Keynote address by Judge of Appeal Malcolm Wallis at the Administrative Justice Association of South Africa annual conference, 10 August 2017, Durban

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION AND THE SEPARATION OF POWERS

It is a daunting prospect for a judge to address a conference that includes among its participants a number of leading academics in the field on which the judge is asked to speak. For many of you much of your working lives over a number of years have been spent in contemplation of the issues that arise in the area of administrative justice, whereas for working judges like myself those issues arise from time to time in a coincidental fashion, depending upon the cases that come before them. It is to your books and articles that we turn when confronted with difficult issues. The temptation then is to make the address an anodyne one, raising no controversy and treading on as few toes as possible. To poke a few sacred cows, particularly those embodied in prevalent academic theories, is not only dangerous, but runs the risk of exposing ignorance. Stephen Sedley, then a Lord Justice of Appeal, remarked on this once and said:

'For every practitioner who suspects that these swathes of mega-theory are banality parading as thought, there is an academic who regards lawyers and judges as mechanics for whom thought is a distraction from the task of case disposal.'[1]

You have before you a mechanic.

The title of this lecture in the programme may have suggested that I proposed to cover the full sweep of judicial review and its relationship to the doctrine of the separation of powers. If that is what you have come

[1] Sir Stephen Sedley. *Ashes and Sparks* 330.

to hear I am afraid that you will be disappointed. Such an exercise would require an entire conference and numerous papers in order to be reasonably comprehensive, so of necessity the focus must be narrower. My theme today is the relationship between judicial review of administrative action, that is review under PAJA, and the doctrine of the separation of powers. The topic was not chosen to deal with the concerns expressed by Lord Sumption, that have generated a considerable debate in England, as to the proper scope of the judicial function,[2] although I share some of those concerns. It was chosen because the statements of principle in the leading judgment, one that has been repeatedly cited, do not seem to me on close analysis to reflect the reality of judging in the courts and in order to have a satisfactory concept of judges:

'… we have to construct our vision of their role and mode of operation from what they do, rather than what they say about what they do.'[3]

When I was studying jurisprudence the one prescribed textbook was that of Professor Paton,[4] whose view of the separation of powers could perhaps be described as slightly cynical. He wrote of it that:

'Although in political theory much has been made of the vital importance of the separation of powers, it is extraordinarily difficult to define precisely each power … The major juristic difficulty is to discover a clear definition of legislative, administrative and judicial process which can be related to the functioning of actual states.'

Trying to ascertain the content of the doctrine of the separation of powers in any particular context is an exercise that bears a close resemblance to a pursuit of Lewis Carroll's Cheshire Cat – the physical embodiment has

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[2] N W Barber, Richard Ekins and Paul Yowell (eds) *Lord Sumption and the Limits of the Law*.

[3] Prof Brian Simpson 'The Reflections of a Craftsman' in Mads Andreas and Duncan Fairgrieve (eds) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* at 194.

[4] George Whitcross Paton *A Textbook of Jurisprudence* (3rd ed by David P Denham). Lord Lloyd's *magnum opus* was then a slender volume in comparison with the current ninth edition. For similar cynical comments on the doctrine of separation of powers see G E Devensih 'The doctrine of separation of powers with special reference to events in South Africa and Zimbabwe' (2003) 66 *THRHR* 84 at 85.

vanished leaving only its smile to beguile us. Yet it has a powerful hold on the legal and in particular the judicial imagination. Chaskalson CJ, in a quotation that appears on the home page of your website, says that administrative law itself is an incident of the separation of powers.[5] Professor Hoexter[6] in her magisterial – and I would add enormously useful – book says that it is a doctrine that infuses our Constitution. And, to paraphrase Mark Anthony, these are honourable people. So it is with a measure of timidity that I suggest that, to the mechanics who labour in the courts, there is no clear guide to determine when and how, or even if, the doctrine of separation of powers actually impacts upon the process of judicial decision-making in cases of the judicial review of administrative action. With deference – a popular word in the realm of administrative law – a reading of the judgments in this field of law reveals little practical explanation of where and how the doctrine is to be applied. To be sure one finds an occasional ritual obeisance to the doctrine, usually by a judge who is about to intervene, and worse still, on other occasions, a convenient incantation, in place of reasons, for refusing to intervene, but little by way of practical guidance. If, as I suspect, it is of no practical relevance to the process of adjudication in the judicial review of administrative action, it is perhaps time to cry that the emperor has no clothes and rely on the academics to devise a new theory, or to say that none is needed, so that the mechanics can get on with their work in peace.

