

REVIEWING REASONABLENESS: AN APPROPRIATE STANDARD FOR EVALUATING STATE ACTION AND INACTION?

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INTRODUCTION

One of the most important issues facing administrative lawyers today is that of the appropriate role of the judiciary in a constitutional democracy. This concern is at the centre of many of the recent important decisions on the legality, rationality and reasonableness of exercises of public power.¹ Under apartheid, the courts were often seen as the only, if not always effective, protectors of individuals against the state. Given this historical context, arguments for a less active judiciary continue to be viewed as politically conservative.² However, recent arguments emphasize the need for the role of the judiciary to be examined more closely, with a view to developing a 'theory of deference' and introducing some variability into the level at which state action is scrutinised.³ It has been pointed out that the 'climate of constitutional justification'⁴ in which our law now operates 'requires justification for the exercise of judicial power as much as any other sort of power'.⁵

Negative responses to the idea of deference are not difficult to understand. Traditionally, deference has been defined as '[a] yielding of judgment or preference from respect to the wishes or opinion of another; submission in opinion; regard; respect; complaisance'.⁶ Applied to judicial review, this definition entails a complete submission of the courts to the administration,

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¹ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *President of the RSA v SARFU* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC); *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) and *Bel Porto School Governing Body v Premier, Western Cape*, 2002 (3) SA 265 (CC), in particular.

² Cora Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *SALJ* 484 at 499–500.

³ Hoexter op cit note 2 at 500–3.

⁴ Hugh Corder 'Administrative justice: A cornerstone of South Africa's democracy' (1998) 14 *SAJHR* 38 at 41.

⁵ Hoexter op cit note 2 at 500.

⁶ Webster's Dictionary (1913 edition).

the executive or the legislature. However, in the modern context of judicial review, the term has been interpreted to mean:

'[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.'⁷

From the perspective of this definition, deference is far less objectionable to those who have traditionally argued for an expanded role for the judiciary, since everyone agrees that there should be some variability in standards of review, rather than a general principle of non-intervention. It is my view that the issue is not one of *whether* courts should, as a rule, exercise a high degree of deference but *when* they should do so. Moreover, the decision by a court to exercise a degree of restraint requires justification in much the same way that the decision to intervene does.

The aim of this article is to examine the concept of reasonableness as a standard for evaluating administrative action. I do not intend to argue either that the approach by the courts thus far has been too deferential or not deferential enough but, rather, that it has been incoherent. The decision regarding how high a standard of review should be applied must be based on factors such as the kind of action being reviewed as well as the constitutional and legislative requirements; and must be applied consistently across the cases. In trying to determine what the content of the reasonableness standard should be in the review of administrative action, I will draw on developments in two other areas of the law where reasonableness is used as a means to evaluate state action: the enforcement of socio-economic rights and the liability of the state for negligent omissions in delict.

The comparison is useful because the reason for courts wishing to define the parameters of their involvement in these three areas is the same: there is a concern about the institutional capacity and mandate of the courts. Because a court's power to evaluate the reasonableness of state action leaves open the possibility for a judge to substitute his or her views on the best approach in a given circumstance for that of the original decision-maker, reasonableness is controversial. Thus, it is imperative that the content given to the concept and that this be applied consistently across the cases.

I will argue that, when a court is called upon to review an *administrative* act on the basis that it is unreasonable, reasonableness must include a proportionality analysis. There are a number of reasons for this argument. First, executive action has been held to be reviewable on the basis of rationality. As administrative action is susceptible to a higher standard of review, reasonableness cannot be held to mean the same thing as rationality. Secondly, reasonableness and rationality are conceptually different: a rational connection between means and end is only one aspect of a standard of

⁷ Hoexter op cit 2 at 501–2.

reasonableness. Thirdly, the inclusion of proportionality need not inevitably result in a court substituting its view for the expertise of an official.

To take the argument further, I draw on the socio-economic rights cases decided by the Constitutional Court thus far. In determining whether a state policy is reasonable or not, the court has been cognizant of the separation of powers principle but has, nonetheless, applied a proportionality test as one element of reasonableness. Given the common underlying concerns, there is no reason why the same should not apply when a court reviews an administrative act of the ground of unreasonableness. Finally, I explore developments in the area of state liability for omissions in delict. Again, the concerns regarding the appropriate role of the courts underlie the attempt to re-define the test for wrongfulness to cater for the action or inaction of public bodies. It is my argument that the standard of reasonableness in all three areas should be the same. However, the approach of the courts, thus far, has not reflected this.

LEGALITY UNDER THE CONSTITUTION

The principle of legality in administrative law has taken on new meaning since the coming into operation of the Constitution. Whilst legality under the common law was determined in relation to legislative intent, legality is now to be determined with reference to constitutional requirements. The development of the principle of legality has been most striking in a series of cases considering the definition of ‘administrative action’: *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁸ *President of the Republic of South Africa v SARFU*,⁹ and *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa*.¹⁰ In these cases, the Constitutional Court held that, even though the acts concerned were not administrative, they were, as exercises of public power, still subject to constitutional scrutiny on the basis of the principle of legality, underpinning the Constitution.

The courts (mainly the Constitutional Court) began grappling with the concept of ‘administrative action’ in a series of cases, starting with *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.¹¹ The case concerned the review of resolutions made by local government structures in the ‘greater Johannesburg municipal area’¹² and was brought under s 24 of the interim Constitution, which protected the right to just administrative action. The court, per Chaskalson P, Goldstone J and O’Regan J, discussed the changes to local government brought about by the

⁸ 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

⁹ 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

¹⁰ 2000 (2) SA 674 (CC).

¹¹ 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

¹² *Fedsure* supra note 1 para 1. See also para 15. For a more detailed account of the circumstances under which the case arose, and an analysis of the case, see Jonathan Klaaren ‘Redlight, greenlight: *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*; *Premier Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*’ (1999) 15 SAJHR 209.

