DEFEERENCE AS RESPECT AND
DEFEERENCE AS SACRIFICE: A
READING OF BATO STAR FISHING
V MINISTER OF ENVIRONMENTAL
AFFAIRS

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ABSTRACT
The Constitutional Court was recently asked to review an administrative decision to allocate fishing rights. The case raises the question of the proper role of the Court in review proceedings vis-à-vis the administration in respect of the transformation of the fishing industry. The Court held that the allocation decision in question was lawful, reasonable and procedurally fair. The judgment is critically analysed in this article in respect of the findings of lawfulness and reasonableness. It is argued that the Court has still not succeeded in departing from the formalistic approach which has characterised administrative law jurisprudence for most of the 20th century. It is contended that for the Court to show a concern with administrative justice, it not only has to abandon its formalistic approach, but it has to adopt a vocabulary of sacrifice. Such a vocabulary will register the ordeal of having to judge in accordance with the law whilst at the same time being called upon to bring about administrative justice.

I INTRODUCTION
The Alien Land Laws, the internment of Japanese Americans and the various programs to subdue and absorb American Indian nations strike us now as terrible errors. Yet in their time, they were supported by people who believed they were doing the right thing. What are we doing now that we will regret in a hundred years?1

The decision of the Constitutional Court in Bato Star Fishing v Minister of Environmental Affairs2 (Bato Star) is one of the most important South African decisions on the judicial review of administrative action in recent years. It is also the first case in which the Constitutional Court directly deals with the implications of the newly enacted Promotion of Administrative Justice Act 3 of 2000 (PAJA). The court in this case was faced with an extremely difficult dispute to resolve. A ‘medium-sized

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2 2004 (4) SA 490 (CC).
black empowerment’ fishing company (Bato Star Fishing (Pty) Ltd—hereafter ‘the applicant’) was dissatisfied with its hake quota allocation for deep-sea trawling (for the period 2002-2005) and sought the review and setting aside of this decision in the Cape High Court. The pace of transformation of the fishing industry and the scope of the review powers of a court were central to the dispute. The review application in the Cape High Court was successful. The Court set aside the allocation by the Chief Director as the result of a finding that various grounds of review were present. The appeal of the Department to the Supreme Court of Appeal (SCA) however succeeded, the Court rejecting the views of the High Court on the existence of review grounds. The Constitutional Court upheld the judgment of the SCA. This article seeks to analyse the judgment of especially the Constitutional Court in relation to the approach taken to lawfulness and reasonableness. The analysis of the case will be used as a backdrop to reflect on broader issues that arise

3 The allocation was made by the Chief Director: Marine and Coastal Management (after having been delegated this power by the Minister in terms of s 79 of the Marine Living Resources Act 18 of 1998) in terms of s 18 of the Act, the relevant parts of which provide as follows: ‘(1) No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such activity or to operate such an establishment has been granted to such a person by the Minister. (2) An application for any right referred to in subsection (1) shall be submitted to the Minister in the manner that the Minister may determine. . . . (5) In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section (2), have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society’.

4 In the High Court and in the Supreme Court of Appeal, the courts also heard and gave judgment on the application by Phambili Fisheries (Pty) Ltd for the review of the same allocation. Phambili Fisheries did not, however, pursue an appeal to the Constitutional Court.

5 Phambili Fisheries v Minister of Environmental Affairs CPD 1171/2002 (26 November 2002) unreported.

6 Per Ngwenya J and Potgieter AJ.

7 These included the absence of evidence on the basis of which the allocation was made (because of the fact that the Deputy Director-General had deposed to the main answering affidavit as opposed to the Chief Director and as no affidavit had been put forward on behalf of the advisory committee paras 59-68 (and see Minister of Environmental Affairs and Tourism v Phambili Fisheries; Minister of Environmental Affairs and Tourism v Bato Star Fishing 2003 (6) SA 407 (SCA) paras 19-23)) and the Chief Director having acted arbitrarily and without rational justification in making the allocation (ibid paras 127-51).

8 The Court (per Schutz JA) held that the decision did not involve a misinterpretation or misapplication of the law and that it was not irrational.

9 Two members of the Constitutional Court gave judgment in the matter, both (somewhat unusually) concurred in by all other members of the Court. O’Regan J dealt with all the grounds of review relied on by the applicant whereas Ngcobo J specifically dealt with the issue of statutory interpretation. O’Regan J found that it could not be said that the Chief Director had misinterpreted or misapplied the relevant statutory provisions (Bato Star (note 2 above) paras 32-41) or that he had acted unreasonably in making the allocations (ibid paras 42-54). She also rejected the applicant’s complaint that its application had not been considered by the Chief Director on its merits (ibid paras 55-60) and that there had been a policy change before the award of points to the applicants of which the applicant was not made aware (ibid paras 61-6). Ngcobo J agreed that it could not be said in this case that the Department had misconstrued or misapplied the provisions of the Act (ibid paras 108-15).
in judicial review proceedings. These issues include the appropriateness of a contextual approach (both in respect of statutory interpretation and in determining the reasonableness of a decision) in administrative law and the possibility of administrative justice. I enquire specifically into the question of the possible impact of the thinking of Jacques Derrida (as elaborated on by a number of mainly legal scholars) on the judicial review of administrative action. The analysis of Bato Star in this article will not aim to show that the case was incorrectly decided. I will also not argue that the Court had to make a political choice and that it chose the more conservative option. Such a conclusion would simply involve a ‘political’ statement, where politics is reduced to economics. The aim is rather to expose the way in which the court dismisses otherness in Bato Star. The judgment is shown for what it is: a formalistic and economic reduction of plurality, without an acknowledgement of the unjust sacrifice involved. The analysis aims at preparing for an administrative justice which is always yet to come.

In section II of this article I will provide a background to the dispute in Bato Star. In section III the approach that O'Regan J adopts in respect of unreasonableness will be analysed. O'Regan J held that the reasonableness of the action was to be determined in every case with reference to a range of factors. She held that in particular circumstances, depending upon a consideration of these factors, it might be appropriate for the Court to impose a standard of reasonableness which is not a very

10 This article forms part of my own ongoing reflection on the proper role of the court in judicial review proceedings and specifically of a contextual approach in relation to the grounds of review. It departs in significant ways from my previous thinking on the topic; see JR de Ville Judicial Review of Administrative Action in South Africa (2003) 1-34.

11 This approach will be elaborated on in IV below. The main features of this approach should nevertheless be spelt out here: The contextual approach that is at issue here departs from the (formalistic) idea that legal rules provide mechanistic (a-contextual) answers to legal questions. It is based on the hermeneutic insight that interpretation is an essential feature of all aspects of our lives, including adjudication. In accordance with this approach the meaning of a statutory or constitutional provision will always depend on the position of the interpreter and thus on the context within which the provision finds application (including the language used, the broader legislative scheme, purpose, other legislation, history, values, precedent as well as the socio-political and concrete context), and not on the ‘intention of the legislature’ or the literal meaning of the text. When it comes to broad requirements or standards such as reasonableness and procedural fairness, this approach sometimes involves an elaboration of the relevant factors that will be taken account of in determining the application of such standard. This is clearly different from an approach which would classify administrative action according to its nature and in accordance therewith determine whether the requirements of natural justice are applicable or whether reasonableness is in fact a requirement for that specific type of action.

12 The differences that exist between these scholars will not be closely scrutinised in this article as my main purpose is an analysis of the decision in Bato Star. I will also rely on the writings of a number of scholars who cannot be said to be ‘followers’ of Derrida, but whose work show a similar concern.

13 See IV(c) below.

14 The focus in this article on ‘administrative justice’ is not to be understood as an argument that administrative justice is a ‘special case’, in the sense that the arguments made here apply only in the context of the review of administrative action. The argument made here with regard to administrative justice can be made in a similar manner with regard to other areas of law.
It will be argued that the standard of review adopted in this case was the minimal rationality standard. This ‘contextual’ approach departs in important respects from the pre-1994 approach of the courts with regard to reasonableness. The contextual approach will be analysed in more detail in section IV(a), with reference to the broader philosophical thinking that underlies this approach. In section IV(b) it will be pointed out that this approach still retains traces of formalism. The approach of the Court is characterised by a rigid distinction between law, fact and policy. In respect of lawfulness, the Court adopts the view that a distinction should be drawn between law and policy. Insofar as the issue is one of law, the Court will interfere if it does not agree with the interpretation that the administrative body gave to the statutory provision concerned. If the matter is however one of policy, the Court will not easily interfere. This approach seems to resurrect the jurisdictional/non-jurisdictional distinction in a different guise. It will be argued that the approach that the Court adopts to statutory interpretation is also problematic as it assumes that meaning is determined by context. A plea is made in this article for a new vocabulary in judicial review proceedings; a vocabulary that is stripped of the pretensions of objectivity, neutrality, consensus and legitimacy, traces of which can still be found in the contextual approach of the Court. In section IV(c) I will enquire into the ‘political’ nature of judicial review, and specifically of the contextual approach, with reference primarily to the writings of Johan van der Walt. I will argue that administrative law (as currently constructed) should be seen as a restricted economy which always leads to a reduction of plurality and thus a withdrawal from politics (understood as plurality). In section IV(d) the writings of Van der Walt will be enquired into with reference to the sacrificial logic that underlies (administrative) law and the way in which it finds expression (but not sufficient recognition) in the contextual approach adopted in Bato Star. The view adopted here is that law tends to be nothing but economics, involving the unjust economic sacrifice\(^\text{15}\) of certain interests for the sake of others that are more highly rated. It will be argued that a court, if it has a concern with administrative justice in review proceedings, should register the reality of legitimate dissent with respect to the issue at hand. A court should also acknowledge the reality of (unjust) sacrifice which is effected by means of the reduction of plurality involved in judicial decision-making. Is administrative justice possible in light of what has been said above? A contextual approach, it will be argued in sections IV(e) and V, should not

\(^\text{15}\) The understanding of law as economics is discussed in IV(c) below. It is based on the insight that we (ie individuals and ‘communities’) cannot but act in our own self-interest. Our actions as a ‘community’ in relation to others are therefore always ‘economic’ actions, directed towards our self-preservation (our will to survive), which inevitably entails the sacrifice of those (interests) which are less highly valued. The notion of sacrifice is discussed in IV(d) below.
be equated with justice. A contextual approach remains violent\textsuperscript{16} and a court applying such an approach cannot do justice to the parties seeking it. I conclude that only if the court abandons the remaining vestiges of formalism, recognises the sacrifice involved in decision-making, and faces up to the impossibility of its task in seeking administrative justice, does administrative justice stand a chance.\textsuperscript{17}