Let me say at the outset that I am not concerned with the usefulness of the concept of the separation of powers as a general principle and as a descriptive tool in the realm of constitutional law and political science that is helpful to indicate the elements that are characteristic of and necessary for the establishment of a constitutional

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[5] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 45.
[6] C Hoexter *Administrative Law in South Africa* (2nd ed, 2012) at 24.

democracy.[7] My concern is with its usefulness as a legal tool in the judicial armoury – or toolbox if you do indeed regard us as mechanics – enabling judges to decide the cases that come before them. If it is to be a useful tool in explaining judicial decisions in any field, but particularly in the field of judicial review of administrative action, to which I am confining these remarks, then it must be because it provides a basis for demarcating the areas that are off limits for the judiciary. Reading judgments on the subject suggests that our courts understand this to be its role, as do courts in countries with which we share something of a common heritage. My point is that to serve this purpose in any satisfactory way the doctrine must assist the judge in determining where the judicial boundaries lie beyond which intervention in the actions of administrators is impermissible. The need for boundaries arises because, by its very nature, judicial review involves judicial intervention in the areas that constitutionally speaking are allocated to other branches of government, particularly the executive, an expression that encompasses much of the policy forming as well as the administrative side of government.

Judicial review of this character at any level has always been controversial. Over a century ago in the United States Professor Thayer wrote that:

'The tendency of a common and easy resort to [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is not a light thing to do that.'[8]

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[7] It appears that the discussions of the separation of powers in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) 416 (CC) para 38 and *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) paras 90-95 are concerned with the broad constitutional structure rather than the provision of guidelines to courts in regard to the permissible extent of judicial intervention. In some ways they read like a parent telling a child not to wander too far away, without indicating where the 'too far' boundary will be crossed.

[8] J Thayer *John Marshall* 106-107 (Boston, Houghton Mifflin 1901).

That was written in a book about Chief Justice John Marshall, so it concerned judicial review of legislation, but the comment can equally be applied to judicial review of administrative action, whenever it strays from the procedural into the area of substantive review on the merits. This is not some antediluvian plea for a return to a past normality. It is worth remarking that until the last minute passage of PAJA,[9] the Constitutional Court's approach to judicial review of the substantive merits of administrative action was that this intruded impermissibly into the spheres of activity that the Constitution reserved to the executive. In *Bel Porto*[10] Chaskalson CJ made it clear that the proper province of judicial review of administrative action lay in ensuring fairness of process, not substantive fairness,[11] and said that there were good reasons for this. He rejected an argument that the requirement of justifiability of administrative decisions in the Constitution prior to PAJA meant that the substantive fairness of the decision fell to be considered and said:

'The setting of such a standard would drag Courts into matters which, according to the separation of powers, should be dealt with at a political or administrative level and not at a judicial level. This is of particular importance in cases such as the present, in which the issue relates to difficult and complex policies adopted in order to promote an equitable transformation of apartheid structures and a reversal of policies that were grossly unequal.'[12]

As I have already indicated, this explanation allocates the role of demarcating the proper province of the judiciary to the doctrine of the separation of powers. Judges are to keep their noses out of the substantive

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[9] Promotion of Administrative Justice Act 3 of 2000.

[10] *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) paras 85-90.

[11] Citing Corbett CJ in *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231G. Corbett CJ was of course dealing with the requirement of a fair procedure under the *audi alteram partem* rule, not the grounds for setting aside a decision on the basis that for one or other reason the decision-maker had not properly applied their mind to the issue.

