

# Justifying administrative action for reasonableness

## A quest for accountable public administration

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### ABSTRACT

Defining reasonableness in the positive and knowing its true meaning in the context of public administration is no easy task. This article attempts to explain the practical functioning of the standard of reasonableness in administrative action and decision-making. The aim of having the standard of a reasonable decision-maker is to produce a set of guidelines that public officials can use. The very presence of the rationality, proportionality and contextual standards of reasonableness has proved to have a positive guiding or justifying effect on the execution of administrative decision-making. These standards of reasonableness have the potential not only to enhance accountability in public administration, but also to enrich the South African administrative justice system.

### INTRODUCTION

Reasonableness is about the soundness (goodness) of reason and judgment. It is a constitutional imperative that administrative action must be reasonable. However, the question to ask is what the quality of reasoning is in administrative actions and decisions in the practice of South African public administration.

In terms of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) (Section 195(1)) a public official as a 'public servant' is called upon to deliver a service to the public (the 'customers') and in his/her service delivery the public official must not only act in a way that is lawful, procedurally fair and *reasonable* (Section 33(1)), but also in such a way that he/

she is alert to the needs of its people and addresses these needs. This means that the Constitution imported the standard of a reasonable decision-maker into public administration. However, to establish the constitutional content of reasonableness is no easy task because the concept is more often than not defined in the negative by the courts and legislation.

The purpose of this research is to explain the practical functioning of the notion of reasonable administrative action by means of an interpretation and analysis of relevant legislation and judicial decisions. In doing this an attempt is made to apply a 'positive' perspective to the understanding of reasonableness in contrast to the more common negative perspective. The first aim of this article is to establish the meaning and content of the word "reasonable" in terms of the Constitution as that meaning must inform one's reading of the *Promotion of Administrative Justice Act, 3 of 2000* (hereafter the PAJA) (the national legislation emanating from the constitutional mandate contained in Section 33(3) of the Constitution). The second task is an interpretation of "reasonableness" in terms of the provisions of the PAJA (which is logically underpinned by an understanding of the Constitution from which it emanates). Establishing the meaning of the three elements of reasonableness (rationality, proportionality and contextual reasonableness) and understanding how public officials should apply them in practice to ensure "good" public administration are crucial to an understanding of reasonableness. The third aim is to establish the extent to which the reasonableness of administrative action may contribute toward accountable public administration.

The foundational principles of a deliberative and accountable public administration have their source in the Constitution and its values. The argument of this article is that in order to promote the constitutional vision, a proper and understandable application of the requirements of administrative justice, with particular emphasis on reasonable administrative action, is needed to foster the principle of accountability.

## **THE CONSTITUTIONAL MEANING OF REASONABLENESS**

Defining reasonableness in the positive (what it is) is no easy task. This explains why the courts and even pieces of legislation often find it easier to define reasonableness in the negative by pointing out what is not reasonable. The exact meaning and content of reasonableness is therefore not clear as no single meaning can be attributed to reasonableness. This article suggests that the constitutional meaning of and intent for reasonableness should be the starting point.

The Constitution makes an unqualified, direct and specific reference to reasonableness. It states that administrative action must be reasonable (Section

33(1)) which implies that all administrative action is subjected to a standard of reasonableness. The Constitution has therefore created the standard of a reasonable decision-maker, but without explaining what is meant by this. This standard does not, however, mean that the decision of a public official must be correct or perfect in all respects. The standard simply means that decisions must fall within the range of decisions that a reasonable public official will make (Klaaren and Penfold 2006:63/109). The standard of reasonableness in itself implies a measure of flexibility which allows the public official appropriate leeway to determine the best way to meet the administrative justice obligations of the Constitution. In this sense “reasonable” may be interpreted as a decision in accordance with reason or within the limits of reason – a space within which various reasonable choices may be made to give scope for legitimate diversity (Hoexter 2009:70). It simply implies that a reasonable decision-maker should not make an irrational or capricious decision, but this reverts to the negative explanation of reasonableness rather than the positive approach that this article strives to introduce. The standard of a reasonable administrative action therefore refers to a midpoint between obviously capricious decision-making and what would be perceived as perfect decision-making. To repeat, it does not suggest that a decision is only reasonable when it is perfect or correct in all respects (Hoexter 2004:159). Reasonableness in this sense seems to be an appropriate standard of administrative justice in a constitutional democracy that values the accountability of public officials.