II BACKGROUND TO DISPUTE

The deep-sea hake trawl industry in South Africa has traditionally been dominated by five ‘pioneer’ companies which were established, owned and managed by members of the ‘white’ population group.\textsuperscript{18} The Department’s efforts in the past to permit new entrants to the market were successfully resisted by these companies through judicial review proceedings.\textsuperscript{19} Nevertheless, in 1986 the number of participants rose to seven and in 1992 to 21. Between 1992 and 2002 the number rose to 51.\textsuperscript{20} The applicant had been allocated 750 tonnes in 1999 for the first time, the same in 2000, and in 2001 this was increased to 803 tonnes.\textsuperscript{21} For the 2002-2005 period, it was initially allocated 856 tonnes (per year), which was increased to 873 tonnes after an appeal.\textsuperscript{22} The applicant had applied for an allocation of 12 000 tonnes. The total allowable catch (‘TAC’) in the deep-sea trawl industry was 138 495 tonnes.\textsuperscript{23} The allocation took place in terms of policy guidelines, published in the \textit{Government Gazette}. These indicated that allocations would be made in accordance with the objectives and principles set out in s 2 of the Marine Living Resources Act 18 of 1998.\textsuperscript{24} Certain more specific policy considerations were also

\begin{itemize}
\item \textsuperscript{16} The ‘violence’ that is referred to here is to be understood in terms of ‘an unjust, unwarranted, or unlawful display of force’; see \textit{Collins English Dictionary}. This force, as will appear in the article, can be imposed through inter alia (a) language, which, through the identity principle, forces similarities and dissimilarities on reality which do not exist in themselves; (b) legal rules, without such rules having a legal foundation; (c) the imposition of legal meaning where none exists in itself; and (d) the police or other agencies.
\item \textsuperscript{17} The paradox that is at stake here will be clarified in the discussion that follows. The argument, in brief, is that it is only when something is acknowledged to be lacking (in this instance, law as lacking justice) that justice stands a chance; not as a given in the present, but as an ‘experience of waiting, of promise or of commitment’. J Derrida ‘The Politics of Friendship’ (1988) \textit{J of Philosophy} 632, 636.
\item \textsuperscript{18} \textit{Bato Star} (note 2 above) para 5.
\item \textsuperscript{19} See \textit{Phambili Fisheries} (note 5 above) para 51.
\item \textsuperscript{20} \textit{Minister of Environmental Affairs} (note 7 above) para 7.
\item \textsuperscript{21} See \textit{Bato Star} (note 2 above) para 7. Each 1000 tonnes of hake ensures a profit of approximately R5 million (ibid para 5).
\item \textsuperscript{22} See \textit{Bato Star} (ibid) paras 15-6.
\item \textsuperscript{23} The TAC in the other sectors was as follows: in-shore trawl sector: 10 165 tonnes; long-line sector: 10 840 tonnes; hand-line sector: 5 500 tonnes.
\item \textsuperscript{24} The section determines: ‘The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles: (a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources; (b) the need to conserve marine living resources for both present and future generations; (c) the need to apply precautionary approaches in respect of the management and development of marine living resources; (d) the need to utilise marine living resources to achieve economic
\end{itemize}
mentioned such as (1) business plan, fishing plan or operational and investment strategy; (2) equity, transformation, restructuring and empowerment; and (3) impact on the resources, environment and the fishing industry.\textsuperscript{25} The policy of the Department was to seek to bring in smaller companies, owned and managed by people from previously disadvantaged communities, mainly in the long-line and hand-line sectors. In the deep-sea trawl industry, because of its capital- and labour-intensive nature, the policy was to encourage internal transformation (requiring that the management and ownership of the companies be transformed so as to represent the demographics of South Africa) rather than the introduction of new entrants.\textsuperscript{26}

Applications were first screened by an advisory committee, appointed by the Department. Points were awarded to each applicant in accordance with criteria based on the policy guidelines.\textsuperscript{27} As pointed out by O’Regan J, the applicant received a low score (4.9 out of a possible 10; being outscored by 72 of the 110 applicants, also with reference to the transformation criteria set out in the policy guidelines – it being outscored by 77 of the other applicants).\textsuperscript{28} The eventual allocations were made by the Chief Director of the Department, having been delegated this power by the Minister. The starting point for the allocation was the 2001 allocation. Five per cent of the quota of each rights holder in 2001 was subtracted and placed in a redistribution pool which was then reallocated to the rights holders in proportion to the points allocated to growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government; (e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation; (f) the need to preserve marine biodiversity; (g) the need to minimise marine pollution; (h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act; (i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry’.

\textsuperscript{25} Minister of Environmental Affairs (note 7 above) para 6. The policy guidelines in this respect indicated that the degree of transformation of an applicant would not be evaluated only with reference to changes in ownership, but also in respect of equity within an applicant, the ‘distribution of wealth created gained through access to marine living resources’ and the extent to which employment is provided to people from historically disadvantaged sectors of the community.

\textsuperscript{26} Minister of Environmental Affairs (note 7 above) para 6.

\textsuperscript{27} Six factors were to be taken account of: (a) involvement and investment in the industry; (b) past performance; (c) strategies for by-catch and offal utilisation; (d) compliance; (e) transformation; and (f) the extent to which the applicant has used or will use its allocation merely as a ‘paper quota’. In respect of transformation, points were allocated with reference to ownership (points being awarded with reference to the percentage of the company owned by people from previously disadvantaged backgrounds), management structure, workforce, transformation plan; and compliance with the Employment Equity Act 55 of 1998.

\textsuperscript{28} Bato Star (note 2 above) para 13.
them (apart from the points allocated in terms of one of the criteria).29 This meant that tonnages of the holders with bigger allocations were redistributed to holders of smaller allocations.30 General reasons were furnished for the allocation. No new entrants were accommodated as the industry was considered to already be oversubscribed.31 51 of the 54 existing right holders received quotas for the 2002-2005 period.

III REASONABLENESS

The applicant(s) challenged the allocation decision on almost every conceivable review ground in all three courts. In order to deal with these grounds, O’Regan J categorised them in a way similar to the broad grounds of lawfulness, reasonableness and procedural fairness in s 33 of the Constitution.32 It is especially in relation to the requirement of reasonableness that the judgment is innovative.33 O’Regan J, relying on the wording of s 33(1) of the Constitution (providing for a right to ‘reasonable’ administrative action) and developments in English law in respect of unreasonableness (simply requiring that the decision be reasonable), rejected the pre-1994 standard of gross unreasonableness. Section 6(2)(h) of PAJA,34 irrespective of its seeming correspondence with Wednesbury unreasonableness,35 should according to her not be understood as imposing the same standard of unreasonableness as was adopted in that case.36 The question whether a decision is reasonable, should rather be approached in the same manner as is the position with procedural fairness, namely as depending on the specific circumstances of the case.37 The factors to be taken account of in determining the reasonableness of the decision were said to include –

the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well being of those affected.38

29 This was with respect to the criterion in (c) (note 27 above), the Chief Director being of the opinion that the scores were not sufficiently reliable (Minister of Environmental Affairs (note 7 above) para 35).
30 See Minister of Environmental Affairs (note 7 above) para 11.
31 Phambili Fisheries (note 5 above) para 96.
33 The decision in respect of lawfulness and procedural fairness does not break new ground. I will return to the lawfulness section of the decision in IV below.
34 Providing for review 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’.
35 In Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680 (CA) 683 Lord Greene held that a decision would be reviewable if it is ‘so unreasonable that no reasonable authority could ever have come to it’.
36 Bato Star (note 2 above) para 44.
37 Ibid para 45.
38 Ibid.
O’Regan J was however quick to point out that this does not imply the abolition of the distinction between review and appeal.39 It was not the task of the Court to decide what the best decision would be under the circumstances,40 but only to determine whether the decision can be said to ‘fall within the bounds of reasonableness’.41

In the SCA, Schutz JA had adopted an approach of deference in reviewing the reasonableness of the decision.42 He held that because of the polycentric nature of the decision a standard of rationality was appropriate in this case.43 O’Regan J, however, expressed her discomfort with the notion of deference and commented that the way in which this notion is usually understood – as submissiveness – may lead to a misconception concerning the ‘true function’ of a court in review proceedings.44 O’Regan J expressed her preference for an understanding of deference as ‘respect’.45 A court should specifically treat with respect the findings of fact and policy decisions made by those with special expertise and experience in the field.46 Furthermore, the extent to which a court would be prepared to give weight to the findings of fact and policy decisions of an administrative authority would depend upon the nature of the decision and the identity of the decision-maker.47 Respect would however have to be earned. Even in the event that a wide discretionary power (only stipulating the goal to be achieved but not the measure to be taken to achieve such goal) is given to an official with expertise, such decision will be invalidated if it cannot be said to be reasonable in light of the reasons given for it, where the decision ‘will not reasonably result in the achievement of the goal’ or where it is ‘not reasonably supported on the facts’.48 Applying the above approach to the review application before the court, O’Regan J held that the applicant would not succeed –

39 Ibid.
40 Ibid para 54.
41 Ibid para 45.
42 Minister of Environmental Affairs (note 7 above) para 47.
43 Ibid paras 51-5. Rationality is often perceived as a less stringent standard than reasonableness or proportionality. Rationality would require of a court to determine only whether there is a rational connection between the action taken and its purpose. This test is often equated with asking whether a decision is arbitrary or capricious. The standard of reasonableness is a more stringent one and would require of a court to determine the coherence of the measure as well as have regard to constitutional values, especially that of human dignity in determining its reasonableness. Proportionality is usually perceived as the most stringent standard of review, where the government would have to show also that less restrictive means were not available to achieve the objectives in question. For a discussion of these different standards, see De Ville (note 10 above) 195-216.
44 Bato Star (note 2 above) para 46.
46 Ibid para 48.
47 Ibid.
48 Ibid.
[If we are satisfied that the Chief Director did take into account all the relevant factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the legislative goal in the light of the facts before him.49

Because of the wide discretionary power that was given to the decision-maker, the fact that it involved policy considerations, and the expertise required, the Court adopted what seems to be a rationality standard. Although this is not stated explicitly in the judgment it appears from the evaluation of the decision against the requirement of ‘reasonableness’. The argument of the applicant in this regard was that insufficient weight had been given to the s 2(j) criterion (restructuring the fishing industry). O’Regan J’s evaluation of the actions of the Department against the requirement of reasonableness consisted of little more than stating what was done, stating the reasoning of the Department, and then saying that the decision (first in respect of using the 2001 allocation as the starting point and the five per cent reallocation,50 secondly the focus on the internal transformation of existing participants rather than allowing new entrants, and thirdly the equilibrium struck as to the principles and objectives) could not be said to be unreasonable.51 The impact of the decision on the lives and well-being of those affected, a factor identified by O’Regan J as relevant to determining the reasonableness of the decision,52 does not feature in the analysis. There is also no overt attempt by the Court to assess whether the weight attached to stability was appropriate under the circumstances vis-à-vis the obligation to restructure the industry. In effect, the Court simply asked, in accordance with the minimal rationality standard, whether there was a rational basis for the decision in relation to its purpose.53

IV CONTEXTUALISM

(a) Introduction

With Bato Star, the Constitutional Court has extended its contextual approach,54 which was applied previously to the interpretation of the Constitution and of statutes55 as well as to procedural fairness,56 to cover

49 Ibid para 50.
50 As Ngcobo J points out, the way in which points were allocated during the first stage, meant that only two per cent of the equity pool was effectively reallocated according to transformation criteria (ibid para 108 n88).
51 Ibid paras 53-4.
52 Ibid para 45.
53 See De Ville (note 10 above) 212; 214.
54 See note 11 above for a brief elaboration of what a ‘contextual approach’ entails.
55 For discussion, see JR de Ville Constitutional and Statutory Interpretation (2000) 142-45; P de Vos ‘A Bridge Too Far? History as Context in the Interpretation of the South African Constitution’ (2001) 17 SAJHR 1, 7. One can in other words say that a contextual approach is followed in respect of the ‘lawfulness’ (which mostly entails questions of statutory interpretation) of the decision.
56 See Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal 1999 (2) SA 91 (CC) para 39; Minister of Public Works v Kyalami Ridge Environmental Association 2001 (3) SA 1151 (CC) paras 100-01.
the question whether action can be said to be reasonable. This approach
seems to be one of the responses57 to the dilemma that always surfaces in
the judicial review of administrative action, namely the appropriate scope
of the court’s review powers.58 As Cora Hoexter has pointed out:

[J]udicial review is characterised by a continuous tension between two opposing ideals:
the ideal of governmental freedom of action, and the ideal of judicial control. The tension
ensures that even the blandest case of judicial review is ineluctably political in the broad
sense. Whether the subject matter of a dispute relates to the (politically charged)
withdrawal of thousands of disability benefits or the (politically insignificant) award of a
single trading license, its outcome depends at least partly on the politics of judicial review
the courts’ willingness to interfere in administrative decisions.59

The ‘difficulty’ of reconciling the judicial control of legislation with the
fact that such legislation has been enacted by a democratically elected
legislature (the counter-majoritarian difficulty)60 is in other words
replicated in the administrative-law context. In an application for review,
the actions of administrative bodies and officials, established by a
democratically elected legislature to perform certain functions (involving
questions of law, fact and policy) stand opposed to a judiciary with the
(constitutional, common-law or derived legislative) function of control-
ning, reviewing or supervising such action. As opposed to parliament, the
executive, and by extension the administration is only indirectly elected.
This does not make the task of resolving the difficulty any easier. The
debate concerning this difficulty in the administrative law context is
however usually confined to a formalistic (and supposedly purely legal)
one, namely whether such review power of the courts is justified by the
ultra vires doctrine or whether it is a power which inherently belongs to
the courts (by virtue of their common-law jurisdiction).61 In a number of
countries (including South Africa and Namibia) this controversy has
been ‘resolved’ by entrenching a right to administrative justice in the
Constitution and/or by enacting legislation codifying the grounds of
review of administrative action. However, like the ultra vires doctrine and
the common law approach, these enactments do not answer the question
of what the proper relationship is between the judiciary and the
administration/executive.