[12] Similar comments on the need for courts to beware of intruding into the realm of other areas of government are to be found in *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 42 and *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 180.

merits of administrative decisions, because these are allocated to the other branches of government.

There are admittedly confusing elements in the way in which Chaskalson CJ articulated his conclusions. In regard to substantive fairness he said[13] that unfairness alone had never been a ground for review and that more was required, namely that the unfairness was of such a degree that an inference could be drawn that the person making the decision had erred in a respect that would have provided grounds for review. However, this had little to do with unfairness but was the historic approach to unreasonableness.[14] The leading cases had never suggested that substantive, as opposed to procedural, unfairness would provide a ground of review. To compound the confusion, after saying that all that the Constitution required was a decision taken lawfully and directed to a proper purpose, Chaskalson CJ added that the decision needed to be one that a reasonable authority could reach. As he footnoted Lord Cooke's comment that the traditional exercise of heaping adjectives upon the word 'unreasonable' served no useful purpose and one could simply ask whether the decision was one that a reasonable person could reach,[15] it is unclear whether he was suggesting that fairness and reasonableness are discrete elements to be considered in reviewing administrative action, or whether he was conflating the two. As I understand *Allpay*[16] - a qualification necessary in the light of the obscurity of that decision; the distinction without a difference it sought to draw between inconsequential and immaterial irregularities; and the general approach to irregularities in paras 28 to 30 thereof – the current view of the Constitutional Court is

[13] Para 86.
[14] *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735G-H.
[15] *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* (1999) 1 All ER 129 (HL) at 157d-e.
[16] *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 42.

that he was conflating the two. I say that because, in giving the judgment of the court, Froneman J said that, 'apart from the unreasonableness ground', fairness is not a basis for the judicial review of administrative action.

The enactment of PAJA[17] and the concomitant coming into force of s 33 of the Constitution brought about a sea change in our understanding of the scope of judicial review, largely arising from the requirement that administrative decisions are required by s 33 of the Constitution to be reasonable, although the rationality provisions in s 6(2)(e)(ii) of PAJA also operate to broaden the permissible grounds of review. Those responsible for drafting PAJA appear to have had in mind the approach to unreasonableness that had characterised our earlier administrative law, namely that unreasonableness of a substantial degree was required in order to challenge an administrative decision. In s 6(2)(h) of PAJA they provided that a decision 'so unreasonable that no reasonable person could have' taken it would be reviewable. This language was taken from previous decisions both of our courts and the English court,[18] that held that unreasonableness on its own would not suffice to justify a court in setting aside an administrative decision on review. But it received short shrift from the Constitutional Court in *Bato Star*,[19] where O'Regan J adopted Lord Cooke's formulation of whether the decision was one that a reasonable authority could reach.[20]

This altered the existing position in two subtle and largely unspoken, but fundamentally important, ways. Unreasonableness on its

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[17] Promotion of Administrative Justice Act 3 of 2000.
[18] *The Administrator, Transvaal and The Firs Investment (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 80A-E and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680 (CA) at 683.
[19] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 44.
[20] Applied in relation to CCMA arbitrations of labour disputes in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras 107-110.

own, shorn of any other purpose or effect, was now a ground of review. Although this was described in Lord Cooke's language as affording the decision-maker 'ample and rightful rein, consistently with the separation of powers' this could only be within a relatively narrow area, such as the one with which he was there concerned, namely the allocation of limited police resources.[21] The fact is that many, if not most, administrative decisions are of the 'yes or no' variety, where there is little or no issue concerning matters of policy and no other range of possible responses, so that considerations of the separation of powers can hardly arise. Similarly, separation of powers does not arise in cases of legal error; bias or caprice on the part of the decision-maker; absence of authority; and other similar grounds of review of administrative action, where the substance of the decision is irrelevant save in regard to proof of prejudice.[22] On any basis therefore separation of powers can have only a partial influence on the adjudication of judicial review of administrative action.