To complicate matters, various meanings of reasonableness exist depending on the particular context. When reasonableness is determined and defined contextually it is important to locate the issue at hand in its appropriate constitutional setting. The most popular South African contexts in which the concept of reasonableness are located are those of the right to administrative justice (administrative matters), the enforcement of socio-economic rights (non-administrative/policy matters) (Hoexter 2012:340), and the liability of the state for negligent omissions in delict (Pillay 2005:420). The standards of reasonableness under the distinct provisions of the Constitution overlap, but do not duplicate the same function. There is indeed an interaction between these standards that promote the core advantages of reasonableness in public affairs (Quinot and Liebenberg 2011:661), but there is no single concept of reasonableness applicable to all the mentioned contexts (Steinberg 2006:276).

## **REASONABLENESS IN TERMS OF THE PAJA**

The PAJA attempts to give practical effect and content to the scope and meaning of this constitutional obligation upon public officials to act reasonably. In a

sense the obligation to act reasonably is a constitutional matter because the relevant subsections of the PAJA must be construed and applied consistently with the Constitution (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC): para 25). The PAJA dictates reasonable administrative action by setting reasonableness as a ground for judicial review of administrative action (Sections 6(2)(f)(ii) and 6(2)(h)). The implication is that administrative decision-makers are required to act reasonably or within the limits of reasonableness. The question that inevitably arises is what is meant by reasonableness and what does it imply for public administration. The three important elements of reasonableness are the *rationality* standard (Section 6(2)(f)(ii)), the *proportionality* standard and the *contextual reasonableness* standard (Section 6(2)(h)). The first element refers to the structure of the decision-making process which allows the reasonable decision-maker to make a *rational* decision (i.e. a decision which is supported/justified by the evidence and information before the public official and the reasons given for that decision). In other words, does a set of reasons exist for the decision that would convince someone that the decision is indeed reasonable? The second element relates to the effects of the decision in that a reasonable decision-maker needs to make a decision which is *proportionate* in its effect (i.e. a decision which achieves a reasonable equilibrium in the circumstances). The third element refers to a contextual approach where reasonableness varies from case to case depending on the particular facts and circumstances (i.e. a nuanced, situation-sensitive approach). What is reasonable in a particular case will then depend on the circumstances (i.e. it is context-based) which may be defined by factors such as the nature of the decision, the identity and expertise of the decision-maker, the issues relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the effect of that decision on the lives and wellbeing of those affected.

Each of the three elements of reasonableness will now be analysed separately.

## **The rationality standard of reasonableness (Section 6(2)(f)(ii) of PAJA)**

Rationality is regarded as a minimum threshold requirement for the exercise of public authority (*Pharmaceutical Manufacturers Association of SA In Re: Ex Parte Application of President of the RSA* 2000 (3) BCLR 241 (CC), 2000 (2) SA 674 (CC): para 90). The rationality standard of reasonableness requires that the administrative action or decision have a sound and rational basis, i.e. be based on reason. Every administrative decision has an element of subjectivity in the sense that a decision is based upon a particular public official's special expertise and qualifications. However, despite this subjectivity a decision must always be capable of objective substantiation – or be justifiable. Justifiability

(a rational connection between the action/decision and the reasons given for it) was contained in Section 24(d) of the *Constitution of the Republic of South Africa*, 200 of 1993 (hereafter the Interim Constitution), but it has been abandoned by the 1996 Constitution and replaced with a simple right to “reasonable” administrative action (Section 33(1)). Reasonableness (which includes rationality and some other standards) sets a higher standard because it calls for more intensive scrutiny (*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC): para 108).

Rationality refers to the structure rather than the effects of an administrative action. The structure refers to the manner in which the action is taken or in which the public official reaches his/her decision. This structure (or manner) of rational decision-making is explained in the PAJA by using the following four requirements (which goes a good deal further than the justifiability requirement of the Interim Constitution). The PAJA (Section 6(2)(f)(ii)) stipulates that administrative action be rationally connected to the following:

- the *purpose* for which it was taken;
- the *purpose* of the empowering provision;
- the *information* before the public official; or
- the *reasons* given for it by the public official.

The meaning of each of the four requirements (the four-pronged test) for rational administrative action will now be analysed separately.

### ***Administrative action must be rationally connected to the purpose for which it was taken (Section 6(2)(f)(ii)(aa) of PAJA).***

This subsection of the PAJA clearly requires that there be a rational connection between means and end. This implies that the means or measure chosen (the administrative action) by the public official has to be such that there is at least an objective probability that the end (the purpose) will be achieved. There must be a rational connection between the measure taken and its aims. The measure taken has to be reasonably capable of achieving the desired aims. Whether there is indeed such a rational connection is to be determined objectively (De Ville 2005:201).