Constitution. They found that, under both the interim and final Constitutions, ‘a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognized in the Constitution itself.’¹³ Consequently, the court held that the imposition of rates and levies by the local authorities (municipalities) was not administrative action.¹⁴ However, the court did find that the municipalities, being bound by the Constitution, had to meet the requirement of legality, which underpins the Constitution.¹⁵

Although the Constitution (then interim) itself did not specifically provide that a local government acts unconstitutionally when it acts outside its statutory powers, this principle was implied by various constitutional provisions dealing with the powers and functions of local government.¹⁶

As was stated in the judgment, this proposition is unsurprising because:

‘[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is generally understood to be a fundamental principle of constitutional law’.¹⁷

The only question is where the requirements of legality are to be found. Where one is dealing with the exercise of constitutional powers, that which makes an action lawful depends on the provisions of the Constitution itself—and the requirements for legality might be express or implicit.¹⁸

Thus, the court looked first to the provisions of the Constitution in determining the content of the controls on the powers of local government legislatures. In addition, because the constitutional provisions themselves made reference to ‘other laws made by a competent authority’,¹⁹ these were also taken into account in reviewing the actions.

The Constitutional Court had to again consider the issue of what ‘administrative action’ means in the case of *President of the Republic of South Africa v SARFU*.²⁰ In this case, the action concerned was the appointment of a commission of inquiry by the President. The court found that this did not constitute ‘administrative action’ for the purposes of s 24. The court held that the power to appoint a commission of enquiry granted to the President by s 84(2) of the Constitution, was not concerned with the implementation of legislation (as is most administrative action) but with the formulation of policy. It was an original constitutional power, controlled by the Constitution itself.²¹ Again, the court referred to a broad principle of legality, deriving from the Constitution as a whole, by which the President was bound.²²

¹³ *Fedsure* supra note 1 para 26.

¹⁴ *Ibid* para 34.

¹⁵ *Ibid* para 59.

¹⁶ *Ibid* paras 54 and 55.

¹⁷ *Ibid* para 56.

¹⁸ *Ibid* para 58.

¹⁹ *Ibid* 1 para 54.

²⁰ *Supra* note 1.

²¹ *SARFU* supra note 1 para 147.

²² *Ibid* para 148.

The constraints in s 33 (administrative justice) of the Constitution did not apply, but other constraints imposed throughout the Constitution did. For one thing, the exercise of powers under s 84(2) is expressly limited by the terms of the section itself. The section makes in clear that the powers are to be exercised by the President personally. In addition, s 101(1) of the Constitution provides that:

- 'A decision by the President must be in writing if it —
- (a) is taken in terms of legislation; or
 - (b) has legal consequences.'

Most importantly, however, the court found that the exercise of presidential power is also limited by the principle of legality. This was held in the case to mean that 'the President must act in good faith and must not misconstrue the power.'²³ These requirements were found to be implicit in the Constitution.

RATIONALITY

The concept 'administrative action' was further considered in *Pharmaceutical Manufacturers Association of South Africa: Ex parte President of the Republic of South Africa*.²⁴ The question before the court, in this case, was whether the decision of the President to bring an act into operation constituted 'administrative action'.²⁵ Referring to its decision in *SARFU* (discussed above), the Constitutional Court described the *Pharmaceuticals* case as one of the difficult ones. Whilst the power to bring legislation into force is derived from legislation and is akin to the administrative process, the decision whether to do so is determined by political judgment. Thus, the action involved lay somewhere 'between the law making process and the administrative process'²⁶ and did not amount to administrative action for the purposes of s 33.

As with the two previous cases, the court here went on to find that the President was bound to exercise the power concerned 'lawfully and consistently with the provisions of the Constitution in so far as they may be applicable to the exercise of such power'.²⁷ On the question of what would meet the requirements of the rule of law, the court went further than it had previously,²⁸ finding that '[d]ecisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary

²³ *Ibid.*

²⁴ *Supra* note 1.

²⁵ It was alleged that the regulations necessary to give effect to the act had not been made when the President purported to bring the act into operation. It was also stated that the President's decision to bring the act into force had been made on the basis of the Department of Health's premature and erroneous decision to request him to do so—see paras 6 and 7 of the judgment.

²⁶ *Pharmaceutical Manufacturers* *supra* note 1 para 79.

²⁷ *Ibid.*

²⁸ On this point, see Hoexter *op cit* note 2 at 507. See also Hugh Corder 'Reinventing administrative law in South Africa' in Chris Finn (ed) *Sunrise or Sunset? Administrative Law in the New Millennium* (2000) 24 at 24–5.

and inconsistent with this requirement'.²⁹ The court went on to find that bringing an act into operation without the regulatory structure being in place was irrational as it rendered the legislation unworkable.³⁰

The Constitutional Court, in *Fedsure*, *SARFU* and *Pharmaceutical Manufacturers* seemed to have developed a somewhat peculiar approach to administrative justice.³¹ The court refused, in all three cases, to apply the right to administrative justice but referred instead to principles of administrative law 'that are ordinarily implied by that right'.³² Thus, although the acts had been determined to fall outside of the scope of 'administrative action', they were treated very much as though they were.³³ The only basis for such an approach is to limit the grounds on which review takes place, but the approach in *Pharmaceutical Manufacturers* is difficult to explain on this basis. In *Fedsure* and *SARFU*, the acts were scrutinized against the basic principle of legality alone.³⁴ The content of this principle appeared in both *Fedsure* and *SARFU* to be incidents of the administrative law requirement of lawfulness. The court's finding that there was a requirement of rationality in *Pharmaceutical Manufacturers*, however, went beyond legality to the much more controversial question of justifiability.³⁵

This point leads to the question of how onerous the standard of rationality is and how it compares to the standard of review for administrative actions. In *Pharmaceutical Manufacturers* the court held the rationality standard to be a low one:

'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. . . . A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision.'³⁶

On the question of what the content of the requirement of rationality is, the court found, relying on *Prinsloo v Van der Linde*³⁷ that '(a)s long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way'.³⁸

The inclusion of rationality as a requirement for the legality of non-administrative action, that is, action that does not involve the making of policy or legislation, implies that ordinary administrative action is susceptible to review on a higher standard. This raises the question of what 'reasonable' means in the context of the s 33 right to administrative action that is lawful, reasonable and procedurally fair.

²⁹ *Pharmaceutical Manufacturers* supra note 1 para 85.

³⁰ Ibid paras 88 and 89.

³¹ Hoexter has referred to the 'curious dichotomy' created by these cases (op cit note 2 at 507).

³² Ibid. See also Klaaren op cit note 12 at 212.

³³ Hoexter op cit note 2 at 507.

³⁴ Ibid at 507.

³⁵ Ibid. See also Corder op cit note 28 at 24–5.

³⁶ *Pharmaceutical Manufacturers* supra note 1 para 90.