The fundamental point of departure from the perspective of the separation of powers has always been the claim that judicial review is concerned with the process of arriving at decisions and not their substantive merits. Grounds such as misconstruing the empowering legislation, bias, caprice or improper purpose, whilst often requiring an examination of the substance of the decision at a factual level, were nonetheless concerned with this as evidence of procedural failings. The earlier test in regard to unreasonableness similarly allowed the doctrine to operate by asking whether the unreasonableness evidenced a failure to approach the decision making process on a proper footing. So

[21] Lord Hoffmann described the case on unreasonableness as hopeless, which raises the question whether it was truly a matter of the separation of powers or simply a matter of the evidence failing to substantiate the case sought to be made.

[22] See the grounds of review in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152E-I and s 6(2) of PAJA.

unreasonableness of outcome was symptomatic of deficiency of process, thereby recognising that the merits of the decision lay in the realm of the executive and not the courts. In adopting this approach the courts accepted the possibility, in the interests of maintaining that separation, that some decisions by authorities in the exercise of public powers might be unreasonable, but beyond the reach of judicial review.[23] Cases of egregious unreasonableness were however captured in the judicial review net on the basis that they demonstrated process failings. The construction of reasonableness adopted by the court in *Bato Star* put an end to that and in doing so squarely raised the question of the compatibility of the grounds for judicial review of administrative action with the doctrine of the separation of powers.

The second subtle change lay in the fact that by recognising that judicial review now had a substantive element it created a symbiotic relationship between unreasonableness and other existing grounds of review, for example that set out in s 6(2)(e)(iii) of PAJA, of taking into account irrelevant considerations or ignoring relevant considerations. Substantive unreasonableness fortifies and strengthens this ground, thereby making it easier to persuade a court to grant relief on judicial review. At a practical level it is now far easier to persuade a court that a decision is unreasonable because the decision-maker took into account irrelevant factors, or attached insufficient weight to relevant factors, than it was to rely on those factors on their own as a ground of review, because it was ordinarily for the decision-maker to determine which facts were relevant and what weight to attach to them.[24] Similarly it makes it

[23] This was not a limitation unknown to other areas of the law. Arbitration awards were also immune from scrutiny for unreasonableness. *Dickenson & Brown v Fisher's Executors* 1914 AD 166 at 174-181; *Amalgamated Clothing and Textile Workers' Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A). Section 33(1) of the Arbitration Act 42 of 1965.

[24] *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) at 35D as qualified in *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 550D-H. The point remained that the failure to have proper

easier to rely on irrationality and the inadequacy of reasons for a decision than was previously the case, or to prove that a decision was actuated by bias or some capricious motive. These all involve judgments on the substantive merits of a decision. This is not said in any spirit of criticism of the more extensive grounds of review now available under PAJA, but to highlight the fact that the risk of judges substituting their own judgment for that of the administrative decision-makers has substantially increased.

The problem facing the court in *Bato Star* was to reconcile the new and more extensive review jurisdiction afforded by s 33 and PAJA, as interpreted by it, with Chaskalson CJ's earlier and emphatic rejection of review for substantive fairness, because it dragged courts into an area reserved for the executive and administrative branches of government, thereby breaching the separation of powers. When faced with that situation judges often resort to an attempt to explain that while the law now looks fundamentally different the underlying principles are unaltered. With all due respect I suggest that this is what happened here.

I have little doubt that Justice O'Regan and the other members of the court were alive to the potentially controversial nature of review of administrative action on the grounds of reasonableness. Professor Hoexter has rightly said that this is the most controversial ground of review. What is more the construction of reasonableness that the court invoked, namely: 'Is it a decision a reasonable decision-maker could make?' flew in the face of the more conservative language chosen by the legislature. The notion of deference was invoked to explain why 'the

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regard to factual considerations was evidence that the decision-maker had misconceived the nature of the discretion vested in them. The SCA has held that neither the Constitution nor PAJA has altered this principle that within the bounds of reasonableness it is for the decision-maker to determine which facts are relevant to the making of the decision and to determine the weight to be attached to those facts. *MEC for Environmental Affairs and Development Planning v Clarison's CC* 2013 (6) SA 235 (SCA) paras 20-22.