The traditional model of review, in an attempt to justify review, casts
the courts into a mechanistic role, having to control the powers (or vires)

57 The other response is invoking the concept of the rule of law; see Fedsure Life Assurance Ltd v
58 See K O’Regan ‘Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative
60 See AM Bickel The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2ed
1962) 16-23. For a recent discussion, see P Lenta ‘Democracy, Rights Disagreements and
61 For criticism, see D Dyzenhaus ‘Form and Substance in the Rule of Law: A Democratic
141.
of the administrative body through ascertaining the intention of the legislature.62 Insofar as action taken by an authority did not relate to its powers and the authority had freedom of choice, the courts would not scrutinise such action; such exercise of powers being regarded as non-jurisdictional. This formed the basis for the review/appeal distinction. The conceptual approach63 of classifying administrative action into the categories of judicial, quasi-judicial, legislative and purely administrative actions also played an important role in determining the scope of the review powers of the Court.64 The contextual approach, as a response to the perceived formalism65 and rigidity of the conceptual approach,66 seeks to provide a different solution to the above dilemma. A much greater range of factors is now to be considered by the Court, in a seemingly more flexible manner, in determining the appropriate degree of scrutiny.67

The contextual approach of the Constitutional Court shows a remarkable degree of similarity with that of the Canadian Supreme Court.68 This approach seems to attempt to steer a balance between the views expressed, usually by proponents of the Critical Legal Studies (CLS) movement, that law is indeterminate and simply ‘politics dressed in different garb’69 and the formalist belief that law is a science and therefore determinate. The contextual approach is based on the belief that law is flexible, but that it is still sufficiently determinate to produce answers to legal problems.70 It takes seriously the hermeneutic insight

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63 J Willis ‘The Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional’ (1935-36) 1 Univ Toronto LJ 53, 69 appropriately describes the conceptual approach as ‘relating the unknown to the known and in seeing the likeness in unlike things’.
66 See O’Regan (note 58 above) 428.
67 The concept of administrative action has introduced a new classification of functions: that between administrative action on the one hand and legislative, judicial and executive action (the latter not being subject to the requirements of the administrative justice clause).
70 Sugunasiri (note 68 above) 167-68. For earlier cases where this belief appears prevalent, see S v Zuma 1995 (2) SA 642 (CC) paras 17-8; S v Mhlungu 1995 (3) SA 867 (CC) paras 78; 83-4; 95; S v Makwanyane 1995 (3) SA 391 (CC) paras 87; 206; 257; 392. The judgment in Bato Star shows that the Court has not changed its stance in this regard. See IV(b) below.
that interpretation is always situated and that it takes place within a
historical and linguistic context. Context, including constitutional
values, consequently plays a central role in producing answers to legal
problems. At the same time, law and legal reasoning is believed to be
different from politics. Although it is accepted that judges come to texts
with prejudgments, it is believed that autonomous and impartial
judgment remains possible. Through the openness of the Court to
different views, made possible by means of generous standing and
amicus curiae requirements, judges are enabled to broaden their
horizons of understanding. The contextual approach also allows for
more candour regarding the factors that play a role in decision-making
and enables the court to give (more) persuasive reasons for its findings.

The contextual approach furthermore contains elements of critical
pragmatism, often making the court sensitive to historical uses and

71 See FJMootz III 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry
Based on the Work of Gadamer, Habermas, and Ricoeur' (1988) 68 Boston Univ LR 523, 528;
Sugunasiri (note 68 above) 168-69. For a discussion of this approach of the Constitutional
Court, see De Vos (note 55 above).

72 This appears to be based on one of the legal realist approaches to decision-making; see Singer
(note 65 above) 501: '[T]he realists argued that judges should make law based on a thorough
understanding of contemporary social reality. Judges should not make value judgments in the
abstract about the substantive content of the law. Rather, they should closely examine the
social context in which those affected by legal rules operate. Understanding this social context
would enable judges to adjudicate disputes through “situation-sense”, meaning the ability to
fit the law to social practice and to satisfy the felt needs of society to achieve a “satisfying
working result”’. See also R West Caring for Justice (1997) 50-61; 69-74 who stresses the
importance of contextualisation in judging on the merits of a specific case, from the
perspective of an ethic of care.

73 In Bato Star (note 2 above) paras 46-8, O’Regan J clearly attempts to draw a distinction
between law (legal principles) and policy/politics. See further IV(b) below.

74 Sugunasiri (note 68 above) 170. See President of the Republic of South Africa v South African
Rugby Football Union 1999 (4) SA 147 (CC) paras 40-8; South African Commercial Catering
and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3)
SA 705 (CC) paras 11-7.

75 See s 38 of the Constitution. See also De Ville (note 10 above); Hoexter (note 59 above) 258-75.

76 See Rule 9 of the Constitutional Court Rules. For discussion see HJ Erasmus Superior Court
Practice (RS 19 2003) C4-20 – C4-29; M Chaskalson & C Loots ‘Court Rules and Practice
Directives’ in M Chaskalson et al (eds) Constitutional Law of South Africa (RS 5 1999)
7-6 7-8.

77 Sugunasiri (note 68 above) 170. See also National Coalition for Gay and Lesbian Equality v
Minister of Justice 1999 (1) SA 6 (CC) para 22 where Ackermann J says that “[t]o understand
“the other” one must try, as far as humanly possible, to place oneself in the position of “the
other”’. See also Prince v President, Cape Law Society 2002 (2) SA 794 (CC) para 157 (per
Sachs J). For criticism of this approach, see K van Marle ‘From Law’s Republic to the
Heterogeneous Public: On Containment, the Ethics of Difference and Reflexive Politics’ (2002)
17 SA Public Law 394, 399-401.

79 Sugunasiri (note 68 above) 170; 174; 180.

79 For the distinction between critical and complacent pragmatism, see MJ Radin ‘The
Pragmatist and the Feminist’ (1990) 63 Southern California LR 1699, 1710; JW Singer
‘Property and Coercion in Federal Indian Law: The Conflict between Critical and Complacent
Pragmatism’ (1990) 63 Southern California LR 1821.
abuses of socio-political power. There is also as a consequence also
frequently attention given to patterns of exclusion, to power dynamics
and to the broader socio-political context. There is also (at times)
sensitivity shown regarding the impact of different interpretations on
human lives and the broader body politic. In addition, as one can see in
Bato Star, the court is very aware of the need to maintain a fine balance
in scrutinising actions of the other branches of government so as not to
be perceived to overstep its ‘proper role’. The contextual approach
allows it to indicate what the factors are which are to be taken into
consideration in this respect.

(b) The formalism of contextualism

(i) Policy versus law

As pointed out above, the Constitutional Court is acutely aware of the
importance of not overstepping its ‘proper role’ in scrutinising the actions
of the other branches of government. The way in which this is to be
determined is elaborated on by O’Regan J in the context of deference:

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

This statement is supported with reference to a dictum of Lord Hoffmann
in R (on the application of ProLife Alliance) v British Broadcasting
Corporation, that the allocation of decision-making powers to different
branches of government is a question of law based upon ‘recognised
principles’ and that it must necessarily be answered by the courts.
Furthermore, when a court decides that a matter falls within the
competence of the legislature or the executive, the court is not showing
deference; it is deciding the law. Regarding the question of allocation of
powers as a matter of law for the courts to determine is not in itself
objectionable. It however appears that underlying this assertion is the

80 See C Albertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the
‘Equality’ in Chaskalson et al (eds) (note 76 above) 14; P de Vos ‘Equality for All? A Critical
81 Sugunasri (note 68 above) 173 n220. See also note 80 above.
82 See, for example, Democratic Alliance v Masando 2003 (2) SA 644 (CC) para 76.
83 See, for example, Kaunda v President of the RSA (2) 2004 (10) BCLR 1009 (CC) paras 71-81.
84 Bato Star (note 2 above) para 46.
85 [2003] 2 All ER 977 (HL) paras 75-6.
belief that 'politics' and 'law' can be clearly separated. This approach 'enables' the Court to act as impartial arbiter in instances of judicial review rather than as 'active participant' in relation to the policy issues that require adjudication.

This is evident from the fact that the distinction between 'law' and 'policy' is central to the role the Constitutional Court casts for itself in review proceedings. According to O'Regan J, due weight is to be accorded to 'findings of fact and policy decisions made by those with special expertise and experience in the field'. In evaluating the decision for its lawfulness, O'Regan J by contrast found it unnecessary to consider the need for deference, except insofar as the way in which transformation was to be given effect to, or for different standards of review. The distinction between law, fact and policy (also between law

86 A different conception of politics will be argued for in IV(c) below. For now, the (contrary) assertion that 'law is politics' seeks to convey the idea that law is an expression of social struggle. See J van der Walt 'The (Im)possibility of Two Together when it Matters' 2002 T3AR 462, 463. In IV(c), I follow Van der Walt in arguing that a distinction should be drawn between 'social struggle' and 'politics'.

87 See Prince (note 77 above) para 109 (per Chaskalson CJ; Ackermann & Kriegler JJ): 'The question before us...is not whether we agree with the law prohibiting the possession and use of cannabis. Our views in that regard are irrelevant. The only question is whether the law is inconsistent with the Constitution'. Similar statements can be found in Makwanyane (note 70 above) paras 207 (per Kriegler J); 266 (per Mahomed J) and 349 (per Sachs J) regarding the constitutionality of the death penalty. For criticism of statements of the same kind in other recent cases, see K van Marle 'Revisiting the Politics of Post-Apartheid Constitutional Interpretation' (2003) T3AR 549, 552-53.


89 Bato Star (note 2 above) para 48. It is interesting to compare the difference in approach by the court in regard to deprivation of property (see First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) para 100) and the grant of 'property' (in the form of fishing rights) in the instant case (see R Cloete 'Die Grondwetlike Erkenning en Beskerming van Welvaartsregte: 'New Property', Socio-ekonomiese Rege en Ander Onstoflike Deelnemingsregte' (2003) 66 THRHR 531, 543-44). Those who already have, appear to stand a greater chance of convincing the court to intervene on their behalf when their rights are interfered with compared to those who do not have and seek the assistance of the court in obtaining certain rights.

90 The grounds of review alleged by the applicant to be present that were categorised under lawfulness included the following provisions of PAJA: s 6(2)(b) (a mandatory or material procedure or condition prescribed, not having been complied with), s 6(2)(d) (action materially influenced by an error of law), s 6(2)(e)(ii) (irrelevant considerations having been taken into account and relevant considerations ignored), s 6(2)(f)(i) (law having been contravened or action being unauthorised) and s 6(2)(f)(ii)(bb) (action not being rationally connected to the purpose of the empowering provision).

91 Bato Star (note 2 above) paras 35; 40. See also paras 104; 111 (per Ngcobo J).

92 It is assumed by the Court that a standard of correctness is applicable in evaluating the presence of basically all the grounds of review categorised under lawfulness.
and discretion)\textsuperscript{93} is of course one which courts regularly employ, especially in relation to the substantive grounds of review, in order to legitimate their interference or non-interference with decisions of the executive/administration.\textsuperscript{94} The distinctions are notoriously difficult to draw and are easily subject to manipulation.\textsuperscript{95} In this case for example, the interpretation of the relevant provisions of the Act, specifically the phrases ‘have regard to’ in s 2 and ‘have particular regard to’ in s 18(5), was regarded as a question of law to be determined by the Court with reference to the broader constitutional context (thereby stretching the ‘ordinary meaning’ of these words).\textsuperscript{96} This meant that the Court found itself capable of proclaiming the importance that ‘transformation’ should play in the taking of decisions in terms of the Act. The meaning of ‘transformation’ was also determined by the Court, but in such a way that it left ample room for policy/discretion. The Court held that the way in which ‘restructuring’ or ‘transformation’ was to be effected was a matter that is to a significant extent left to the discretion of the decision-maker,\textsuperscript{97} and as ultimately one of policy.\textsuperscript{98}

Comparing the judgment of the Constitutional Court with that of the High Court shows that the interpretation that is given to a statute can determine the scope that is left for policy or discretion. In other words, the meaning that was given to ‘transformation’ or ‘restructuring’, determined the scope given to the decision-maker in the implementation thereof. The interpretation that the High Court gave to the Act consequently also had important implications for its finding on reasonableness (rationality). The High Court found that –

\textsuperscript{93} Other terminology and techniques employed by the courts are drawing a distinction between legality and merits, review and appeal, between jurisdictional and non-jurisdictional questions, or to classify administrative functions, as indicated above.