A suitable example to explain this requirement comes from a case that was decided before the PAJA was implemented. In *University of Cape Town v Ministers of Education and Culture* 1988 (3) SA 203 (C), the then Minister of Education stopped the payment of state subsidies to that particular university on the basis that the university did not uphold law and order on campus. The Minister exercised his authority in terms of the provisions of the *Universities Act*, 61 of 1955. The university, however, argued that the purpose of the payment of subsidies was to promote tertiary education, and not to uphold law and order

on the campus. The court found that the ministerial conditions were indeed invalid because the means (the promotion of law and order) did not coincide with the ends (the promotion of higher education in terms of Section 25 of the Universities Act). If this case were to be decided in terms of the PAJA it could be argued that there is no rational connection between the Minister's decision (to stop payment of state subsidies) which was taken for the purpose of restoring law and order on campus, and the purpose of the Universities Act which was to promote tertiary education.

***Administrative action must be rationally connected to the purpose of the empowering provision (Section 6(2)(f)(ii)(bb) of PAJA).***

This subsection of the PAJA, like the previous one, also requires that there be a rational connection between means and end. This requirement for rational decision-making requires a rational connection between the purpose of the decision and the empowering provision. Whether there is indeed such a rational connection is to be determined objectively. In other words, is the decision, objectively speaking, rationally related to the purpose for which the authority was given? The issue here is not whether the decision itself is rational, but whether it is rationally related to the purpose for which the authority was given by the empowering provision. If this is not the case then the decision is arbitrary.

Suppose that an empowering provision allows for compensation to be awarded to an employee for unfair dismissal. Say a Commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) then awards compensation to an employee for an action by an employer which is totally unrelated to unfair dismissal. If an award for compensation is then given for unfair dismissal in this situation there would be no rational connection between the granting of the award and the purpose of the empowering provision. In other words, such an award would not achieve the aims and objectives of the empowering provision.

***Administrative action must be rationally connected to the information before the public official (Section 6(2)(f)(ii)(cc) of PAJA).***

This subsection of the PAJA clearly requires that there be a rational connection between the information (evidence and argument) before the public official and the decision reached. This requirement for rational decision-making ensures that a public official apply his/her mind to the matter before him/her. This means that the action taken must make sense given the information that is available to the public official who makes the decision to take the action. Or to put it differently, the public official must be able to justify the rational connection between the information before him/her and the conclusion reached (*Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA): para 29).

A suitable example to explain this requirement can be found in a procurement matter where the award of a tender by the Potchefstroom Local Municipality was found to be not rationally connected to the information before the deciding committee. Mr Justice Murphy held that the information on price, company profile, preference and reference sites did not justify the award to a particular company. This decision by the Potchefstroom Local Municipality clearly indicated that there was no rational connection between the outcome of the decision of the municipality and the facts upon which the decision was based (*Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality* 2008 (4) SA 346 (T): para 55).

### **Administrative action must be rationally connected to the reasons given for it by the public official (Section 6(2)(f)(ii)(dd) of PAJA).**

This requirement for rational decision-making must be read with Section 33(3) of the Constitution and Section 5(1) of the PAJA on the provision of written reasons. The latter imposes a duty on the public official to provide written reasons on request where rights have been materially or adversely affected (*Cf. Brynard* 2009:638—648).

This subsection (dd) of the PAJA requires that administrative action be rationally connected to the reasons given for it (i.e. that the outcome be rationally justifiable in terms of the reasons). This simply implies that the reasons given by a public official must be supportive of the decision that was taken. To ensure the rationality of the administrative action there must be a rational connection between the action and the reasons given for it by the public official. The reasons also have to show that the public official applied his/her mind to all the relevant issues at stake and did not take account of any irrelevant considerations or bad reasons. The influence of bad or inadequate reasons (i.e. with regard to the integrity of the reasons) points to another dimension of rationality in decision-making. This dimension was emphasised by Mr Justice Cameron when he said: “Once bad reasons played an appreciable or significant role in the outcome, it is in my view impossible to say that the reasons given provide a rational connection to it.” (*Rustenburg Platinum Mines Ltd v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA): para 34). This simply means that bad reasons cannot be the basis of rational decisions.