fundamental constitutional principle of the separation of powers' was nonetheless being observed and would be observed in cases involving judicial review on the grounds of unreasonableness.[25] The judgment quoted the well-known passage from an article by Professor Hoexter[26] and relied on a passage from Lord Hoffmann's speech in *ProLife Alliance.*[27] The latter was unhelpful as the passage in question had no bearing on the issue of judicial review of administrative action, but appeared in the context of an excursus on the legitimacy of statutory restrictions on freedom of speech. The two are not the same and the impact of the doctrine of the separation of powers in the context of the compatibility of legislation with human rights guarantees is significantly different from its impact upon judicial review of administrative action.[28]

The problem could have been addressed head-on by saying that the design of separation of powers in South Africa and the areas that it allocates to different branches of government is a matter primarily for the Constitution itself, supplemented in some instances by legislation. The Constitution says expressly that there is an entitlement to reasonable administrative action and allocates the function of adjudication to the courts. That being so there is no escape from the proposition that courts must pronounce on the reasonableness of administrative action. This is a function that courts perform in many different contexts on an objective basis and there is no reason to think that in the area of administrative

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[25] Hoexter supra fn 6 at 327.
[26] C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 501-2.
[27] *R (on the application of ProLife Alliance) v British Broadcasting Corporation* (2003) 2 All ER 977 (HL) paras 75-76.
[28] For that reason the discussion of deference in *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 81 is (*pacem* Professor Hoexter, supra fn 6, at 153) of no assistance in relation to the present problem. Nor are the dicta cited on the same page from *Ekhuruleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) para 10, which concerned the permissibility of an order that the municipality purchase a property in an eviction case, and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 (4) SA 242 (SCA) para 48, which related to the court's power to order an organ of state to exercise its powers of expropriation, of any relevance.

action they will do anything different. It is only conduct that is unreasonable that is to be condemned and that is a judgment that will not lightly be made when one is dealing with the mechanisms of government (as with any other specialised institution or field of activity). These decisions are often complex, having wide-ranging implications especially where these involve the allocation of resources and the direction of policy. These are areas where courts are both unaware of the ramifications of the decision and institutionally ill-equipped to make a judgment.

That approach would have disposed of the separation of powers question at the outset rather than injecting it into the process of judicial decision-making. Justice O'Regan rightly said that judges should not attribute to themselves superior wisdom in relation to matters entrusted to other branches of government, thereby echoing what Judge Clifford Wallace – no relative of mine – said many years before that no-one 'gains added wisdom or a keener perception of social value merely by becoming a judge'.[29] But judicial humility is simply a desirable judicial quality, not a tool for determining the outcome of cases. My concern is where the judgment identified factors relevant to determining whether a decision is reasonable and, in support of the notion that due regard was being had to the separation of powers, among these were the 'identity and expertise of the decision-maker'. Courts were urged to give 'due weight to findings of fact and policy decisions made by those with special expertise and experience in the field' and it was said that the extent to which the court should give such weight would depend upon 'the character of the decision and the identity of the decision-maker'. But, the statement, in the next breath, that neither the nature of the decision nor the identity of the

[29] Clifford C Wallace 'The Jurisprudence of Judicial Restraint: A Return to the Moorings' reprinted in David M O'Brien *Judges on Judging* 163 at 167.

decision-maker should prevent the judge from setting aside an unreasonable decision, largely obviated this latter caution.