\textsuperscript{94} See P Cane \textit{Responsibility in Law and Morality} (2002) 255, 269. See also the quotation with approval by Ackermann J in \textit{First National Bank} (note 89 above) para 96 of the dictum of the Court of Appeal in \textit{R v Ministry of Defence, Ex Parte Smith and other appeals} [1996] 1 All ER 257 (CA) 264g-j: ‘The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court must necessarily be in holding a decision to be irrational. That is good law and, like most good law, common sense’.

\textsuperscript{95} See P Cane \textit{An Introduction to Administrative Law} (3 ed 1996) 111-19.

\textsuperscript{96} Compare in this regard \textit{Minister of Environmental Affairs} (note 7 above) para 29 with \textit{Bato Star} (note 2 above) paras 87-99. The correctness standard employed by the Court in relation to review for ‘lawfulness’ (specifically insofar as questions of statutory interpretation are concerned) appears to derive from the court’s understanding of the rule of law. In accordance with this understanding, it is the role of the court to strictly scrutinise all exercises of power, ensuring that they remain within the limits set for them either by the Constitution or by Parliament; see O’Regan (note 58 above) 434.

\textsuperscript{97} \textit{Bato Star} (note 2 above) para 35 (per O’Regan J).

\textsuperscript{98} See ibid para 104 (per Ngcobo J).

\textsuperscript{99} According to the \textit{Oxford English Dictionary} the ‘chief living sense’ of the word ‘policy’ is interestingly enough ‘[a] course of action adopted and pursued by a government, party, ruler, statesman, etc.; any course of action adopted as advantageous or expedient’. 
the intention of the legislature with the promulgation of the Act was to herald a new era in the fishing industry. In the legislature’s wisdom from the time the Act came into operation all the commercial fishing rights vested in the state and were henceforth to be leased out. There was no right holder for purposes of considering new applications.\(^{100}\)

There was therefore no reason why one needed to start with the 2001 allocation (as the Department had done) in determining the allocation for 2002-2005 or for allowing no new entrants into this sector.\(^{101}\) The Court believed that having regard to the ‘mischief’ which the Act was aimed at remedying, specifically the objectives and principles set out in s 2, gave one an added insight into the meaning of the Act. In terms of the legislation that existed prior to the new constitutional dispensation, racially based legislation preserved the resources at stake in this case to a specific racial group. These resources were ‘owned’ by the major players in the industry and defended jealously, as indicated above. According to the Court, this was meant to change with the coming into effect of the Act: \(^{102}\)

The legislation empowers and enjoins the government respondents to restructure the fishing industry to address historical imbalance. It does not call for piecemeal restructuring [as the government respondents seem to suggest. The historical imbalances are the mischief sought to be remedied.\(^{103}\)

This interpretation of the Act clearly had an impact on the scope left for policy considerations. The Court was of the view that the Chief Director, in making the allocation, was so preoccupied with this history of ownership that he was not able to properly apply the Act (which effectively repealed these rights).\(^{104}\) The Court was, in other words, of the view that the Chief Director had not complied with the requirements of the Act. The Chief Director had instead preserved the status quo which prevailed under the previous Act.\(^{105}\) Using the 2001 allocation as a starting point for the 2002-2005 allocation was thus at best ‘arbitrary’.\(^{106}\)

The primary purpose of the Act being ‘to build a fishing industry that [insofar as] its ownership and management [is concerned], broadly reflects the demographics of South Africa today’,\(^{107}\) the allocation could also not be said to be rationally connected to the purpose for which the power was granted.\(^{108}\)

The approach of the Constitutional Court is closely related to the legal

\(^{100}\) Phambili Fisheries (note 5 above) para 139.
\(^{101}\) See ibid paras 143-44.
\(^{102}\) Ibid para 143.
\(^{103}\) Ibid para 144.
\(^{104}\) Ibid para 143.
\(^{105}\) Ibid para 144.
\(^{106}\) Ibid para 145.
\(^{107}\) Ibid para 144.
\(^{108}\) Ibid para 145.
process school of thought. The three different facets of the legal process approach to legal reasoning (institutional competence, reasoned elaboration and majoritarianism) can clearly be seen in Bato Star. In accordance with this approach the ‘neutral’ question of institutional competence is to be used to determine the outcome of legal disputes. The branch of government which is the most competent to provide an answer to the specific question in other words allocated the power to do so and the other branches may not interfere with such decision-making, apart from in exceptional cases. Legislatures consequently are allocated the function of deciding questions of political preference; the executive or administration, questions of policy or which are polycentric in nature and which require a hands-on approach; and the courts, questions of law (rules, principles and process). The method of judicial analysis, as we saw above, nevertheless differs markedly from the approach under formalism: the context of the specific case is of importance in determining reasonableness and in interpreting statutes and the Constitution, context and purpose play a similarly important role. As Singer furthermore points out, the legal process school, similar to other major liberal theories such as rights theory and law and economics, attempts to -

create a new foundation for legal principles and decisions to replace the discredited foundations of formalism. They each attempt to recreate, to some extent, the idea of an objective standpoint that judges can use to adjudicate complex legal issues without taking sides in desperate social struggles.

The legal process school does this by means of the imposition of a ‘neutral decision procedure’ for adjudicating claims (based on institutional competence). We can now see the reason for the reference by O’Regan J to ‘recognised principles’, the principle of separation of

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109 According to Singer (note 65 above) 505, legal process theorists ‘have shifted attention away from substantive legal principles to the process by which legal institutions operate. They accept the legal realist theory that we cannot deduce specific rules from abstract principles. They admit that much of law is political in the sense that members of the polity disagree about substantive ends. In contrast to the formalists, they argue that legal rules can be justified if they are created through a legitimate set of procedures by legitimate institutions keeping within their proper roles’.

110 For example, in the case of irrationality or bad faith; see Kaunda (note 83 above) paras 78-80. An ‘exception’ is sometimes permitted with regard to ‘insular minorities’, who can rely on the protection of the court, in spite of the ‘political’ nature of the issue in these instances (see Singer (note 65 above) 507-08 on ‘majoritarianism’). Compare in this regard the successful challenge of gays to legislation discriminating on the grounds of sexual orientation (National Coalition (note 77 above)), with the unsuccessful challenge to legislation infringing on the right to religion of an adherent to the Rastafari religion (Prince (note 77 above)) and the unsuccessful challenge to legislation making provision for the prosecution of women engaged in prostitution (S v Jordan 2002 (6) SA 642 (CC)).

111 See Singer (note 65 above) 505-07 on ‘institutional competence’.

112 See Singer (ibid) 507 on ‘reasoned elaboration’.

113 Ibid 516.

114 Bato Star (note 2 above) para 47.
powers\textsuperscript{115} and the rule of law.\textsuperscript{116} This terminology is used to refer to that which provides an ‘impartial’ basis for the adjudication of seemingly incompatible values.\textsuperscript{117} But the notion of institutional competence is controversial and not in the least neutral or objective.\textsuperscript{118} This approach also assumes that it is possible (and easier) to reach consensus on \textit{means}, even though consensus on \textit{ends} is not always possible.\textsuperscript{119} As Singer rightly argues (and as \textit{Bato Star} illustrates), there is no reason to believe that \textit{means} is any less controversial than the ends that are pursued.\textsuperscript{120}

\textit{(ii) Shared values}

The ‘problem’ with review proceedings, which has been identified by Hoexter, is a real one. There is, however, also another problem, which is often obscured in review proceedings: the subject-matter of the dispute. The traditional model was clearly based on the liberal view that the role of the court is the protection of individual autonomy against the abuse of state power.\textsuperscript{121} Interference with rights was legitimate only when it was authorised by the legislature and then certain procedures had to be followed (the rules of natural justice). The classification of functions, the distinction between appeal and review and between jurisdictional and non-jurisdictional errors thus also played another role: laying down ‘neutral’ criteria by means of which the tension between state powers (referring here to both the powers of the administration and of the court) and individual freedom of action can be resolved. The traditional model, as has often been pointed out, presents a one-dimensional view of the role of administrative bodies, failing to recognise the ‘positive’ role that is required from them.\textsuperscript{122} The contextual approach is a clear response to this perceived shortcoming of the traditional approach. The ‘control’ that the Court exercises with regard to the performance of the functions of administrative bodies, must take account of both the interfering and the beneficial functions performed by the administration and therefore needs to be more flexible.\textsuperscript{123} \textit{Bato Star} however illustrates that the recognition of the positive role the state has to play does not necessarily lead to an acknowledgement of the active role the Court plays in determining the outcome of the dispute in relation to the subject-matter at hand. This

\textsuperscript{115} Ibid para 46.
\textsuperscript{116} See O’Regan (note 58 above) 434.
\textsuperscript{117} See Singer (note 65 above) 536.
\textsuperscript{118} See also Singer (ibid) 518.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
\textsuperscript{121} Hoexter (note 59 above) 69-70; 73; O’Regan (note 58 above) 427; RB Stewart ‘The Reformation of American Administrative Law’ (1975) 88 \textit{Harvard LR} 1667, 1682.
\textsuperscript{122} See also O’Regan (note 58 above) 433; HW MacLauchlan ‘Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada’ (2001) 80 \textit{Canadian Bar Rev} 281, 297.
\textsuperscript{123} See O’Regan (note 58 above) 435-36.
tends to be the case even more so in relation to the ‘positive’ functions to be performed by the administration. These can easily be perceived as non-controversial and non-‘political’, to be performed by ‘experts’ in the field and with regard to which the control function of the Court consequently has to be minimised.

Insofar as it falls within the functions of the Court to control the actions of the administration, such control is exercised in the name of ‘constitutional values’. In accordance with this view, the foundation for the review of administrative action is to be found in the principles of the Constitution.124 These ‘uncontroversial shared values’125 are derived from s 1 of the Constitution and include the principles of the rule of law (requiring lawfulness) and that of rationality (or, as expressed in PAJA, reasonableness).126 In this respect there is a clear overlap with the rights theory school of thought.127 This can be seen both in respect of the approach to questions of statutory interpretation and the question of reasonableness. Whereas meaning was previously said to inhere in the legislature as expressed in the language of the statute, it is now said to inhere in the context. This entails that the statute in question also has to be interpreted in accordance with the values of the Constitution.128 The Court has in other words largely abandoned the traditional literal-intentional approach and opted for a broad contextual approach (often infused with pragmatism). A contextual approach with

124 Ibid 431; 433.
125 Singer (note 65 above) 516-17.
126 O’Regan (note 58 above) 434-35.
127 The essential feature of this school of thought is its employment of rational consensus as a way of resolving disputes; see Singer (note 65 above) 508-513. Dyzenhaus (the source whence O’Regan derives the notion of deference as respect; see Dyzenhaus (note 45 above) 279; 286; 302-07) can similarly be said to ‘belong’ to both the ‘rights theory’ and the ‘legal process’ schools. Dyzenhaus proposes an approach of ‘deference as respect’ which prescribes a presumptive approach of deference regarding actions of the administration. The notion of deference as respect ties in with the theory of Dworkin: judges are required to make of the decisions of an administrative body ‘the best they can be’. Ultimately, however, the decision has to be ‘reasonably justifiable’ (to be determined with reference to the notion of substantive equality). These notions are clearly based on the presumed existence of consensual practices and beliefs of the particular community. The problem with the notion of ‘reasonable justification’ (and of substantive equality) is that, except on this high level of abstraction (with people agreeing that these are worthwhile concepts to use in administrative law), no consensus exists as to what reasonable justification (or substantive equality) entails (as Bato Star illustrates). As Singer (note 65 above) 517 points out, these abstract notions are ambiguous and can generate conflicting outcomes. They are therefore of no use in serving as ‘neutral principles’ to determine disputes between parties. Their indeterminate nature makes them vulnerable to being used in the interests of some and to the exclusion of others. In the words of Singer (ibid) 520: ‘The idea that one can deduce answers to controversial questions from noncontroversial, widely-shared premises, smacks of formalism. It assumes that people can be forced, as a matter of logic, to reject conclusions they intuitively accept’. The notion of reasonable justification will always have the effect of excluding certain contentions, either for being unreasonable (as in the SCA) or (as in the Constitutional Court) for being wrong in that a specific decision is not unreasonable (as was contended). As used by O’Regan J in Bato Star, the concept of reasonableness is problematic for the same reasons.
128 Bato Star (note 2 above) paras 34 (per O’Regan J); 72-7; 91 (per Ngcobo J).
regard to issues of statutory and constitutional interpretation deviates from the belief that meaning inheres in the statutory text or in the intention of the legislature. The contextual approach of the Court however entails a similar belief in the presence of meaning: context is now believed to determine meaning. The structural inability of either text or context to bring about stability of meaning has been commented on and illustrated before. It should suffice to say here that the context itself is in principle without limitation. Interpretation with reference to the context thus inevitably involves the drawing of boundaries and deciding what will be included and what will be excluded, as well as the weight to be attached to different parts of the context. The ‘political’ nature of this ‘fixing’ of context can hardly be denied.