³⁷ 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

³⁸ *Pharmaceutical Manufacturers* supra note 1 para 90n108.

Reasonableness has always been a controversial ground of review in administrative law, largely because of the idea that examining an act on the basis of whether it is reasonable or not blurs the distinction between review and appeal. South African common law dealt with this concern by following the English symptomatic unreasonableness test with respect to the review of an administrative *decision*. The locus classicus here is *Union Government v Union Steel Corporation* 1928 AD 220, where this was said:

[N]owhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is “inexplicable except on the assumption of mala fides or ulterior motive,” . . . or that it amounts to proof that the person on whom the discretion is conferred has not applied his (sic) mind to the matter³⁹

Thus, the unreasonableness itself was not relied upon. Rather it was the presence of something else (*mala fides* or ulterior motive) which pointed to unreasonableness. In effect, unreasonableness was not, in itself, a ground of review at all. Established grounds of procedural review were relied upon.⁴⁰ In addition, the unreasonableness had to be gross — the decision reached had to be ‘so unreasonable that no reasonable authority could ever have come to it.’⁴¹

This approach was heavily criticized. For example, Mureinik commented as follows:

‘It is difficult to see why the fact that a decision is strikingly grossly unreasonable does not, on its own, prove abuse of discretion. Or, for that matter, why unreasonableness does not, on its own, prove abuse of discretion. After all, if we characterise a decision as unreasonable, we mean much more than that we disagree with it, or that we consider it wrong. We mean that we judge it to lack plausible justification. If so, how can we believe it to have been reached without an abuse of discretion?’⁴²

The Appellate Division questioned the gross unreasonableness standard in *Theron v Ring van Wellington van die NG Sendingkerk*.⁴³ However, the approach in *Theron*⁴⁴ did not attract much support.⁴⁵ The interim Constitution’s formulation of the ground of review was that ‘every person shall have the 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’.⁴⁶

³⁹ 1928 AD 220 at 237.

⁴⁰ This was not the case for the review of delegated legislation, however. See Lawrence Baxter *Administrative Law* (1984) 478–9.

⁴¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. See also *National Transport Commission v Chetty’s Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A).

⁴² Etienne Mureinik ‘Reconsidering review: Participation and accountability’ 1993 *Acta Juridica* 35 at 40–6.

⁴³ 1976 (2) SA 1 (A).

⁴⁴ Jansen JA in *Theron* supra note 43 stated that there is, in administrative law, a formal yardstick for intervention in review. This formal yardstick meant that a court could not question *how* a body or official exercised discretion but only *whether* that individual or body exercised discretion. However, he then stated that it should be accepted that the law had changed (or at least was changing) and that this formal yardstick was extended, in respect of purely judicial decisions, to cover review on the basis of unreasonableness (on its own).

⁴⁵ Cf *Hira v Booysen* 1992 (4) SA 69 (A).

⁴⁶ Constitution of the Republic of South Africa Act 200 of 1993, s 24(d) (hereafter ‘interim Constitution’).

Following the coming into operation of the interim Constitution, it was held that,

'[t]he test of "gross unreasonableness" in view of the testing rights given to the courts in the Constitution of the Republic of South Africa 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'.⁴⁷

Another case decided under the Interim Constitution's administrative law provision was *Carephone v Marcus*.⁴⁸ Here the court found that there had been a widening of the scope of review in South Africa. This extended scope was based upon the constitutional provision that administrative action be justifiable in relation to the reasons given. The court also specified that 'justifiable' does not mean simply just or correct but refers to something that is legally and morally defensible, thus preserving the distinction between review and appeal. Most importantly, the court acknowledged that value judgments will have to be made under the provision, and that 'merits, in some cases will thus, of necessity, come into play'.⁴⁹ However, the distinction between review and appeal may still be maintained if the judge is aware that he or she cannot substitute his or her own opinion — the question is whether the outcome is rationally justifiable.

Academic opinion supported this view that s 24(d) overruled both symptomatic and gross unreasonableness as necessary for unreasonableness review.⁵⁰ The position taken by commentators was that justifiability was used as a synonym for reasonableness.⁵¹ The factors to be taken into account in an enquiry into justifiability under s 24(d) were said to be whether:

- (a) the decision-maker has considered all the serious objections to the decision taken, and has answers which 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 connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision that it reached.⁵²

The formulation above clearly points to both rationality and proportionality being included as requirements for justifiable administrative action. The view that s 24(d) allowed for reasonableness to be a ground of review on its own appeared to be confirmed by s 33 of the final Constitution. According to s 33(1), '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair'.

However, the question whether reasonableness means something more than rationality appears to be undecided. Two developments have occurred

⁴⁷ *Standard Bank of Bophuthatswana Ltd v Reynolds* 1995 (3) BCLR 305 (B) at 325.

⁴⁸ 1998 (10) BCLR 1326 (LAC).

⁴⁹ *Carephone* supra note 48 para 36.

⁵⁰ Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31 at 39–40.

⁵¹ See Lourens du Plessis & Hugh Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 169.

⁵² Mureinik op cit note 50 at 41.

to confuse, rather than clarify matters. First, the Promotion of Administrative Justice Act (PAJA) provides the following:

'A court or tribunal has the power to judicially review an administrative action if 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.'⁵³

This appears to reintroduce the standard of gross (*Wednesbury*) unreasonableness.⁵⁴ More importantly, for the purposes of this argument, however, is the fact that rationality is a separate ground for review under this act,⁵⁵ which is an indication that, at least under PAJA, reasonableness means something different from, and arguably more than, rationality.

The second and more problematic development is the decision of the Constitutional Court in *Bel Porto School Governing Body v Premier, Western Cape*.⁵⁶ The minority judgment accepted that justifiability (the term used in s 24 of the interim Constitution) included an element of substantive review and cited *Carephone* with approval,⁵⁷ stating that,

'[i]n our view, the concept of justifiability requires more than a mere rational connection between the reasons and the decision. . . Although a rational connection would certainly be necessary, it would not on its own be sufficient. All exercises of public power have to have a rational basis, this is one of the foundations of legality, or lawfulness as required by s 33(a).'⁵⁸

The judges relied, for this proposition, on the *Pharmaceutical Manufacturers* case. They went on to find that justifiability, although it does not amount to the court determining what would, in its view, have been the best outcome, does require 'something more substantial and persuasive' than a rational connection.⁵⁹ This something more appears to be encapsulated in the principle of proportionality, referred to as a requirement of justifiability in the minority judgment.⁶⁰

However, the majority rejected this and expressed the view that justifiability (reasonableness under the final Constitution) required only that the decision be a rational one, taken lawfully and to a proper purpose.⁶¹ It is true that the majority did leave open the possibility for justifiability or reasonableness to encompass a more intensive standard of review than mere rationality, but this case was held to be an inappropriate one in which to set such a higher standard.⁶²

There are a number of grounds upon which this decision may be criticized. The one relevant to this article is that, as a consequence of the

⁵³ Section 6 (2)(h) of Act 3 of 2000.

