Book Review - Claudia Lange, Unreasonableness as a Ground of Judicial Review in South Africa – Constitutional Challenges for South Africa's Administrative Law

By Geo Quinot[*]

[Claudia Lange, *Unreasonableness as a Ground of Judicial Review in South Africa – Constitutional Challenges for South Africa's Administrative Law* (Recht und Verfassung in Südafrika Vol. 16; Nomos, Baden-Baden 2002; 120 pages, ISBN 3-7890-7832-8, 24 EUR)]

Reasonableness as a ground of judicial review remains one of the most controversial aspects of South African administrative law. Whereas the controversy prior to the new constitutional dispensation focused on the question whether reasonableness should be an independent ground of review, the attention has shifted in the post-1994 era to the content of reasonableness as an independent ground of review. This shift is entirely due to administrative justice being constitutionalized as a fundamental right, with the grounds of review set out in the Constitution[1] including reasonableness. The only remaining question is therefore what the content of this ground of review is or should be. However, the answer to this question is, as Claudia Lange's study clearly illustrates, not an easy one.

In the context of this ongoing debate, Claudia Lange's study is a welcome contribution. It focuses, from a comparative perspective, on reasonableness as a distinct ground of judicial review in South African law, using German law as the comparative viewpoint. The work commences with a concise look at the origin of South African administrative law and specifically the role of reasonableness in the common law. From there, the bulk of the book is dedicated to the new constitutional dispensation and the effect it had/has on reasonableness. The author traces the

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[1] The relevant provisions are section 24 of the Interim Constitution of 1994 and section 33 of the (final) Constitution of 1996.

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development of the "new" reasonableness ground of review from the negotiation process leading to the Interim Constitution through the final Constitution and eventually its incorporation in the Promotion of Administrative Justice Act ("PAJA").[2] The final part of the study focuses on reasonableness in German administrative law in comparison with the preceding analysis of South African law. It concludes with an appendix which in table format contains a direct comparison between PAJA and corresponding provisions in German law. This table provides both South African and German lawyers with an invaluable tool to access the opposite administrative law regime.

It is of some irony that the desirability of having reasonableness as a distinct ground of administrative review remains contentious after it has been elevated to such status by the Constitution. The irony lies in the fact that many of the arguments advanced in favour of reasonableness prior to constitutionalisation, seems now, after constitutionalisation, to be the best arguments against such a ground of review, or at least towards restricting reasonableness. This theme is touched upon at various points in the book. The basic premise is that in the pre-constitutional regime the absence of reasonableness as an independent ground of review resulted in administrative review being restricted to predominantly formal requirements such as narrow lawfulness (meaning action in terms of the empowering provision) and procedural propriety. The author illustrates this narrow approach with the following quote (on page 16) from *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd*:[3] "in order to establish review grounds it must be shown that the …[administrator] failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice.' " Those who wanted to challenge the often unreasonable (and draconian) actions of the administration in court were required to show that government did not follow its own (supreme) legislation before a court would set the particular action aside. Recognising unreasonableness as a general ground of review was therefore seen and pursued as a way of curtailing the executive by means of administrative review in order to protect the rights of individuals against state intrusion. The author discusses on pages 18 to 21 the various arguments advanced by legal scholars to this effect.

Under the new constitutional administrative law the inclusion of unreasonableness as an independent ground of review in section 33 of the Constitution is justified by citing the "importance attributed to the creation of a new, reliable and fair administration" and "to create a system of administrative law which attempts to ensure

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[2] Act 3 of 2000.

[3] 1988 (3) SA 132 (A) at 152 A-B.

that justifiable decisions are made …to avoid a recurrence of the injustices of the past" (page 7). While these are surely imperative objectives, there is the more pressing goal of redressing the injustices of the past. It is in this context that the above pre-constitutional arguments pro-unreasonableness embody the threat that this ground of review poses. The threat is that conservative courts and/or judges may seriously hamper transformation processes by subjecting all government action to strict reasonableness scrutiny. Lange confirms that this fear motivated the eventual formulation of the reasonableness test in PAJA (pages 49-50, 67). This formulation, namely that administrative action can be judicially reviewed if it was taken in a manner which is "so unreasonable that no reasonable person could have so exercised the power or performed the function" (the so-called "reasonable man test", PAJA section 6(2)(h)), results in a distinctly narrow content to the constitutional requirement of reasonable administrative action.

Despite these concerns, there remains a strong argument, along the lines of the pre-constitutional demands, for a wider concept of reasonableness in administrative review. Judicial review in essence serves to deter executive excess and protect fundamental rights (page 68). In a regime "founded on…the advancement of human rights and freedoms"[4] this is clearly an important aim. A crucial question in South African administrative law has therefore become one of balance between judicial supervision of executive action and judicial deference for the democratically elected government and its popular agenda. In *Carephone (Pty) Ltd v Marcus No and Others*[5] (discussed in the book on pages 37 to 38) the court referred to this balance in the context of defining "justifiability"[6] when it remarked (at par. 34): "Of importance in this regard, for present purposes, is the constitutional separation of the executive, legislative and judicial authority of the state administration, as well as the foundational values of accountability, responsiveness and openness in a democratic system of government." This balance is of the utmost importance in defining the content of reasonableness as a ground of administrative review, seeing that it is in reviewing the reasonableness of administrative action that courts come closest to encroaching on executive authority.