### **The proportionality standard of reasonableness (Section 36(1) of the Constitution)**

The second element of reasonable administrative action promised in Section 33(1) of the Constitution is proportionality. But, unlike rationality and contextual

reasonableness, the status of this element remains somewhat controversial because there is no direct reference to the requirement of proportionality in the PAJA. However, in terms of Section 36(1) of the Constitution proportionality finds application when any fundamental right included in the Bill of Rights (including the right to just administrative action) is limited. This section stipulates that the limitation of a fundamental right must be reasonable and justifiable and therefore mentions specific factors which must be taken into account to determine whether there was proportionality in the limitation of the fundamental right.

What then is proportionality? Proportionality relates to the means or method used to achieve a particular purpose – whether the means are proportional to the purpose. Proportionality has been described as “not using a hammer to crack a nut” (*S v Manamela* 2000 (3) SA 1 (CC): para 34) or as “not using a sledgehammer to kill a fly on the wall”. Proportionality therefore requires that in achieving a statutory purpose, the harm to the individual should not be disproportionate to the gain to the community. What can public officials learn from this? Simply to exercise a sense of proportion — that they need to consider both the need for the action and the possible use of less drastic, oppressive or restrictive means to accomplish a desired purpose or end. The purpose of proportionality is therefore to avoid an imbalance between the adverse and beneficial effects of the administrative action (Hoexter 2012:344).

The principle of proportionality has three elements:

- the *suitability* of the administrative action
- the *necessity* of the administrative action
- a *balance* between adverse and beneficial consequences of the administrative action

The nature of each of the three elements for proportional administrative action (three-stage test) will now be analysed separately.

### ***Suitability of the administrative action (use of lawful and appropriate means)***

Suitability (or adequacy) means that the public official must, when exercising his/her authority, choose only those means (from the variety of options available) that are most appropriate for achieving the desired end. In short, there must be proportionality between the means and the ends. This element is almost synonymous with rationality – there must be a rational connection between the means and the end. A public official who orders the demolition of an informal settlement because he/she is of the opinion that it constitutes a breeding place for illness and crime will not pass the test of rationality or proportionality.

Suitability thus refers to the use of lawful and appropriate means to accomplish the public official's objective.

### ***Necessity of the administrative action***

Necessity means that the public official must consider the need for the action and take only such steps as are indispensable (necessary) if any prejudice to an individual is involved. The public official must choose the administrative action that causes the least harm (least intrusive option) to those who will be affected by the measure.

### ***A balance between adverse and beneficial consequences of the administrative action***

The achievement of a balance implies the weighing up of the advantages and disadvantages when considering the end (purpose or objective) to be attained. The methods or means used must not be out of proportion to the advantages to the community. The public official should determine whether there is a proper balance between the means (used by the public official) and the ends (the advantages and disadvantages of the end which is attained by the performance of the particular administrative action). It also means that the public official should be alert to the presence of less restrictive means to achieve the purpose for which the action was taken ("should not use a hammer to crack a nut"). Some may say that the public official even has a duty to consider less restrictive means (Hoexter 2004:160) to be able to be moderate and to avoid extremes.

## **The contextual standard of reasonableness (Section 6(2)(h) of PAJA)**

This subsection of the PAJA stipulates that administrative action may be judicially reviewed if the action is "so unreasonable that no reasonable person" could have exercised the authority. The subsection must be read consistently (and interpreted purposively) with the Constitution and in particular with Section 33(1) which requires administrative action to be reasonable. Section 6(2)(h) of the PAJA was promulgated to give effect to this constitutional obligation and should then be understood to require that administrative action must simply be reasonable and must mean no less than what the Constitution requires. Ms Justice O'Regan stated that the subsection should be understood to require a simple test, namely that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC): para 44). Reasonableness in this sense is the standard of "good" public administration that the Constitution calls for, whose converse is simply unreasonableness —

axiomatically something that no reasonable public official would perform. Mr Justice Howie refers to such unreasonableness as administrative action which is “so unreasonable that no reasonable person would have resorted to it” (*Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA): para 20). When the rationality and contextual standards of reasonableness are viewed together they, in essence, come down to the same meaning. This is why Mr Justice Nugent remarked that “If a decision is founded upon reason (*rationality standard*), then it is difficult to see how it could be said to be so unreasonable that no reasonable person could come to it (*contextual standard*), and the converse is equally true” [own addition and emphasis in italics] (*Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA): para 60). However, the PAJA lists them as separate standards of reasonableness and it has been confirmed by Mr Justice Hurt that the contextual standard of reasonableness actually goes beyond mere rationality when he held that “A decision which has no objectively rational connection to the purpose of the empowering provisions (*rationality standard*) must necessarily be one which no reasonable decision-maker could make (*contextual standard*), but an unreasonable decision may not necessarily be so because of irrationality” [own addition and emphasis in italics] (*Head, Western Cape Education Department v Governing Body, Point High School* 2008 (5) SA 18 (SCA): para 15).