⁵⁴ The argument has been made that the section cannot be read in this way if it is to pass constitutional scrutiny. On this issue, see Hoexter op cit note 2 at 518–19; Cora Hoexter *The New Constitutional and Administrative Law; Volume 2: Administrative Law* (2002) 185–7 and Iain Currie & Jonathan Klaaren *The Promotion of Administrative Justice Act Benchbook* (2001) 169–73.

⁵⁵ Section 6(2)(f).

⁵⁶ 2002 (3) SA 265 (CC).

⁵⁷ Mokgoro and Sachs JJ in *Bel Porto* supra note 56 paras 162–4.

⁵⁸ *Bel Porto* supra note 56 para 164.

⁵⁹ *Ibid.*

⁶⁰ *Bel Porto* supra note 56 para 162.

⁶¹ Chaskalson CJ in *Bel Porto* supra note 56 para 89.

⁶² *Bel Porto* supra note 56 para 128.

decision, legislative and executive acts are reviewable on the same basis as administrative action. This is inconsistent with any attempt to limit the review of acts determined to involve policy making.

Review for reasonableness or justifiability has similarly been equated, in a number of other cases, with the rationality requirement, held to be part of the principle of legality in *Pharmaceutical Manufacturers*. In *Paola v Jeeva NO*, for example, the court found that the Constitution had widened the scope for review to include procedural fairness, lawfulness and reasonableness.⁶³ However, the action in question was tested against the requirement of rationality alone.⁶⁴ The fact that the principle of legality as set out in *Fedsure*, *SARFU* and, most importantly, *Pharmaceutical Manufacturers*, was developed to review executive and legislative action, rather than administrative action, is not taken into account in the cases referred to.

The Constitutional Court has more recently applied the reasonableness standard of review in *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*.⁶⁵ The case was decided under the Promotion of Administrative Justice Act 3 of 2000. In a unanimous judgment, the court criticised the *Wednesbury* unreasonableness formulation, finding that '[e]ven if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be "reasonable"'.⁶⁶ The decision in *Bel Porto* is referred to only once in the *Bato Star* judgment and then only for what it had to say about transformation, not the majority judgment's interpretation of reasonableness.

In *Bato Star*, the Constitutional Court appears to have quietly moved away from the equation of reasonableness with rationality in *Bel Porto*. In *Bato Star*, the court did refer to the idea of judicial deference as a fundamental part of the separation of powers doctrine⁶⁷ but noted also that '[t]his does not mean . . . that where the 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.'⁶⁸ Moreover, the court, per O'Regan J, set out a number of factors to be used in determining whether a decision is reasonable, namely,

'the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant

⁶³ 2002 (2) SA 391 (D) at 403

⁶⁴ *Ibid.* See also *South African Post Office Ltd v Chairperson, Western Cape Provincial Tender Board* 2001 (2) SA 675 (C) paras 20–21.

⁶⁵ 2004 (4) SA 490 (CC); 2004 (7) BCLR 687(CC).

⁶⁶ *Bato Star* supra note 65 para 44.

⁶⁷ *Ibid* para 46.

⁶⁸ *Ibid* para 48.

to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.⁶⁹

This goes considerably further than *Bel Porto's* standard of a rational decision made lawfully and with a proper purpose and is consistent with the decision in the *Carephone* case (discussed above). In particular, competing interests and the effect the decision may have on affected individuals are concerns in the application of a proportionality standard, not the lower rationality standard.

As may be seen from the discussion above, there are a number of bases on which one may question the application of the standard of reasonableness to exercises of state power by the courts. The majority of the Constitutional Court in *Bel Porto* subjected administrative action to review on the same ground as that used for the review of executive and legislative action, rationality. Given that the reasoning in *Pharmaceutical Manufacturers* was that executive action should be subject to a lower standard of review than administrative action, this is clearly problematic. Finally, in its most recent case on administrative action, the Constitutional Court has incorporated elements of a proportionality test into the reasonableness standard.

That reasonableness should include an element of proportionality is additionally borne out by an examination of other areas of the law, to which I now turn.

SOCIO-ECONOMIC RIGHTS

The right of access to adequate housing, protected in s 26 of the Constitution, and the right of access to health care, food, water and social security, protected in s 27 of the Constitution are qualified by a standard of reasonableness.⁷⁰ The interpretation of this standard by the courts in the context of social and economic rights is useful because the concerns about the appropriate role of the judiciary are much the same as they are when courts review the exercise of public power in the context of administrative law.

The inclusion of social and economic rights in the Constitution was first examined in the *First Certification* case.⁷¹ In this case, the Constitutional Court made it clear that such rights are justiciable under the Constitution. Objections to the direct enforceability of social and economic rights are generally based on a separation of powers argument. The concern is that these rights require a court to pronounce on matters that should be left to the executive or the legislature because they have both the mandate and the expertise to deal with them. On the question of whether the inclusion of socio-economic rights in the Bill of Rights violates the principle of separation of powers, the Constitutional Court in the *First Certification* case

⁶⁹ Ibid para 45.

⁷⁰ As are other second and third generation rights in the Bill of Rights (see s 29(1)(b), 29(2) and 24(b)). Discussion of these is beyond the scope of this paper.

⁷¹ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

stated that the enforcement of civil and political rights such as the right to equality and the right to a fair trial, would often also have budgetary implications. These implications did not in themselves mean that the rights, whether civil and political or socio-economic, were not justiciable by a court.⁷² The fact that socio-economic rights are directly enforceable in court has been subsequently confirmed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*,⁷³ and *Minister of Health v Treatment Action Campaign (1)*.⁷⁴

However, the enforceability of these rights has not been taken to mean that the courts are completely free to pronounce on the merits of state policy. A unanimous court in *Grootboom*, in deciding on a challenge to government housing policy, stated that the particulars of the housing programme should be left up to the executive and the legislature to work out. The role of the court was described as follows:

‘A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.’⁷⁵

In this respect, the Constitutional Court’s treatment of the minimum core obligation is also significant. The United Nations Committee on Economic, Social and Cultural Rights, which is tasked with monitoring states’ compliance with the Convention on Economic, Social and Cultural Rights (ICESCR) has set out the idea of core minimum obligations with respect to the rights protected in the ICESCR as follows:

‘[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. . . If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.’