To decide on the reasonableness of the action, a judge, in accordance with the approach adopted by O’Regan J, similarly has to measure the action against ‘common sense’ notions of reasonableness. As we saw above, this is now to be done in accordance with an approach which allows for the consideration of a number of factors and which may call for ‘respect’. Although the contextual approach seems to demand more candour from a judge in explaining why a decision is (un)reasonable, such openness is absent in O’Regan J’s judgment. Reasonableness as a requirement (with ‘moral and social overtones’) is presented as neutral with regard to value choices, whilst in fact as constructed and applied it clearly favours the dominant interests in the fishing industry (and thereby the status quo). This approach shows no recognition of the contested...

129 For criticism, see generally G Peller ‘The Metaphysics of American Law’ (1985) 73 California LR 1151, 1160-75, and specifically with regard to context 1172-73.
130 See De Ville (note 55 above) 13-14.
131 See, for example, De Vos (note 55 above) 1.
133 See RJCoombe ‘Same as it Ever Was’: Rethinking the Politics of Legal Interpretation (1989) 34 McGill LJ 644: “Context” is not a self-present source for meaning, but the derivative effect of representational practices in which some elements of social life are said to constitute context to the exclusion of others.
135 It may be argued that O’Regan J’s determination of the reasonableness of the decision is directly related to her interpretation of the Act and the Constitution as allowing for slow transformation. The same criticism expressed here regarding her analysis of reasonableness is however applicable to her interpretation of the Act and the Constitution.
136 See in this regard Baxter (note 64 above) 483: ‘What is “reasonable” is a question which contains moral and social overtones: reasonableness is a social concept which relies on an appeal to reasons accepted or recognized by others’.
137 See similarly the comments of Singer (note 79 above) on complacent pragmatism. See JD Caputo Radical Hermeneutics: Repetition, Deconstruction and the Hermeneutic Project (1987) 229 who points out that ‘reason is always embedded in systems of power. To a great extent what “reason” means is a function of the system of power which is currently in place, and what is irrational is what is out of power. Indeed, it is of the essence of the power which institutionalized reason exerts that it is able to define what is out of power as “irrational”.’
nature of reasonableness or of the effects of the current orthodoxy on evaluations of what is regarded as reasonable and what as unreasonable. What remains unexplored is the insightful statement of Ngcobo J (which O’Regan J concurs in) that the fear of instability, which is usually raised in the context of transformation (and uncritically accepted by Schutz JA), has clear racist overtones. If this fear was (and is) the basis of slow transformation and if this fear is without foundation, does this not raise serious questions about the reasonableness of the allocation decision? The approach of deference regarding the issues that could not be resolved by the Court on a correctness standard (issues of policy and discretion) of course had the policy effect of leaving the transformation of the fishing industry to the market and of leaving the existing inequalities in respect of the distribution of wealth in place. The seemingly neutral distinction between policy and law and the refusal to engage with policy issues thus had very real policy effects. In spite of pretending not to choose sides in the policy issues involved, the Court actively chooses in favour of the current distribution of economic power. From the discussion that follows it should also become clear that basing the outcome of the case on the vocabulary of neutral procedures and consensual values, judicial review as practised by the Constitutional Court aims at legitimising and thereby concealing the violent nature of the political-legal order (including of judicial review). It will also be argued that this approach amounts to a denial of the reality of sacrifice as an inevitable consequence of such an order. It will be contended that administrative justice as well as politics, plurality,

also A Barron ‘Ronald Dworkin and the Challenge of Postmodernism’ in A Hunt (ed) Reading Dworkin Critically (1992) 141 (referring to the fact that rationality is always produced by means of exclusion and marginalisation); C Farina ‘Administrative Law as Regulation: The Paradox of Attempting to Control and to Inspire the Use of Public Power’ (forthcoming) 3 (‘judges are accustomed to assessing ‘reasonableness’ in terms of existing practice ie the status quo’).


139 Bato Star (note 2 above) paras 105-07.

140 As O’Regan J held, the fact that a goal is identified in legislation without dictating the route that should be followed means that the route selected should be respected by the court. Nevertheless ‘where the decision is one which . . . [is] not reasonable in the light of the reasons given for it’ a court may review such a decision. Ibid para 48.

141 Bato Star (note 2 above) paras 53-4.

142 See ibid para 78 n55 (per Ngcobo J).

143 See Singer (note 65 above) 528-29. For an excellent analysis of the socio-economic jurisprudence of the Constitutional Court and for criticism along the same lines as presented here, see Brand (note 88 above) 55.
democracy and friendship (all differently conceived than is traditionally the case) are made completely impossible in terms of such an approach.

(c) The economics involved in a contextual approach

As should be clear by now and as was stated in the introduction, this article is not an attempt to criticise the decision of the Court in Bato Star from a ‘political’ perspective (as traditionally understood), by arguing that the Court should rather have adopted a more radical view of transformation. Such an approach would reduce law to a political instrument. It would furthermore make critique impossible, because any such legal critique could simply be countered by expressing an opposing ‘political’ view. The CLS notion of ‘law as politics’, Van der Walt argues, should be understood differently if law is not simply to become an instrument of preferred political views (and therefore simply of economics). Van der Walt argues that we should come to an understanding of law with reference to a (radicalised) understanding of the conceptions of Hannah Arendt (and Carl Schmitt) of ‘politics’. Arendt held the view that ‘plurality is specifically the condition – not only the conditio sine qua non, but the conditio per quam – of all political life’. Van der Walt argues that law (as political in this sense) should be understood as fundamentally concerned with the conditions for plurality. Politics, Vander Walt furthermore argues, comes to the fore whenever there is a serious issue to be decided between more than one and there is disagreement on how such issue is to be decided – a crisis that divides a

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144 The notion of friendship is usually understood as something which is possible, which exists between people (usually between ‘brothers’). Derrida argues for an understanding of friendship as something which does not exist as a presence: ‘O my friends, there is no friend’, Aristotle is reported to have said, repeats Derrida. Even the ‘love’ for our ‘friends’ is ultimately self-serving. We tend to be ‘friends’ with those who are ‘like us’, not with those who are other than us; thereby in effect loving ourselves. Derrida argues that we should rather understand friendship (as well as politics, plurality, democracy and justice) as ‘never given in the present; it belongs to the experience of waiting, of promise, or of commitment’ (Derrida (note 17 above) 636). As Derrida asks rhetorically (ibid 635): ‘How could I give you my friendship where friendship would not be lacking, that is, if it already existed more precisely, if the friend were not lacking?’

145 See Van der Walt (note 86 above) 463-64.

146 Ibid 464. See also J van der Walt ‘Law: The Sacrificial Tension between Justice and Economics’ (unpublished) 1. Van der Walt makes a move which is similar to, but at the same time very different from, that of Frank Michelman (F Michelman ‘Bringing the law to life: A Plea for Disenchantment’ (1989) 30 Cornell LR 256) who seeks to draw a distinction between pluralist politics and a dialogical conception of politics. Whereas Michelman sees the latter as a possibility, Van der Walt views dialogical politics as ultimately impossible. For criticism of these views of Michelman, see A Boshoff ‘Law as Dialogical Politics’ in Botha et al (eds) (note 88 above) 1.

147 Van der Walt (note 138 above) 123 criticises Arendt for having accepted the possibility of the-more-than-one too easily.

148 Van der Walt (note 86 above) 467, referring to C Schmitt Der Begriff des Politischen (1963) 39 (see C Schmitt The Concept of the Political (1976) 26).
community. He argues for a conception of politics or the political as ‘the mutual encounter with otherness which “reciprocally” … brings together mutually finite beings’ and as ‘a momentary suspension of violence’.  

In the administrative-law context, ‘politics’ (thus understood) comes to the fore whenever a dispute arises as to the validity of administrative action, ie when judicial review proceedings are instituted.

Politics (understood in the above way) is to be distinguished from economics (or the logic of self-preservation). Politics, however, always risks being replaced by economics. As Van der Walt points out with reference to Levinas, ‘social or interpersonal relationships cannot escape from a dialectic and economic reduction of the otherness of others to the needs of the self’. The position is the same in respect of law:

Every legal decision, be it legislative, executive or judicial, ultimately sacrifices one liberty or one right in favour of another on the basis of economic considerations.

The logic of self-preservation (that is, a restricted economy as opposed to a general economy which would entail complete selflessness) always ultimately asserts itself whenever such a situation (the moment of crisis) presents itself. This is based on the Nietzschean insight that it is in order to survive that we violently arrest the play of signification (through utilitarian interpretations) and impose order by means of structures or systems on social relations. There is in other words always an economic (self-interested) reduction taking place through the enactment of laws and the making of legal decisions. Van der Walt argues that something more is required of a court which has a concern with (administrative) justice than a simple choice in favour of the one or the other. 

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149 See Van der Walt Twilight of Legal Subjectivity (note 65 above) 327; 328.
150 J van der Walt ‘The Quest for the Impossible, the Beginning of Politics: A Reply to Dennis Davis’ (2001) 118 SALJ 463, 469.
151 Van der Walt (note 147 above) 4. See also Van der Walt (note 146 above) 119 stating with reference to Jean-Luc Nancy that “we cannot yet come together without threatening and indeed destroying the separateness, otherness and singularity of both the other and the self”.
152 Van der Walt (note 146 above) 13.
153 See Van der Walt Twilight of Legal Subjectivity (note 65 above) 288-90.
154 The consequences of invoking the principle of separation of powers and accepting the present political-economic order are clear from the decision in Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC). The Court is prepared to let someone (and many others) die for the sake of maintaining the distinction between law and policy and keeping intact the present political-economic order. The economy of self-preservation (of the Court and of society as presently constituted) is in other words given priority over the life and dignity of others. (Van der Walt (note 86 above) 469). The priority given to human life and existence over the life of non-humans (in this case, fish) also clearly appears from the judgment; see J Derrida The Gift of Death (1995) 69, 71.
156 Van der Walt (note 134 above) 73.
other ‘political’ view, expressed in objective, legal, economical language.157 The exercise of a choice, also from a left political perspective, would still amount to an economics: it would still amount to a calculation of whether something – affirmative action, immigration, transformation, etc – is affordable.