The reasonableness of administrative action is always context-based. What constitutes reasonable administrative action will depend on the circumstances of each case. One therefore needs to make an analysis of the factual setting in which the question of reasonableness arises. What is relevant may vary from case to case depending on the particular facts and circumstances of an issue. In *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Limited* 2005 (2) All SA 239 (SCA) at para 15, the Supreme Court of Appeal dealt with the reasonableness of a decision (in terms of Section 6(2)(h) of the PAJA) regarding the allocation of fishing rights in the hake longline sector. In the judgment of the Court *a quo* Mr Justice Scott found that the method used by the Department of Environmental Affairs and Tourism to decide on the allocation was “objective, rational and practical *in the circumstances*” [own emphasis] (para 17). The directive circumstances here were the need to transform the fishing industry as prescribed by Section 18(5) of the Marine Living Resources Act, 18 of 1998 (hereafter the MLRA). What is reasonable in one context may, however, not be reasonable in another. The administrative action or decision must be able to achieve a reasonable equilibrium in the particular circumstances. Which equilibrium is the best in the circumstances is left to the discretion of the reasonable public official. This approach is context-sensitive, flexible and allows for some variability of reasonableness. A list of factors was offered in the *Bato*

*Star* case to allow considerable scope for variance. The mentioned factors to guide a reasonable public official include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected (*Bato Star* 2004: para 45). Although the mentioned factors are not expected to perform ‘magic’ for public officials they offer some frame of reference for reasonableness which is otherwise a rather ‘colourless’ concept (Hoexter 2009:71).

But what does this standard imply for public officials who need to make reasonable decisions? The standard simply requires a decision-maker to act reasonably, in the sense that the decision taken needs to be one of the decision-making options or courses of administrative action (band of options or bounds of reasonableness) open to a reasonable public official in all the circumstances. For example, the Department of Environmental Affairs and Tourism has the authority to allocate fishing quotas to applicants from the deep-sea fishing industry in terms of Section 18 of the MLRA. The band of options open to the public official to allocate the fishing quotas are specified as “objectives and principles” in Section 2 of the MLRA. These are the objectives which the public official must have regard to when exercising the authority granted under the MLRA. In the *Bato Star* case Ms Justice O’Regan said that such a decision must strike a reasonable equilibrium between the objectives and principles mentioned in Section 2 and the guidelines of Section 18(5) of the MLRA in the context of the specific facts of the deep-sea fishing industry (*Bato Star* 2004: para 54). This allows a judicious amount of “administrative space” for the public official to ensure reasonable decision-making (Hoexter 2006:67).

## **CREATING A CULTURE OF ACCOUNTABILITY**

The content of the “reasonableness” requirement of administrative justice is now clear but what is its constitutional foundation? The foundation of administrative justice is embedded in the values and principles of the Constitution. The founding values of the Constitution are expressed in section 1 and include, among others, issues such as human dignity, non-racialism, non-sexism, constitutional supremacy, rule of law and a system of democratic government. The constitutional values extracted from these which are the most suitable to be promoted through the application of the principles of administrative justice are linked to a system of democratic government which must ensure accountability, responsiveness and openness (Section 1(d)). Apart from the mentioned commitment to accountability, responsiveness and openness the Constitution in its “principles governing public administration” repeats the commitment to accountability, responsiveness and

transparency (Section 195(1)(e)-(g)) and also requires the fair, impartial and equitable provision of public services (Section 195(1)(d)).

Accountability, in the constitutional sense, means that public officials must explain the way in which they have exercised their authority. They must be able to justify their decisions in terms of the rationality standard of reasonableness. Rationality is ideally suited to do this as it requires that the administrative action or decision have a sound and rational basis, i.e. be based on reason. All four of the requirements for rational decision-making give expression to the fundamental constitutional value of accountability. Firstly, the public official must be able to justify (or give proper account) that the action or decision taken is at least reasonably capable of achieving the desired aims. Secondly, the public official must likewise be able to provide evidence (or give proper account) of a rational connection between the purpose of the decision and the empowering provision. Thirdly, the information (evidence and argument) before the public official and the decision reached must show evidence (or give proper account) of a rational connection. Finally, the reasons given by a public official must be supportive (or give proper account) of the decision that was taken. All of these requirements clearly work toward accountability as it gives structure to the decision-making process and explains the manner in which decisions were taken.