⁷⁶

Although it is clear from the above that a state’s resource limitations will be taken into account in determining its minimum core obligations, the Committee has also indicated that a state claiming a lack of resources will have to ‘demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.⁷⁷

⁷² *First Certification case* supra note 71 para 77.

⁷³ 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 20.

⁷⁴ 2002 (5) SA 703 (CC); 2002 (10) BCLR 1033 (CC) para 25.

⁷⁵ *Grootboom* supra note 73 para 41.

⁷⁶ Para 10 of General Comment 3 of the UN Committee on Economic, Social and Cultural Rights (5th Session 1990) UN Doc E/1991/23.

⁷⁷ *Ibid.*

At a national law level, it has been argued before the Constitutional Court in South Africa that the court should, in line with international law,⁷⁸ set out the state's minimum core obligations with respect to the rights to housing and health. The court has twice declined to do so. In *Grootboom*, the court cited a lack of information as its main reason.⁷⁹ In *TAC*, however, the Constitutional Court dealt with the issue at some length and relied more directly on a separation of powers argument for its refusal to set out a core minimum obligation. The court stated that the judiciary was not

'institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards. . . should be, nor for deciding how public revenues should most effectively be spent. . . Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.'⁸⁰

With respect to the determination of the reasonableness of a state policy, the socio-economic rights cases illustrate that a court will steer clear of deciding what the best policy would be in a particular case and will also stop short of telling government how to spend state resources. However, in each of the two cases referred to, the court was quite willing to find the impugned policy⁸¹ to be unreasonable. In *Grootboom*, the basis for this finding was, due to the facts of the case, quite limited. The court held that the government's failure to provide temporary relief for those in desperate need was unreasonable.⁸² More significantly, the court in *TAC* examined each of the justifications provided by government for its policy against the reasonableness standard. The reasons for this rejection ranged from a simple lack of evidence to support government's claims⁸³ to — most importantly for the purposes of this paper — a lack of proportionality between means and end. Thus, the court dealt with the government's argument that wider provision of the drug Nevirapine would result in people developing a resistance to it as follows:

'Although resistant strains of HIV might exist after a single dose of Nevirapine, this mutation is likely to be transient. At most there is a possibility of such resistance persisting, and although this possibility cannot be excluded, its weight is small in comparison with the potential benefit of providing a single

⁷⁸ The idea of a minimum core obligation is set out in General Comment 3 of the United Nations Committee on Economic, Social and Cultural Rights. Although the General Comment is a non-binding instrument, it has been accepted as an authoritative interpretation of the obligations in the ICESCR — see Henry Steiner & Philip Alston *International Human Rights in Context: Law, Politics, Morals* (2000) 265.

⁷⁹ *Grootboom* supra note 73 para 32.

⁸⁰ *TAC* supra note 74 paras 37 and 38.

⁸¹ The 'state housing programme in the area of the Cape Metropolitan Council' in *Grootboom* (supra note 73 at para 99) and the policy of the government to restrict the provision of Nevirapine to prevent mother-to-child-transmission of the HI virus to certain pilot sites in the *TAC* case (supra note 74 para 19).

⁸² *Grootboom* supra note 73 paras 95 and 99.

⁸³ This was the reason given for the rejection of the government's claim that Nevirapine would not be effective in preventing mother-to-child transmission without the 'full package' of treatment including counselling (see the *TAC* case supra note 74 paras 57–8) and the government's claim that Nevirapine was not yet proven to be safe (*TAC* supra note 74 paras 60–4).

tablet of Nevirapine to the mother and a few drops to her baby at the time of birth. The prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time in the future is well worth running.⁸⁴

In the most recent case on social and economic rights, *Khosa v Minister of Social Development*,⁸⁵ the Constitutional Court dealt with the question of whether s 27's protection of the right to social security extends to permanent residents who would qualify for the benefits were it not for the fact that they are not citizens.⁸⁶ The court held that a number of factors should be taken into account in determining whether the legislation's exclusion of permanent residents was reasonable: 'the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose'.⁸⁷ This test corresponds in fundamentals with that used by the court in *Bato Star*⁸⁸ to review the reasonableness of administrative action.⁸⁹

In short, it seems that the reasonableness test used to evaluate administrative action and that used to evaluate government policy or legislation on social and economic rights is the same. Whilst courts are to stop short of substituting their own views for those of the administrator, legislature or executive body, they do have to make a determination that includes looking at the proportionality of the measure.

DELICTUAL CLAIMS FOR UNREASONABLE STATE OMISSIONS

Another area in which the courts have been struggling to determine the appropriate level of deference to the state is state liability for omissions in delict. As with the review of executive and legislative action dealt with in *Fedsure*,⁹⁰ *SARFU*⁹¹ and *Pharmaceutical Manufacturers*⁹² above, developments in this area stem from a principle of accountability of public bodies and this makes for interesting comparison.

The general principle is and has always been that administrative bodies are liable in delict for damages caused during the performance of their statutory duties in the same way as any other legal person.⁹³ However, public bodies have traditionally been considered to be a special case when it comes to liability for claims in delict and contract under the common law. There are a number of reasons for treating public bodies differently, namely,

'(i) imposing liability on public bodies would make bad economic sense; (ii) liability would inhibit the freedom of action of these bodies; (iii) it would be inappropriate for courts to control elected bodies and

⁸⁴ *TAC* supra note 74 para 59.

⁸⁵ 2004 (6)SA 505 (CC)

⁸⁶ *Khosa* supra note 85 para 49.

⁸⁷ *Ibid.*

⁸⁸ *Supra* note 6.

⁸⁹ Discussed above.

⁹⁰ *Supra* note 1.

⁹¹ *Supra* note 1.

⁹² *Supra* note 1.

⁹³ See s 1 of the State Liability Act 20 of 1957.

tell them how to exercise their discretionary powers; and (iv) the victims in these cases have alternative remedies which makes recognition of a delictual liability not only dangerous but also superfluous.⁹⁴

The first three reasons are similar to those described earlier in this article in relation to the review of executive and legislative action and the evaluation of government's social and economic policies.