The concept of ‘administrative action’ in s 24 of the 1993 Constitution158 and s 33 of the 1996 Constitution and the definition of ‘administrative action’ in s 1 of PAJA has led to a great deal of analysis and criticism. Let us inquire into the notion of administrative action from another angle – that of plurality (as elaborated on above). Administrative action derives primarily from statutes. Statutes are enacted by parliament, supposedly representing the will of the people and therefore supposedly legitimating the enactment of laws which lead to the suppression of dissenting voices.159 Administrative action, executing the will of the majority, follows close on the footsteps of statutes, as we can see in Bato Star. Like statutes, the taking of administrative action leads to the suppression of dissenting voices. In the words of s 1 of PAJA (however it is to be interpreted),160 such action ‘adversely affects the rights’ of the applicant (and of a few others). In other words, by means of administrative action, fishermen and women and fishing companies are allocated fishing rights, sometimes in accordance with what was asked for, but most often not. What does the applicant do? It could have acquiesced in the decision of the Chief Director, like some did (even though they may not have been satisfied with the allocation). The applicant, ‘instead of reducing [its] dissent to silent tolerance of the ‘one and only’ will of the majority’,161 challenges the propriety of the action. By challenging such action, action presumed to be authorised by the will of the majority, the applicant re-introduces plurality, it ‘forces the reconsideration of another voice, [it] forces the interim dissolution of unity, the interim dissolution of the one and only will of the people’.162

The above analysis provides a different perspective on the decision in Bato Star. The judgment, viewed thus, can be said to amount to little more than a formalistic justification for an unjustified163 reduction of plurality in the interests of self-preservation. As seen above, administrative law (as brought about through precedent laid down in judicial review proceedings) typically performs this self-preservation by drawing a number of ‘obvious’ or ‘clear-cut’ distinctions so as to demarcate the role

157 Van der Walt (note 86 above) 464.
160 See De Ville (note 10 above); Hoexter (note 59 above); I Currie & J Klaaren The Promotion of Administrative Action Benchbook (2001) 34-82.
161 Van der Walt (note 159 above) 544.
162 Ibid.
163 See in this regard Van der Walt & Botha (note 138 above) 352.
of the court from that of the executive/administration. In *Bato Star* we see this (as a reaction to the decision in the High Court) in the distinctions drawn between law and policy and between appeal and review. In addition, O'Regan J prescribes a list of factors to be taken account of in determining the standard of review for reasonableness. This latter approach, although innovative, nevertheless presents the role-demarcation dilemma as a purely legal, technical, value-neutral one which can be solved more or less mechanically by taking account of a number of factors. The Court attempts to show that it has a unique (and clearly demarcated) role in scrutinising actions of the executive/administration. This has the further aim of legitimating the review role of the court and ultimately that of the present political-economic-legal order. In *Bato Star* we see a Court that is clearly concerned with its own self-preservation as well as that of the political-economic-legal order brought about by the compromises reached before (and since) the first democratic elections. Although of the view that the process of transformation in the hake industry had been slow, it interpreted the Act to simply require transformation (in any format) which made it possible not to invalidate the allocation decision (it falling within the realms of policy), but rather to give its implicit backing to the more radical restructuring of the industry in future allocations. The judgment has the aim of giving legitimacy to the idea (and the political settlement reached) that transformation may be brought about through a slow process; that South African society has to go through a process of change, but that this is to be done in such a way that the sacrifices required in the process are kept as minimal as possible. The message is clear: One may approach the Court to review a decision of the administration, but need not waste one’s time by asking of the Court to do that which may place its own survival (related to the rule of law) at risk or that of the carefully negotiated political-economic compromise (as perceived by the Court).

The approach of the Court in dealing with a challenge to the validity of

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166 See S Terblanche *A History of Inequality in South Africa* 1652-2002 (2002) 95-108; De Vos (note 55 above) 12-6. By contrast, the High Court was seemingly less concerned than the Constitutional Court with its own long-term survival or that of the political-economic compromise and consequently believed that the Act required an immediate restructuring of the industry.

167 See *Bato Star* (note 2 above) para 106.

168 See De Vos (note 55 above) 12-6 for discussion.
administrative action (specifically where the challenge is dismissed) is that the challenge does not entail –

an interaction or contestation between a fundamental plurality of voices. At issue is at most a temporary, erroneous and therefore factional, and therefore ultimately insignificant, divergence from the norms we hold in common. There is no real otherness and no real plurality at issue here. Otherness is reduced to the mistaken other, the other who would realize that we all think the same if he would just come to think clearly. In terms of this view, plurality is the function of a temporary error.169

(d) The sacrifice involved in a contextual approach

From the discussion above, it appears that the way in which courts justify their decisions in judicial review proceedings entails the construction of a ‘we’, to be distinguished from the ‘them’. This construction of a political community through acts of subjectivist political interpretation means the construction of a frontier, defining an ‘enemy’.170 Another way in which one can describe this process of exclusion is through the language of sacrifice (as was intimated above). Johan van der Walt has in a series of articles pointed to the inevitability of the unjust sacrifice of one party’s interests in every judicial (as well as legislative and administrative) decision. As opposed to Kant,171 (who believed in law’s ability to reconcile divergent interests) Van der Walt argues that law is –

fundamentally a matter of destroying plurality. Law does not reconcile or resolve conflicting interests. It always sacrifices one interest in favour of another in the pursuit of a social goal in a way that can be expected to maintain good order and peace.172

This is of course also true of a contextual approach like the one adopted in Bato Star with respect to unreasonableness. This is not necessarily easy to see when one reads the judgment of O’Regan J. Applying the rule (in the form of contextual considerations to determine the reasonableness of a decision) to the facts of the case appears to entail a purely logical process. Van der Walt, following Derrida and Giorgio Agamben, argues that one should not view this passage as a purely logical one; not if one is really concerned with doing justice to the uniqueness and singularity of

169 Van der Walt (note 159 above) 545.
171 J van der Walt ‘Law as Sacrifice’ (2001) TSAR 710 translates the passage in Kant VII Metaphysik der Sitten in Werke in 10 Bänden (Weischedel ed 1983) 337 as follows: ‘The law is the general system of rules on the basis of which the external liberty of one individual could be reconciled with the external liberty of other individuals’.
172 Van der Walt (note 171 above) 710-11. See also Singer (note 65 above) 536-38, arguing against the use of principles in the resolution of disputes as this is a way of making things too easy, of denying the fact that wrong inevitably has to be done in deciding a case.
the particular case. The passage from law to its application is a complex practical activity similar to the passage from langue to parole. In the latter case it is one or more speaking subjects who undertake this activity (the translation of semiotics into a variety of sentences). In a case of judicial review a plurality of subjects are also involved, making their respective claims as to how the case should be decided. However, it differs from the linguistic utterance because of the intervention of institutional power. Through the actions of a court, the different claims are reduced to a single sentence (the law). What the Court in other words has to do when deciding a case involving a plurality of claims, is to reduce the conflicting and irreconcilable claims to a singular sentence or a singular application of the law (or singular sentences where more than one legal rule is to be applied to different aspects of the case). The ‘crisis’ involved should be clear from the above discussion relating to lawfulness and reasonableness in Bato Star. In every serious case to be decided there is a plurality of (legitimate) convictions involved which need to be reduced to one. In the words of Stewart,

the exercise of agency discretion is . . . the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy.

The judgment of the Court in review proceedings (as Bato Star clearly illustrates) inevitably involves (in the same way as the actions of the administration) the negation (or sacrifice) of one of these interests. Administrative law as it is judged to be in a specific case cannot grant both claims, only one.

With reference to Bato Star, one can further say that the Court, through an application of the doctrine of separation of powers, allocates the decision as to whether certain interests may be sacrificed for the good

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173 J van der Walt 'Towards a Phenomenology of Legal Plurality' (unpublished) 2.
175 Ibid 7.
176 Ibid 5. See also R Cover ‘Nomos and Narrative’ in M Minow et al (eds) Narrative, Violence, and the Law: The Essays of Robert Cover (1992) 95, 139 (also 155), describing the judicial office as ‘characteristically “jurispathic”’: “It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution”. I am indebted to Brand (note 88 above) 52 for this reference.
177 Stewart (note 121 above) 1683. It is of course not always the case that administrative action involves the competing claims of private interests. As explained in IV(b)(ii) above, the conflict is often between a single private interest and the public interest (as in immigration cases). The conflict between a private and the public interest can be said to be (almost) always present in judicial review proceedings, the exception being where two state organs are in dispute where it can usually be said to only be about the public interest (but conflicting versions thereof).
178 The position is the same if the conflict is between a private interest and the public interest. A private interest cannot be upheld without the sacrifice of some other (interest); see Derrida (note 154 above) 69 on the pervasiveness of sacrifice.
179 Van der Walt (note 173 above) 7.
of society to itself (where the issue is one of law) and allocates (at least the major aspects of) the decision regarding the sacrifice of other interests to the public authority (where the issue is one of policy). As a result of the findings of the court on review, the freedom of the applicant to catch as much hake as it is able to (and to employ fishermen and women accordingly), is sacrificed in the interests of the public (by imposing a TAC) and in the interests of other companies competing with the applicant for a quota (by limiting the applicant’s allocation). The Department therefore sacrificed the interests of the applicant in the public interest as well as in the interests of ‘stability’ in the hake industry; and the Court sacrifices the interests of the applicant in the interests of maintaining a proper relationship vis-à-vis the executive.

According to Van der Walt, an attempt must be made to register the unjust sacrificial nature of a judicial decision in legal language. This involves also the recognition of plurality, the reality of irreconcilable interests and of ‘animosity’. The claim of a party to a dispute must not be dismissed as being illegitimate. An acknowledgement of such (unjust) sacrifice, he argues, will play an important role in making a judge (or a plurality of judges) acknowledge and deal with the gravity of the matter and to not simply dismiss otherness. The judgment of the SCA does not contain such an acknowledgement and the judgment of the Constitutional Court does so only partly. As pointed out above, Schutz JA dismisses the arguments for the applicants who questioned the use of the 2001 allocation as starting point, holding that these arguments (in favour of more radical restructuring of the industry) were completely unreasonable. O’Regan J, on the other hand, refrains from expressing a view as to the reasonableness of the contention of the applicant, restricting herself to commenting on the reasonableness of the decision of the Chief Director. O’Regan J does acknowledge the scarcity of the ‘resource’ and that this factor inevitably makes it more difficult for the Department to effect a more equitable distribution of fishing rights.

The contextual approach adopted in respect of statutory interpretation and reasonableness also goes some way towards embracing the ‘politics’ spoken of earlier. It potentially opens the door for candour on the part of the court as well as to a continuous debate on the proper role of the court vis-à-vis the executive/administration. It is nevertheless characterised by too much certainty and too many rigid distinctions that cannot be

180 In administrative law, one effect of the recognition and application of grounds of review is to create a protected space within which a public authority is free to make what it considers to be the best decision in the public interest (the aggregate good of society); see Cane (note 94 above) 270; 276.
181 As J van der Walt ‘Sovereignty and Sacrifice’ (unpublished) 6 notes with reference to Derrida, ‘[w]e sacrifice in order not to be sacrificed’.
182 Van der Walt (note 171 above) 711.
183 Minister of Environmental Affairs (note 7 above) para 42.
184 Bato Star (note 2 above) para 6.
maintained on closer analyses. There is also an absence in O’Regan J’s judgment (as well as in that of Ngcobo J) of an acknowledgement of the reality of sacrifice on the part of the applicant itself in this matter. Ngcobo J remarks on the fact that transformation inevitably means that previously advantaged communities would have to sacrifice certain privileges. However, he does not acknowledge the reality of sacrifice required from the applicant in this case (for the sake of the self-preservation of the Court; and because of the belief of the Department that stability weighed heavier than transformation). The applicant is impliedly told that the claim was brought mistakenly. Had the applicant known better, it would not have brought the application for review. The judgment is thus an attempt to show to the ‘unenlightened’ applicant why the denial of its claim is just. In Bato Star, this entailed explaining to the applicant that its interpretation of the Act as well as its understanding as to how it was to be applied by the administration are mistaken (when contrasted with the ‘correct’ interpretation which the Court espouses and its explanation as to the freedom the administration has in implementing its policies). Furthermore, the decision of the administration is not unreasonable as the applicant believes (or as Schutz JA has it, the applicant itself is being unreasonable). The Court explains to the ill-informed applicant that there is a difference between appeal and review. Van der Walt argues that such an approach amounts to banishment or to expulsion, a ‘disregard for the other’, to a ‘destruction of the relation between the self and an other’, a ‘destruction of the coming together of more than one’, a ‘destruction of plurality’ and as such to the ‘destruction of the very condition for politics’.