Recognising in principle the importance of maintaining the balance between judicial supervision and encroachment does not, however, solve the problem. The hard question is how this is to be translated into practice. In this regard the author ex-

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[4] Sec. 1, 1996 Constitution.

[5] 1999 (3) SA 304 (LAC).

[6] I.e. the term used in the Interim Constitution to denote "reasonableness."

amines (in Chapter 5) the concept of *Verhältnismäßigkeit* in German law, which can loosely be translated as proportionality. She indicates that although this is theoretically a wide legal concept and ground of review and consequently "one might fear a severe intrusion into the domain of the executive by the judiciary in this context the courts have usually resisted such a temptation and have interfered only when a clear case of disproportionality was made out" (page 63). Unfortunately, the book does not analyse in any depth the reasons for this judicial deference. In all fairness, it should be noted that the author expressly states the purpose of the study as the interpretation of administrative reasonableness in the South African constitutional context, with the comparative German perspective as a secondary objective.

The study does provide, however, some insight from a comparative perspective into managing the required balance in its discussion of the scope of German judicial administrative review (pages 53 to 58). As indicated above, German administrative law seems to have established this balance within the framework of a wide proportionality ground of review (in the form of *Verhältnismäßigkeit*). Of particular interest is the classification of administrative actions into different types (and subdivisions) with a different scope of review for each type. At the one end of the spectrum is the administration's handling of indefinite legal concepts (*unbestimmte Rechtsbegriffe*), such as "public order" or "reliability", which is subject to extensive judicial review (page 54). In a subset of this classification, those instances which call for professional evaluations, more leeway is given to the administration. At the other end of the spectrum are discretionary administrative actions, where judicial review is restricted to specific well-defined grounds of review, such as exceeding the limit of the discretion, ulterior motives and failure to exercise the discretion at all (pages 55 to 58). Applying this approach to South African administrative law will certainly give rise to the irony expressed by the court in the *Carephone* judgment (in paragraph 17), that is creating classifications of administrative actions in order to restrict the scope of review, but represents one efficient way of establishing a balance between judicial supervision and intrusion.

In conclusion it is important to note (as the author does on page 68) that the vastly different current socio-economic and political conditions in South Africa as opposed to a country like Germany, play a vital role in the development of reasonableness as a ground for review. The current need for more executive freedom, conversely judicial deference, in order to realise transformation in the face of strong old-regime opposition is obvious in the South African context. The same might not be true in the case of well-established democracies. In my opinion, the framework of the new South African administrative justice recognises this transitional situation by entrenching in the Constitution the broad principles of lawfulness, procedural

fairness and reasonableness,[7] but leaving the specific content of these principles to national legislation.[8] Through these means the executive (with the blessing of the legislature) is given more freedom to determine the scope of administrative review suitable to the prevailing national conditions by enacting and amending the envisaged legislation. On the other hand, this regime does not allow the executive free reign to trample individual rights, seeing that the basic requirements are set in the Constitution, but without casting in stone constitutional requirements which might be either too high for present purposes or too low at some future point in time when transformation has been successfully completed and democracy rooted. Eventually this framework establishes a functional implementation of the interdependence and at the same time separation of the three legs of government.

In my opinion, the most valuable contribution made by this book is twofold. It lies firstly in the compilation of the relevant material regarding reasonableness as a constitutionalised administrative ground of review, which includes material from the drafting process of both constitutions and PAJA. Secondly, the study provides some valuable comparative insights from a German perspective, presenting the South African legal community with alternative routes for interpreting reasonableness as a distinct requirement for just administrative action. As I have indicated above, this development is by no means completed with administrative justice being guaranteed in the Constitution – in fact, the process has only begun and is meant to be indefinitely open-ended.

In this process of developing a new constitutionalised administrative law in South Africa, legal comparison will continue to play an important role. PAJA alone contains a number of provisions which bear close resemblance to developments in other jurisdictions. One example is the "direct, external legal effect" requirement in the definition of "administrative action",[9] which corresponds closely with the German concept of Verwaltungsakt.[10] Another example is the "reasonable man test" in section 6(2)(h), discussed above, which emulates the well-known English law Wednesbury-test.[11] The related jurisprudence in these and other similar jurisdictions

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[7] Sec. 33(1), 1996 Constitution.

[8] Sec. 33(3), 1996 Constitution.

[9] Sec. 1, PAJA.

[10] *See*, Jöst Pietzcker, Individual Rights, The External Effect of Administrative Action and Judicial Review, *in* REALISING ADMINISTRATIVE JUSTICE 99 (Hugh Corder and Linda van der Vijver eds., 2002); IAIN CURRIE & JONATHAN KLAAREN, THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT BENCHBOOK 81 (2001).

[11] *See*, Jeffrey Jowell, Administrative justice and the new constitutionalism in the United Kingdom, *in* REALISING ADMINISTRATIVE JUSTICE 93 (Hugh Corder and Linda van der Vijver eds., 2002).

will no doubt be of considerable assistance as South Africa implements this new administrative law regime. Furthermore, in the continued redefining of South African administrative law, its role, scope and form, as this young democracy strengthens, the experiences of other, more mature, democracies will continue to be of critical importance.