In short, the interest of the public in having an efficient administration, free to act consistently with the public interest and to react to changes in the public interest must be weighed against that of that of individuals who have suffered loss as a result of state action. Public authorities wield a vast amount of power and have the potential to cause a great deal of damage. Personal claims against the officials concerned would place a very onerous burden on such officials. Also, the claimant may not be able to recover economic loss in a claim against an official in her or his personal capacity.

On the other hand, there is concern about the possible 'chilling effect' of holding public bodies accountable for economic loss. The nature of the administration is such that a large number of decisions have to be made within a relatively short space of time for the state to operate effectively. The knowledge that every action was potentially susceptible to claims in delict could have the effect of making the administration overly cautious and, hence, slow. In addition, there was also the practical problem that wrongfulness, an element of a claim in delict, could not be proved where the public authority could show that its actions were authorised by statute.⁹⁵ A general and rigid principle of immunity was rejected under the common law and different approaches were developed to determine when the state was liable for damages for its action or inaction. The approaches were, however, based on quite a strict notion of deference to the legislature and the executive.⁹⁶

As with all other areas of law, this area was significantly affected by the coming into operation of the Constitution. Reference to a constitutional principle of accountability was first made by Davis J in *Faircape Property Developers v Premier, Western Cape (Faircape 1)*.⁹⁷ The plaintiff in the case was a property development company, which had bought the relevant property on the condition that certain restrictive conditions in the title deed be

⁹⁴ Basil Markensinis et al *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999) 49–50, as cited in *Faircape Property Developers (Pty) Ltd v The Premier of the Western Cape (Faircape 2)* 2002 (6) SA 180 (C). See also *Johannesburg City Council v Knop* 1995 (2) SA 1 (A) at 33.

⁹⁵ See Hoexter op cit note 54 at 282–3.

⁹⁶ First, a distinction was made between 'policy' and 'operational' decisions. 'Policy' decisions were exempt from claims based in delict because they related to matters inappropriate for the consideration of a court. See Lord Wilberforce in *Anns v London Borough of Merton* [1977] 2 All ER 492 at 500, as cited in *Barrett v Enfield London Borough Council* [1999] 3 All ER 193 at 220. This approach was not favoured because of the difficulty of drawing the distinction with any degree of accuracy. The second approach was to examine the authorisation in the statute to determine whether the Legislature had intended (expressly or implicitly) claims in delict to be permitted. See Hoexter op cit not 54 at 283. See also *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163 at 173

⁹⁷ 2000 (2) SA 54 (C) (*Faircape 1*).

removed.⁹⁸ The Minister approved the removal of the title deed restrictions and the property was transferred to Faircape.⁹⁹

However, the application form and the plan submitted with it had made it clear that the purpose of the application was to build a two-storey town house development. The application was published in the Government Gazette in those terms and objections were received. The Urban Planning Committee of the Council, taking all of this into consideration, then voted to approve the removal of the restrictions.¹⁰⁰ Some time between the recommendation of the Council and the decision by the Minister, a new plan was submitted for the construction of a four-storey block of flats. The Minister approved the application without noticing the change.¹⁰¹

Faircape demolished the existing building and started excavations. A neighbour objected to the erection of the flats and took the matter on review. The Minister's decision to grant the application to remove the restrictions was set aside.¹⁰² Faircape had already been interdicted from proceeding with construction and, following the judgment, had to re-apply for the removal of the restrictions. The purpose was described as the erection of a block of flats. Many objections were received and the application was eventually granted in May 1998. Faircape alleged loss in the amount of R1 054 407.¹⁰³ The defendant raised an exception to the claim, saying that there was no cause of action — there was no liability for the negligent rejection or approval of an application because no duty of care was owed.¹⁰⁴ Davis J's starting point was that of the determination of wrongfulness. He found that the test for wrongfulness, based on the legal convictions of the community, 'must take account of the spirit, purport and object of the Constitution'.¹⁰⁵ One of the objects of the Constitution was to create a 'culture of justification'. Promoting such a culture necessitates holding public bodies accountable to the public they serve when they act negligently and without due care.¹⁰⁶ There were no means by which the authority could be held accountable in terms of the Act and the lack of a remedy violated the principle of accountability. Thus, Davis J dismissed the exception to the claim that there was no cause of action.

In *Faircape 2*, Davis J had to apply the principle of accountability to decide the merits of the claim. In finding that the Minister was negligent and that damages were owed to Faircape, Davis J noted that 'a finding of wrongfulness may slow down the consideration of applications but only to the extent that they should be carefully read and properly considered'.¹⁰⁷

⁹⁸ *Faircape 1* supra note 97 at 57.

⁹⁹ *Ibid.*

¹⁰⁰ *Faircape 2* supra note 94 at 3–4.

¹⁰¹ *Ibid.* at 4–6.

¹⁰² See *Beck v Premier, Western Cape* 1998 (3) SA 487 (C).

¹⁰³ *Faircape 1* supra note 97 at 57.

¹⁰⁴ *Ibid.* at 59–60.

¹⁰⁵ *Ibid.* supra note 97 at 65.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Faircape 2* supra note 94 at 11.

The crux of the judgment appeared to be that, on balance, the potential slowing down of the administrative process was simply not as important as the principle of accountability's insistence on a remedy for those 'gravely prejudiced by gross negligence of an official'.¹⁰⁸ Davis J also indicated that the potential chilling effect could be mitigated by the requirements of foreseeability and proximity, as well as 'an exercise of proportionality'.¹⁰⁹ These factors could act to limit liability.

The finding in *Faircape 1* was referred to with approval by the Supreme Court of Appeal in *Olitzki Property Holdings v State Tender Board*:

'I agree with the observations of Davis J in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* that in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability. This in turn must of course weigh in the balance when determining legal responsibility for the consequences of public malfeasance.'¹¹⁰

The principle of accountability in the above cases has been used as a basis from which to hold public bodies accountable for negligent omissions in a number of subsequent cases.¹¹¹ However, the *Faircape* decision was appealed to the Supreme Court of Appeal and the decision on the merits was reversed. The SCA made it clear that it approved the principle of accountability as a basis from which to hold public bodies accountable for negligent omissions in delict both in *Faircape*¹¹² and subsequently in *Carmichele*.¹¹³ However, the SCA's finding that the Minister's action was not wrongful is significant for the interpretation of the principle of accountability itself.