Van der Walt and Botha are of the view that in Soobramoney v Minister of Health, KwaZulu-Natal, the Constitutional Court adopted the approach they propose (in spite of dismissing the claim). At issue

185 See especially IV(b) above.
186 Bato Star (note 2 above) paras 76; 106.
187 It may be argued that the Constitutional Court sometimes uses the issue of costs to indicate that an application for review, although unsuccessful, was not a waste of the Court’s time; see Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC) paras 132-33.
188 For a different perspective on this distinction, see De Ville (note 10 above) 27-31.
189 Van der Walt (note 171 above) 711.
190 Van der Walt (note 150 above) 468-69.
191 Note 154 above.
192 Although the authors do not refer to this fact, the Court gave no order as to costs in this case, in spite of the applicant having lost the case; see ibid paras 36-7. I agree with the authors that there was a recognition in this case of the sacrifice that the applicant had to suffer at the hands of the administration in favour of the ‘the larger needs of society’ (Van der Walt & Botha (note 138 above) 357); there was, however, no acknowledgement of the sacrifice the applicant was required to suffer because the court was not prepared to subject the decision of the administration to a stricter standard of review (than rationality). See in this respect also Brand (note 88 above) 55 describing the decision of the Court in Soobramoney as ‘a decision not to decide’.
was a claim by a person suffering from chronic renal failure. The hospital in question said they could not give him access to a dialysis machine (which would prolong his life) as his condition was irreversible. Due to financial constraints the hospital could use the 20 available dialysis machines only for those who stood a chance of recovery. The applicant could not afford further treatment from private doctors and hospitals. The authors argue that the Court in this case explicitly acknowledged the need for sacrifice and the injustice thereof as well as the need to continually reconsider the necessity of its sacrificial practices.\textsuperscript{193} The \textit{Bato Star} case is clearly very different from that of \textit{Soobramoney}, as are the different forms of sacrifice that were required. Furthermore, as pointed out above, in the allocation of points, the applicant received a low score (4.9 out of a possible 10, being outscored by 72 of the 110 applicants, also with reference to the transformation criteria set out in the policy guidelines – it being outscored by 77 of the other applicants).\textsuperscript{194} Yet, because of the fact that the applicant was an existing rights holder, it did receive an allocation, an even higher one than in previous years. The sacrifice of other companies (those that were not existing rights holders) was therefore clearly greater than the sacrifice required of the applicant.\textsuperscript{195} However, this does not make the sacrifice of the applicant (because of the administrative decision as well as the decision of the Constitutional Court) any less real. By acknowledging the sacrifice for the sake of other interests which are contingently regarded as more important, the applicant (and others) would be ‘reintroduced’ into the society from which the court decision expelled it.\textsuperscript{196} In the words of Van der Walt:

\begin{quote}
It would have the effect of acknowledging the legitimate standing in society of the very expectations that society chooses not to tolerate. It would acknowledge the failure of society to accommodate these legitimate expectations and this acknowledgement would, paradoxically, constitute an oblique accommodation, an accommodation in the wake of and despite the failure to accommodate.\textsuperscript{197}
\end{quote}

\textbf{(e) Remaining concerns with a contextual approach}

It has been argued that the contextual approach of the court is based on the false assumption of ‘shared values’. It can instead be stated categorically that there is frequently no consensus in our society on what is reasonable or lawful (otherwise review proceedings would not

\begin{footnotes}
\footnotetext{193}{Van der Walt & Botha (note 138 above) 357.}
\footnotetext{194}{\textit{Bato Star} (note 2 above) para 13.}
\footnotetext{195}{Strategically, it was therefore perhaps not the best company to have brought an application for the review of the allocation.}
\footnotetext{196}{Van der Walt (note 171 above) 711.}
\footnotetext{197}{Ibid 711-12. See also J van der Walt ‘Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought’ in Botha et al (eds) (note 88 above) 213, 227-30.}
\end{footnotes}
have been instituted in *Bato Star*) and that it would constitute a denial of plurality to pretend that there is such consensus. There are in addition a number of other closely related concerns that should be raised in respect of a contextual approach.

In the first place, (and this is perhaps stating the obvious) it is important to take note of the fact that by regarding certain factors as relevant, others are excluded as being irrelevant in determining what is reasonable. Although the list of factors to be taken into account, provided by O’Regan J, is an open one, it will always have to be limited in a specific case. Seeing that context is in principle boundless, there is inevitably an economic reduction involved in the delimitation of context.\(^{198}\) In the discussion above, we saw the difference that a consideration of (and a great degree of weight given to) the historical background of the hake industry as well as the importance the Court attaches to transformation can have in coming to a conclusion as to the reasonableness of the action. This ‘criticism’ of a contextual approach in respect of reasonableness is not aimed at its abandonment. Rather, the realisation of exclusion and the violence that accompanies it, should encourage one (should one have a concern with administrative justice) to continually and carefully scrutinise these factors in order to determine their appropriate ‘application’ as well as relevance for the matter at hand, whilst the openness of the list of factors should be exploited by questioning the reason for the exclusion of other factors. Looking at the factors taken into account in *Bato Star*, it could for example be argued that the notion of ‘expertise’ is highly problematic. The judges in the High Court were of the view that the question to be decided was the ‘political’ one of distribution of resources, the ‘expertise’ of the officials involved having little relevance to this determination. The importance attached to expertise in the Constitutional Court can be said to show a perception of the function of the administration as professional (not political) and that public administration is an apolitical science (or has an objective basis).\(^{199}\) Questions can also be raised about the absence in the list of factors of the ‘social and ideological context’ in which the Court is operating.\(^{200}\) As was illustrated above, this factor can arguably be said to have played the most important role in the outcome of the case. It can also be argued that ‘the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected’ (identified as relevant factors by O’Regan J)\(^{201}\) do not appear to have played any significant role in the ultimate finding in relation to reasonableness.

198 See IV(b)-(c) above.
199 Stewart (note 121 above) 1678.
201 *Bato Star* (note 2 above) para 45.
A second concern is that the listing of factors to be taken account of in determining reasonableness can lead to a ‘scientific’ balancing of factors.\(^{202}\) As Botha points out, the concern with the balancing metaphor is that it –

\[\text{does more to obfuscate the moral and political reasoning behind a judge’s decision than to clarify it; that the rhetoric of balancing allows judges to persist in the fallacy that legal decisions can be ‘read off’ the relevant legal materials. It is argued that balancing, far from promoting dialogue about important moral and political issues and affirming judicial responsibility, tends to result in a new type of formalism, which is grounded in the scientific language of costs benefits analysis.\(^{203}\)}\]

‘Balancing’ has a further danger: it creates the impression that different and conflicting interests can actually be reconciled (without sacrifice).\(^{204}\) As was pointed out above, an approach to reasonableness inevitably leads to exclusion and, as will be discussed in more detail below, it inevitably leads to the economic sacrifice of certain interests for the sake of others that are more highly valued.

The third concern to be raised here is that an approach of contextualism (and the fact that the circumstances of every case will be determinative) can easily lead to an underestimation of the difficulty involved in closing the distance between the universal and the particular, in applying the law to the ‘case’. By providing that the circumstances of each case are to be determinative,\(^{205}\) contextualism in other words creates the dangerous illusion that administrative law’s other (the individual case) can find itself fully accounted for and does not pose a problem. This belief, combined with a value-based approach to review, can easily lead

\(^{202}\) O’Regan J, in setting out her approach to reasonableness (para 45) relies on the approach that the Court has adopted in respect of procedural fairness, an approach which, according to Chaskalson P in *Kyalami* (note 56 above) para 101 requires a ‘balancing of various factors’.

\(^{203}\) H Botha ‘Rights, Limitations, and the (Im)possibility of Self-Government’ in Botha et al (eds) (note 88 above) 13, 22.

\(^{204}\) See Van der Walt (note 171 above) 711. The Constitutional Court, in *Makwanyane* (note 70 above) para 104 adopted an approach of balancing to the limitation clause in the Bill of Rights and has followed this approach ever since. With respect to the possibility of reconciliation, see, for example, the dissent of Ncgobo J in *Prince* (note 77 above) para 76, expressing the possibility of reconciliation of different interests (in this case, the freedom of religion of Rastafari and the state’s interest in maintaining law and order) whilst denying the reality of sacrifice that such ‘reconciliation’ would entail: ‘[i]t is not demeaning to their religion if we find that the manner in which they practice their religion must be limited to conform to the law. Whether this is what they want matters not. Nor is it to underestimate in any way the very special meaning that the use of the “holy herb” has for the self-defining or ethos of the Rastafari religion. As we observed in *Christian Education* and also in *Prince I*, the balancing exercise requires a degree of reasonable accommodation from all concerned. Rastafari are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact on the practice of their religion. A narrow and closely defined exemption that is subject to manageable government supervision does not oblige them “to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously”’. A similar belief seems evident from the judgment of Sachs J (ibid para 161).

\(^{205}\) *Bato Star* (note 2 above) para 45.
to reasonableness and lawfulness (as applied) being equated with administrative justice.206 Such a belief would show little concern with the violence involved in ‘finding the facts’ and in ‘applying the law to the facts’. Even a contextual approach to reasonableness is reductive in nature and consequently cannot help but measure that which is different against the same criteria.207 Drucilla Cornell puts it eloquently as follows:

Within law we are fated to be ‘unfaithful’ to otherness, as we are forced to make comparisons which inevitably call for an analogy of the unlike to the same. Law classifies, establishes the norms by which difference is judged. If classification in and of itself is thought to be violence against singularity, then law inevitably perpetuates that violence.208

By saying that unreasonableness has to be determined with reference to certain factors, one in other words still has to calculate and judge in a specific case whether ‘this is or is not’ reasonable, and by doing that we are always being unreasonable and unjust.209 The concern raised here is again not aimed at abandoning the contextual approach, but rather at disrupting the possible complacency that a contextual approach can lead to. The realisation of the violence involved in generalisation could also raise an awareness of the violence involved in a selective finding and conveying of facts in the decision of the Court (which simply justifies the ‘inevitable’ outcome of the case), aiming instead for a radical empiricism (whilst realising the urgency of coming to a decision).210

V. ADMINISTRATIVE JUSTICE

At issue in seeking administrative justice, if we adopt the above views, is thus more than coping (economically or subjectively) with different

206 According to O’Regan (note 58 above) 435, lawfulness and reasonableness/rationality are ‘the foundation stones of our commitment to administrative justice’.


208 D Cornell ‘Post-structuralism, the Ethical Relation and the Law’ (1988) 9 Cardozo LR 1587, 1591. See also Boshoff (note 146 above) 12; A Boshoff ‘The Fractured Landscape of Family Law’ (2001) 118 SALJ 312, 326-27; Van der Walt (note 134 above) 81; 94; K van Marle ‘Law’s Time, Particularity and Slowness’ (2003) 19 SAJHR 239, 242; 248; 252-54; JD Caputo Against Ethics: Contributions to a Poetics of Obligation with Constant Reference to Deconstruction (1993) 97; JD Caputo Deconstruction in a Nutshell: A Conversation with Jacques Derrida (1997) 135 (‘[the singular is not a case that can be subsumed under the universal, not a specimen of a species, but the unrepeatable, unreproducibly idiosyncratic’).

209 Ijseling (note 132 above) 14; Van der Walt (note 134 above) 77.

210 See J van der Walt ‘Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the Carmichele Saga’ (2003) 19 SAJHR 517, 521 n8; Van Marle (note 207 above) 240 n7.
understandings of lawfulness and reasonableness and applying these to the circumstances of the case. If a judge simply follows a contextual approach in ascertaining the meaning of a statute and in determining how it is to be applied or if a contextual approach is followed in determining whether action is reasonable, we see a concern with law, not with justice. In the ‘new’ methodology adopted by the Constitutional Court one recognises the importance attached to calculation, to economics.211 Justice as understood by Derrida is on the other hand a concern with a resistance to economics, a resistance to calculation.212 The concern with justice lies in the realisation of the injustice that follows from subjectively (and economically) applying a rule to a ‘case’.213 If we are really to be just, we have to be completely selfless; we have to give without expecting a return. Understood thus, a judge in review proceedings is caught in a paradox, an aporia, a non-road: On the one hand she has to calculate or judge in accordance with law, which is always conditional and general. On the other hand, she is faced with the madness of a demand for pure and unconditional hospitality214 or absolute self-sacrifice. What is called for is ‘a certain succumbing to the claims of the Other, a giving in, a melting, a surrender, a loss of self’.215 In this case, the applicant simply asked for a more equitable distribution of fishing rights. The High Court, having found the allocation invalid, was prepared to grant an order setting aside the allocation decision, leaving it to the Minister to do a reallocation. Seeing, however, that the Court has the power to correct administrative action (and give, literally any order that is just and equitable)216 it could have reallocated fishing rights itself, perhaps deciding that all (old and new) applications should be granted and that all rights holders be given an equal share, ordering that those with more sell their boats and transfer their employees to those with less, thereby giving effect to the promise of equality in the Constitution. Even this, perhaps

211 See Singer (note 65 above) 482: ‘The rules in force have the effect of privileging the interests of some persons over the interests others. It is impossible for a legal system not to so distribute power and wealth’.


