SA 795(A)	6
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7. TABLE OF STATUTES

	PAGE
1. British Sunday Entertainment Act 53 of 1932	6
2. Constitution of the Republic of South Africa Act 108 of 1996	2,14,15,16,17, 18,19,21,22,23, 24,25,26,28,29, 30,31,32,33,36, 37
3. Correctional Services Act 8 of 1959	17
4. Group Areas Act 77 of 1957	9
5. Interim Constitution of the Republic of South Africa Act 200 of 1993	2,12,13,16,17 18,19,25
6. Liquor Act 27 of 1987	16
7. Motor Carrier Transportation Act 39 of 1930	6
8. Proclamation R73 GG 218086 of 29 November 2000	22
9. Promotion of Administrative Justice Act 3 of 2000	2,22,23,24,25, 26,27,31,33,34 36
10. Railway Administration Act 49 of 1949	8
11. Sea Shore Act 21 of 1935	8