The difference in the application of the principle of accountability may, it is submitted, be explained with reference to the role of reasonableness in the wrongfulness enquiry. In *Faircape 2*, Davis J used a dictum from *Olitzki* which illustrates part of the role reasonableness plays in the wrongfulness enquiry:

'The conduct is wrongful, not because of the breach of the statutory duty per se, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his legal right'. The determination of reasonableness here in turn depends on whether affording the plaintiff a remedy is congruent with the court's appreciation of the sense of justice of the community.¹¹⁴

Davis J referred to the idea that there may be some cases inappropriate for judicial determination. In deciding which cases fell into this category, one would examine whether a court is actually competent to make a finding on the issue, whether it is, in fact, possible to reach a 'right answer', and whether

¹⁰⁸ Ibid.

¹⁰⁹ *Faircape 2* supra note 94 at 9.

¹¹⁰ 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA).

¹¹¹ See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) and *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).

¹¹² *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) (*Faircape SCA*) paras 40 and 41.

¹¹³ *Faircape SCA* supra note 112 para 34.

¹¹⁴ *Olitzki* supra note 110 para 12 (quoting *LAWSA* (first reissue) vol 8 part 1 para 61) and *Faircape 2* supra note 94 at 9.

adjudication might be damaging to other valuable objectives.¹¹⁵ This was also a concern in the later SCA decisions. Both *Carmichele* and *Faircape 2* set out the parameters of public accountability with reference to the following passage from *Van Duivenboden*:

‘The norm of accountability, however, need not always translate constitutional duties into private law duties enforceable by inaction for damages, for there will be cases in which other appropriate remedies are available for holding the State to account. Where the conduct in issue relates to questions of State policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process or through one of the variety of other remedies that the courts are capable of granting. . . . However, where the State’s failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.’¹¹⁶

This, in my view, does not differ significantly from Davis J’s assessment above and, on the facts, there were no other appropriate remedies and the action did not affect ‘a broad and indeterminate segment of society’. The reason for the SCA’s different conclusions on wrongfulness is, thus, to be found elsewhere. In its wrongfulness enquiry, the SCA, in *Faircape* went on to deal with whether the inaction in question was reasonable:

‘If a reasonable man, placed in the circumstances of the defendant, would have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests, then the defendant is deemed to have been under a legal duty towards such others to exercise appropriate care.’¹¹⁷

One immediate concern with this enquiry is that it appears to be substantially the same question as that asked in the negligence enquiry of a delictual claim. This was acknowledged to be so in the judgment: ‘[A] similar question is inevitably repeated when one is determining the issue of negligence. In the context of determining wrongfulness, the question relates only to whether there should be a legal duty imposed on the Minister not to infringe a legal interest of an applicant.’¹¹⁸ It seems right to say that the reasonableness of the inaction must be factored into the wrongfulness enquiry as it affects the question of whether a duty is owed. However, the reasonableness of that inaction at the wrongfulness stage of the enquiry cannot, it is submitted, revolve around what the Minister foresaw. The enquiry into whether a duty was owed (wrongfulness) is a more abstract, less subjective one.

For the purposes of the argument in this paper, the real problem with the SCA’s judgment in *Faircape*, is that it indicates that the legal convictions of the community, informed now by the constitutional principle of accountability, would not demand a remedy in this case. However, when administrative action is involved, the standard of reasonableness applied in the wrongfulness enquiry cannot be more or less onerous than that applied in the review of such action. The fact that a body has acted outside its powers does not mean

¹¹⁵ Davis J made this point with reference to François du Bois ‘Getting wrongfulness right: A Ciceronian attempt’, (then still unpublished), but later published in 2000 *Acta Juridica* 1: see *Faircape 2* supra note 94 at 8.

¹¹⁶ *Van Duivenboden* supra note 111 para 21.

¹¹⁷ Millner, cited in *Faircape* SCA supra note 112 para 42.

¹¹⁸ *Faircape* SCA supra note 112 para 46.

that it has acted wrongfully,¹¹⁹ but at the same time wrongfulness cannot exist unless the body has acted outside its powers. For the official making an administrative decision, this means that he or she must act lawfully, reasonably and with procedural fairness.

In *Faircape* (SCA), the crux of the court's decision was that it was reasonable for the Minister to have granted the application because he could not have foreseen that a decision *in favour of Faircape* would result in them experiencing prejudice and monetary loss.¹²⁰ The court found that wrongfulness must be determined with reference to the applicant: 'One must ask whether it was wrongful *in so far as an applicant in the position of Faircape is concerned*'.¹²¹ It also found that 'the Minister was entitled to assume that Faircape, as a developer of property, would have checked the application itself'.¹²² Thus, the fact that the Minister failed to notice that the original plan had been replaced by a plan inconsistent with the application did not mean that his actions towards *Faircape* were unreasonable:

'The procedures that were not complied with were enacted for the protection and in the interest of potential objectors and not in the interests of applicants for the removal of restrictions. On the contrary, it is such applicants who are called upon to comply with those provisions as a precondition to securing such removal. Generally, as a matter of legal policy, an applicant who fails to fulfil that obligation should not be entitled to damages even if the Minister negligently fails to detect the applicant's error.'¹²³

I have argued above that these questions are more appropriate to a negligence enquiry. However, the crucial point for the purposes of this paper, is that the standard of reasonableness applied by the SCA to evaluate the Minister's action was far too low. An application of one's mind is a minimum requirement for the reasonable exercise of administrative functions. In fact, it is part of the rationality requirement, the lowest standard in the reasonableness enquiry. It is worth re-stating the enquiry here:

- '(a) the decision-maker has considered all the serious objections to the decision taken, and has answers which 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 connection between premises and conclusion: between the information (evidence and argument) before the decision-maker and the decision taken.'¹²⁴

It cannot be said, on the facts of *Faircape*, that there was a rational connection 'between the information evidence and argument before the decision-maker and the decision that it reached'. The fact that the plan was completely at odds with the information on the application form destroys the required link between information and conclusion.

The conclusion reached on the facts, however, is less important than the courts' approach to the concept of reasonableness. In the cases above, the courts have been grappling with the content of what is a relatively new

¹¹⁹ See Hoexter op cit note 54 at 283 on this point.

¹²⁰ *Faircape* SCA supra note 112 para 46.