The fourth requirement of the rationality standard of reasonableness (mentioned in the previous paragraph) stipulates that the reasons given by a public official be supportive of the decision that was taken (Section 6(2)(f) (ii)(dd) of the PAJA). This implies that the public officials have to justify their decisions in terms of the reasons given for them. This justification is needed, not only to ensure rationality but to facilitate accountability on the part of the decision-maker. The justification also facilitates a transparent and open mode of administrative action and decision-making. It provides a safeguard against arbitrariness as it is likely that a public official will be exposed if he/she acted arbitrarily. The conduct of public officials should, therefore, be above reproach so that account can readily be given of it in public. At the heart of the realisation of the objective of accountability lies the need for a proper (and rational) decision-making process to be followed by the public official. It is common knowledge that an efficient and effective decision-maker will formulate his/her findings and reasons before making a decision. Reasons, therefore, may improve the process of decision-making and encourage consistency and rationality. The need to explain the rationality of a particular decision requires the decision-maker to apply his/her mind to the facts of each case before coming to a decision.

Accountability by its very nature implies the public scrutiny of public administration. Judicial review of administrative action (as authorised by Section 6 of the PAJA) is a mechanism of public scrutiny to ensure accountability. Judicial review is also a way to enforce the right to reasonable administrative action.

This means that any person who is unhappy with an administrative decision can challenge the decision in court. This is an open and transparent procedure which ensures accountability. Judicial review is a significant mechanism to ensure that administrative action or decisions fall within the bounds of reasonableness as required by the Constitution (*Bato Star* 2004: para 44). Although judicial review is not the only mechanism to promote the principles of participation, accountability and transparency in governance, it is an important means to the attainment of transparent and accountable public administration. The *Bato Star* judgment gave a clear expression of this kind of accountability. The Minister of Environmental Affairs and Tourism was reminded by Mr Justice Ngcobo that the enabling legislation made express provision for the application of the objective of transformation in the allocation of fishing quotas. If the decisions taken do not show evidence of promoting the objective of transformation in the allocation of fishing quotas then the Minister would be acting unlawfully and the decision would be open to attack (*Bato Star* 2004: para 103). However, judicial review may only be used as a last resort. In terms of the PAJA any internal remedy provided for in an enabling legislation must be used before an affected person can approach a court for a judicial review (Section 7(2)). For example, in terms of the Marine Living Resources Act, 18 of 1998 an internal appeal to the Minister is allowed against a decision taken by a public official acting under the authority of that Act (Section 80). In the *Bato Star* case the applicant (who was dissatisfied with the allocated fishing quota) did just that by appealing to the Minister against the Chief Director's decision (*Bato Star* 2004: para 16 and 67). Another example can be found in the *Refugees Act*, 130 of 1998 where an applicant for asylum whose application was rejected by a Refugee Status Determination Officer may appeal to the Refugees Appeal Board (Section 26(1)). The latter is a three-member board appointed by the Minister that can confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer.

## CONCLUSION

The analysis of the practical functioning in public administration of the notion of reasonable administrative action provided evidence that the South African administrative justice system is now empowered and ready to make a meaningful contribution to accountable public administration. However, defining reasonableness in the positive has indeed proved not to be an easy task at all. But the Constitution did import the standard of a reasonable decision-maker into our public administration and the PAJA made some contribution to clarify the three elements of reasonableness (rationality, proportionality and contextual reasonableness) in conformity with the Constitution. The article

suggested a logical flow and build up in the understanding of reasonableness. It explained reasonableness as a concept which begins with rationality, as the minimum threshold, then moves on to proportionality as a means to achieve a particular purpose which is proportional or in balance, and ends with the wider concept of reasonableness in its contextual format which is a value judgement on what the best approach in a particular context would be. It was expected of the courts to make some contribution to bring some clarification with regard to the meaning of reasonableness to the table. The *Bato Star* judgment, among others, rose to the occasion. This judgment emphasised the contextual nature (and broader standard) of reasonableness and the fact that a reasonable decision falls within a band of reasonable decisions. This allows for some understanding of the measure of “administrative space” available to the public official to ensure reasonable decision-making. The analysis of the functioning of the three elements of reasonableness provided evidence of the inherent potential to justify administrative action for reasonableness and in so doing contributed toward accountable public administration in South Africa.

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