213 See IV(c) above.

214 See J Derrida Acts of Religion (2002) 361: ‘To be hospitable is to let oneself be overtaken [surprendre], to be ready not to be ready, if such is possible, to let oneself be overtaken, to be surprised, in a fashion almost violent, violated and raped [voleé], stolen [voleé] (the whole question of violence and violation/rape and of expropriation and de-propriation is waiting for us), precisely where one is not ready to receive and not only not yet ready but not ready, unprepared in a mode that is not even that of the “not yet”’.

215 Caputo Against Ethics (note 208 above) 117.

216 See s 8(1) of PAJA.
more equitable order (which would likely appear completely mad within the current dispensation) would not, however, amount to justice.217

A concern with administrative justice thus calls for a different structure of decision-making, one that involves being caught in an aporia. Is there a point in all of this?, someone may ask. Is it not preferable to do what the Court says should be done: deciding the case in accordance with constitutional values?218 Is this not more responsible? The answer, again, depends on one’s understanding of the notion of responsibility. Deciding in accordance with constitutional values, existing in advance of deciding the case, might be said to be irresponsible. In the words of Derrida,

If I know what I have to do, if I know in advance what has to be done, then there is no responsibility. For the responsible decision to be envisaged or taken, we have to go through pain and aporia, a situation in which I do not know what to do. I have to do this and this, and they do not go together. I have to face two incompatible injunctions, and that is what I have to do every day in every situation, ethical, political, or not . . . . An aporia is an experience, enduring an experience, in which nothing such as forgiveness [or justice] presents itself as such. That is because absolute forgiveness [or justice] never presents itself as such and is irreducible to conditional forgiveness [or law]. . . . Of course, when I say that the aporia is what we have to go through in order to take responsibility and to act or to decide, that does not mean that it is easy to do. On the contrary, I will never know that I have made a good decision. If someone tells us, ‘I have made a decision, I have taken this responsibility’, for me, to my ears, this sounds absolutely ridiculous and obscene.219

Still, why should we change our thinking about decisions and responsibility, if what we have is working fine? The question of course is, ‘who does it work for?’ The insight of Derrida that meaning is never really present can be ignored, as can the reality that it is in order to survive that we violently arrest the play of signification.220 We can similarly insist on the legitimacy of the present legal order, the institutions established thereby, and actions taken by virtue thereof.221 Alternatively, with regard to the latter, we can admit to the fact that all states, including our own, are founded through and preserved by means

217 See note 214 above. See also Van der Walt (note 134 above) 92-3 on the demand of justice in the case of Southern Insurance Association v Bailey NO 1984 (1) SA 98 (A).
218 See IV(b)(ii) above.
220 See Van der Walt (note 134 above) 76.
221 See O’Regan (note 58 above) 433: ‘South Africa is now a democracy, which renders a quality of fundamental legitimacy to legislative and executive action that was absent in the past’.
of unjustified violence.\textsuperscript{222} This imposition of order on society is by no means natural or effected through the will of the people.\textsuperscript{223} The founding of a state in turn requires preservation. In a constitutional state this preservation is effected by means of a legal order.\textsuperscript{224} This involves the reduction and suppression of heterogeneity: through the election of ‘representatives’, the adoption of legislation, and the ‘implementation’ thereof. The founding violence thus requires repetition through actions by the legislature, executive\textsuperscript{225} and judiciary which bring about or apply law with a threat of or actual enforcement.\textsuperscript{226}

In the same way that meaning is always deferred, democracy (deconstructed) is to be understood as always deferred (to come, forever).\textsuperscript{227} Democracy, similar to justice, hospitality, the gift and human dignity,\textsuperscript{228} can, on this understanding, never be given perfect expression in the present (through laws, institutions and decisions). It is always imperfect because it always excludes (with the threat or actuality of an ultimately unjustifiable violence).\textsuperscript{229} As Van der Walt points out, the resistance to the imposition of meaning and to the language of constitutional democracy does not entail that we do not need it or replacing it with something new. Instead, it is precisely because we need

\\textsuperscript{222} In Africa, states were, as is well known, typically ‘founded’ through colonial rule, followed by resistance and independence. Whether the post-colonial constitution was brought about through negotiation and ‘peaceful means’ where the old parliament authorises the founding of the new state or whether the new state is founded through violence and a (succession of) coup d’etats (or a combination of the above), its ultimate founding (whether or not one wants to trace this back to the founding of the colonial power itself) is neither legal nor illegal, as no legitimate authority existed at that stage to authorise the founding of the state; see Derrida (note 212 above) 6; 14; 35.

\\textsuperscript{223} The problems with the founding of the Constitution (J Derrida ‘Declarations of Independence’ in J Derrida Negotiations (2002) 46-54) also create a crisis for representation (of the people) through parliament because rules according to which a people will be represented are created at a moment when they do not exist. They are only constituted through the act of Constitution-making yet it fundamentally limits their own ability to make laws for their future. On the (un)democratic nature of the 1993 and 1996 Constitutions see H Botha The Legitimacy of Law and the Politics of Legitimacy: Beyond a Constitutional Culture of Justification (unpublished LLD thesis, 1998) 410-12; J Froneman ‘The Impossibility of Constitutional Democracy’ in Botha et al (eds) (note 88 above) 93, 95-6.

\\textsuperscript{224} Derrida (note 212 above) 31 refers to this as ‘law preserving violence’.

\\textsuperscript{225} The administration is of course the branch of the state that threatens with and/or employs violence whenever the will of the majority (expressed in legislation) or court judgments need to be enforced.

\\textsuperscript{226} As Derrida (note 212 above) 6 points out, ‘there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulatory, and so forth’.

\\textsuperscript{227} J Derrida ‘Politics and Friendship’ in J Derrida Negotiations (2002) 147, 178-80; M Fritsch ‘Derrida’s Democracy to Come’ (2002) 9 Constellations 574, 576. The future that is at issue here is to be understood not merely as the continuation of present time but ‘as the advent of another chance and the chance of otherness imminent whenever we encounter an interpretative uncertainty’; see Van der Walt & Botha (note 134 above) 362 n58.

\\textsuperscript{228} See Van der Walt (note 138 above) 102; 115 for a radicalised understanding of human dignity as ‘that for which we have no value or norm at our disposal’.

\\textsuperscript{229} Derrida (note 229 above) 178-80; Fritsch (note 229 above) 577.
meaning and constitutional democracy ['this language'] that they must be resisted – because they are expressions of our most fundamental needs, the need to institute an orderly and peaceful co-existence. It [deconstruction] resists this language because a complete reconciliation with this language would imply a conclusive reduction of justice to our needs. Deconstruction is concerned with a justice that would not be our justice.\textsuperscript{230}

The impossible demand of giving in to the claims of the other, to justice, is in other words an expression of a concern to disrupt the fundamental violence of law.\textsuperscript{231} This impossible encounter with otherness, which is also called for by the political, plurality and friendship, seeks to open the horizon of possibility of the legal system. It is therefore perhaps necessary to re-conceptualise reasonableness in administrative law,\textsuperscript{232} thinking of it in terms of a re-conceptualised notion of the public interest, that is, the interests of everyone in society (in accordance with its connotations of justice and fairness).\textsuperscript{233} The way in which it is currently understood by the Constitutional Court is, as we saw above, normative and therefore reductive, politically selective and representing certain private interests. Thinking of reasonableness in terms of a re-conceptualised notion of the public interest or in terms of an impossible infinite hospitality that 'would not subject the other to the demands of the self', thereby risking 'a lawless and even an illegal openness to the other'\textsuperscript{234} would possibly enable the adoption of different normative conceptions of reasonableness and unreasonableness in future cases than was accepted in \textit{Bato Star}.\textsuperscript{235}

\textbf{VI Conclusion}

This article has argued that the theoretical approach underlying the judgment of the Constitutional Court in \textit{Bato Star} suffers from a number of shortcomings. In the first place, the Court has yet to overcome the trappings of formalism. This is clear in the rigid distinction that the Court maintains between law and politics/policy. On a practical level, if one refrains from viewing questions of law, fact and policy as rigid categories, but rather accepts their interrelatedness (or sees them as shading into one another on a spectrum), the comments made by O'Regan J regarding the scope of review under the heading of reasonableness seem to be equally applicable to the question of lawfulness, including the interpretation of

\begin{itemize}
\item \textsuperscript{230} Van der Walt (note 134 above) 80.
\item \textsuperscript{231} Van der Walt \textit{Twilight of Legal Subjectivity} (note 65 above) 328.
\item \textsuperscript{232} I rely here on an argument of Van der Walt (note 138 above) 125-26 regarding the boni mores in private law.
\item \textsuperscript{233} See \textit{Webster's Revised Unabridged Dictionary} (1996).
\item \textsuperscript{234} See Van der Walt (note 138 above) 127.
\item \textsuperscript{235} For a similar argument in the context of the principles of private law, see ibid 127.
\end{itemize}
Judicial review cannot prepare for the event which calls for administrative justice if it closes off possibilities by drawing rigid distinctions between law and policy or between review and appeal. The same can be said of the approach the court has adopted in respect of statutory interpretation and constitutional values. Although the Court has, to its credit, abandoned the literal-intentional approach to statutory interpretation, it has now adopted the view that context determines meaning (in a seemingly neutral and objective manner) and that constitutional values, such as reasonableness, are similarly politically neutral and uncontested. This approach, as is the case with the law/policy distinction, aims at resolving (and believes that it can resolve) the dilemma of judicial review vis-à-vis administrative action. This dilemma, it has been contended, cannot be resolved, neither by formalistic distinctions, nor by means of a contextual approach. If differently conceived, the contextual approach can, however, be used to address or to provide an appropriate response to the dilemma. This would entail acknowledging its own violence and injustice as well as the frequent absence of consensus in society (ie acknowledging the reality of legitimate dissent in society and thus the absence of community). Such a re-conceptualised contextual approach would be prepared to face up to the impossibility of resolving the dilemma and as a result, paradoxically, open up the possibility for community and for administrative justice.

It has furthermore been argued that a new vocabulary is called for from the Court in judicial review proceedings which entails acknowledging the existence of legitimate alternative claims to resolving a dispute. This new vocabulary is called for in relation to all the issues raised in this article, including issues of statutory interpretation, the contextual approach in relation to reasonableness, the principle of separation of

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236 In Canada, the realisation of the interrelatedness of questions of law and those of fact/policy has led to an approach in terms of which questions of statutory interpretation need or should not always be reviewed by the courts with reference to a standard of correctness. Standards of patent unreasonableness (irrationality) or reasonableness *simpliciter* may sometimes be more appropriate. This also applies in the context of discretionary powers being exercised, the Court not necessarily having the final say on what the statutory purposes are or which factors are to be considered relevant in exercising discretion; see *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193 (SCC) para 56. This raises the question whether the distinction that is currently drawn between lawfulness and reasonableness can be maintained.

237 See Derrida (note 212 above) 27: ‘[T]here is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth’.

238 For the same argument in the context of the judicial review of legislation, see Van der Walt & Botha (note 138 above) 350-51 (at 351): ‘The very essence of constitutional review can be seen to consist in the failure to resolve a particular case of social conflict with reference to the common will of the people (as expressed in legislation or administrative action). According to Botha (note 203 above) 31: “[c]onsitutional review reminds us of the failures of the democratic process; the existence of reasonable disagreement over vital social issues; the reality of social dissent; the impossibility of a perfect reconciliation of conflicting social interests’.

239 See Van der Walt & Botha (note 138 above) 350-53.
powers, the law/policy/fact distinction and the appeal/review distinction. An acknowledgement is called for that the disputes in judicial review proceedings do not answer themselves. There is in other words invariably no consensus on the issues raised in the review of administrative action and these issues cannot be resolved by means of a neutral decision procedure. A court should not hide behind its ‘review’ role in order to refrain from dealing with the substantive issues of the matter on review. The need to enquire into the lawfulness and reasonableness of the decision involves dealing with the substantive issues at stake. This does not mean that the court will always overturn the decision of an administrative authority that the court does not agree with. Such a refusal to interfere should not, however, be justified simply with reference to formalistic criteria such as the traditional appeal/review and law/fact/policy distinctions. If these distinctions are invoked, it should be accompanied by an acknowledgement that these are not rigid, neutral or objective categories, but fully implicated in the restricted (and sacrificial) economy of law. Administrative justice, it has been argued, must be thought of in terms of the notions of absolute hospitality and a pure gift without return. This impossible claim for justice must be allowed to disrupt the sacrificial logic of law.