¹²¹ Ibid para 42.

¹²² Ibid.

¹²³ Ibid para 49.

¹²⁴ Mureinik op cit note 50 at 41.

principle of accountability. Having found that this constitutional principle makes it possible for public bodies to be liable in delict for damages for negligent omissions, the courts then had to determine how far that principle could extend. In doing so, it is submitted, insufficient attention has been paid to the principles of administrative law. Public bodies *are* a special case: this may sometimes translate into a greater level of accountability for them than for private persons and it may sometimes demand less.¹²⁵ This is an issue for the first part of the wrongfulness enquiry: whether the legal convictions of society deem it reasonable to grant compensation. The next part of the wrongfulness enquiry, whether the action or inaction concerned was reasonable, must be determined with respect to reasonableness as an administrative law ground of review.

CONCLUSION

The court's starting point in *Pharmaceutical Manufacturers* was the transition to a new legal order — the move from parliamentary to constitutional supremacy.¹²⁶ The court referred to the judgment of Ackermann J in *S v Makwanyane*¹²⁷ for the underlying rationale of the new legal dispensation:

'We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order.'¹²⁸

The court went on to find that the requirement that all exercises of public power be rational was an 'incident of the 'culture of justification' described by Mureinik.¹²⁹ Similarly, the principle of accountability developed in *Faircape 1* was based on the same value in the Constitution. Davis J referred the same idea, developed in Mureinik's article in support of the idea that the Constitution 'must lead to a culture of justification — a culture in which every exercise of power is expected to be justified'.¹³⁰ He went on to find that justification, in the context of state negligence, includes responsibility of

¹²⁵ In the *Van Duivenboden* case (supra note 111 para 19) this point was made as follows: 'The reluctance to impose liability for omissions is often informed by a *laissez faire* concept of liberty that recognizes that individuals are entitled to "mind their own business" even when they might reasonably be expected to avert harm, and by the inequality of imposing liability on one person who fails to act when there are others who might equally be faulted . . . However, those barriers are less formidable where the conduct of a public authority or a public functionary is in issue, for it is usually the very business of a public authority or functionary to serve the interests of others, and its duty to do so will differentiate it from others who similarly fail to act to avert harm. The imposition of legal duties on public authorities and functionaries is inhibited instead by the perceived utility of permitting them the freedom to provide public services without the chilling effect of the threat of litigation if they happen to act negligently and the spectre of limitless liability. That last consideration ought not to be unduly exaggerated, however, bearing in mind that the requirements for establishing negligence, and a legally causative link, provide considerable practical scope for harnessing liability within acceptable bounds.'

¹²⁶ *Pharmaceutical Manufacturers* supra note 1 para 45.

¹²⁷ 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

¹²⁸ *Makwanyane* supra note 127 para 156, cited in *Pharmaceutical Manufacturers* supra note 61 para 84.

¹²⁹ *Pharmaceutical Manufacturers* supra note 1 para 85n107, referring to Mureinik op cit note 50 at 32.

¹³⁰ Mureinik op cit note 50 at 32.

the state for the consequences of its negligent action. This is what is required by a principle of accountability.¹³¹

The cases discussed in this article all address the question of what the limits of public power should be and the extent to which a court can enquire into the reasonableness of state action or inaction. Reasonableness as a concept begins at rationality, as the minimum threshold, moves on to proportionality and ends with a value judgement on what the best approach in a particular case would be. The exercise of public power is a special case because of the separation of powers principle. This principle rests on a number of concerns addressed in all the cases (administrative review, socio-economic rights and delict) above:

- (a) courts do not have the mandate of the electorate to pronounce on certain issues;
- (b) courts do not have the capacity to second-guess executive action; and
- (c) extending the ambit of delictual actions, or administrative review for that matter, will result in a slowing down of government action.

With social and economic rights, the courts have been specifically mandated to consider government's social and economic policy on the basis of reasonableness. This includes rationality and proportionality but does not go as far as allowing a court to substitute its own judgment for that of the executive because it does not itself have the expertise to decide on the 'right' policy. Similarly, with the review of administrative action, one begins from the point that s 33 of the Constitution requires reasonableness which, on the face of it, means more than rationality. However, the courts have been unclear on this issue. Given the fact that the concerns underlying the justiciability of social and economic rights are very similar, there is no reason for reasonableness under administrative review to mean something different. This argument is supported by the fact that executive action and legislative action, which require a level of judicial restraint, have been held to be reviewable on the basis of rationality. Finally, the wrongfulness test in delict, as applied to public bodies makes sense if one adopts the same content for reasonableness as one applies in the other two areas. Again, this is because the same concerns about separation of powers and the ability of government to do its job effectively and efficiently are the same here. In all three cases, reasonableness stops short of allowing a court to substitute its view of what the best approach would have been for that of the decision or policy-maker.

The development of a principle of legality has been discussed in an article on the internationalisation of administrative law in other common law jurisdictions namely, New Zealand, Canada, Australia and England. Although the context is slightly different — the issue being the role of unincorporated treaties in administrative law — the concerns about the

¹³¹ *Faircape 1* supra note 97 at 65.

legitimacy of judicial review are the same. The traditional argument has been described as follows:

‘[I]f judges are permitted to chip away at the right of the legislature to declare when its delegates have an unfettered discretion, soon the space of discretion will be squeezed to vanishing point and the administrative decisions will become vulnerable to review on the basis of the judges’ highly contingent sense of fundamental legal values.’¹³²

It has been suggested that at least part of the answer to this problem of the legitimacy of judicial review lies in the development of a principle of legality, sourced in a ‘particular conception of democratic legal culture, the culture of justification, in which decision-makers are obliged to justify their decisions by showing either how the decisions conform to those values, or that they are justifiable departures from those values’.¹³³ The principle is described as a constitutional one and, with respect to how intrusive the standard of review should be, it has been argued that this should depend on the context.¹³⁴ This allows for some variability.¹³⁵ This culture of justification is precisely the basis from which the South African courts have developed the principles of legality and accountability. However, the principles need to be more carefully considered and more consistently applied.

¹³² David Dyzenhaus, Murray Hunt and Michael Taggart ‘The principle of legality in administrative law: Internationalisation as constitutionalism’ (2001) 1 *Oxford University Commonwealth LJ* at 5–6.

¹³³ *Ibid* at 6.

¹³⁴ *Ibid*.

¹³⁵ See generally Hoexter *op cit* note 2.