There are two difficulties with this. The first is that it fails to address the relevance of separation of powers to the many cases where administrative action does not involve the selection of one from a number of permissible alternatives, what may be called the 'yes or no' or 'grant or refuse' cases. The doctrine can have no practical application in such cases. The administrative decision has been allocated to a functionary and the power to review it to the courts, by virtue of the Constitution and legislation properly passed by the legislative branch. That allocation of responsibilities is entirely consistent with the doctrine, but beyond that it can find no traction. There is nothing to which deference can be paid. If a decision is unreasonable it must be set aside. In such cases the only feasible space for invoking the separation of powers would be in considering whether to make what the Constitutional Court has now called a 'substitution order', but here again, once the court concludes that it is in as good a position as the administrator to make a decision and that only one outcome was feasible, there is no scope for deference.[30] If you doubt that, I suggest that you read *Trencon* again and decide whether the outcome could or would have been any different had the discussion of deference in paras 43 to 47 of the judgment been omitted. Similarly, and there is an element of *mea culpa* here because I concurred in the judgment, I doubt that the decision in *NERSA*[31] would have changed in any respect had the citation of *Bato Star* and Professor Hoexter's article been omitted in para 117 of the judgment.

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[30] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) paras 47-48 and 57-60. For a case where the court 'deferred' by refusing to determine the issue – the award of a tender – itself, see *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape and Others* 2007 (6) SA 442 (Ck) para 43, but there the court held that it was not in as good a position as the MEC to determine the issue.

[31] *NERSA v Borbet SA (Pty) Ltd* [2017] ZASCA 87. Leave to appeal refused by the Constitutional Court.

The second, and for me the more fundamental, difficulty lies in its implications for the notion of reasonableness. This is hardly a new concept in law. We use it to test conduct in a number of areas. In all those areas, as far as I can discern, it is said to be an objective yardstick by which to measure the conduct of particular actors. Its importance in being an objective measure is that it is designed to remove the decision from the subjective assessment of the judicial officer. The aim is for a standard that is external to the judge, conforming to acceptable canons of legal reasoning and based on a broad societal picture of the kind of behaviour that is acceptable to society. I am not aware of any other instance where the determination of reasonableness involves consideration of the nature of the decision in the light of the expertise of the person in question. Nor am I aware of any, where the court defers to that broader expertise.

In some instances we leave it to judges to determine unreasonableness on the basis of their understanding of the public's needs and demands. The most obvious example of this is across much of the field of delictual liability where reasonableness is the touchstone for determining liability for negligent conduct, but it also finds application in other contexts. For example, under s 48 of the Consumer Protection Act 68 of 2008 unreasonable prices or terms for the supply of goods or services are outlawed and it is left to the courts to determine what is unreasonable. Generally speaking, the judge weighs the conduct in question in the context of the particular situation and assesses whether conduct of that character would be regarded as acceptable to society viewed broadly – those whom judges are fond of referring to as 'right-thinking members of society'. In some technical areas, such as the negligence of professionals, the court will hear evidence from experts in regard to the standards of performance required in that field when engaged in the activity in question. Even there, however, the question of

reasonableness is not subjective and the court is not bound by the views of the experts.[32]

The suggestion that it is relevant to the judicial review of administrative action on the grounds of unreasonableness to consider the character of the decision and the identity and level of expertise of the decision-maker shifts and, I suggest, undesirably undermines, our understanding of reasonableness as an objective question.[33] In the context of judicial review of administrative action the possibility that these separation of powers issues may arise appears to be restricted to those cases where more than one approach may be taken to the decision; where the decision-maker must weigh a number of frequently incommensurate factors; where the decision may have a range of connected effects going beyond the specific matter under consideration, that is, it is truly polycentric; and where policy factors may obtrude in the decision making. Of course that particular intrusion will often remove the decision entirely from the realm of administrative action, because it is not a decision of an administrative nature and more appropriately belongs in the sphere of the executive.[34]

Confining ourselves to this more limited area of administrative action and reverting to the suggested enquiry, the question that must be posed is how courts are to have regard to the expertise and experience of decision-makers in determining whether their conduct was reasonable? Is that in truth what must be done and, if so, how? In the ultimate analysis is there in truth a requirement of judicial deference and respect, in the light of the doctrine of the separation of powers, or are we perhaps engaged in

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[32] *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* [2002] 1 All SA 384 (A) paras 35-40; *Medi-Clininc Ltd v Vermeulen* 2015 (1) SA 241 (SCA) paras 6-8.

[33] Rationality is an objective issue. *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 69. There seems to be little reason for treating reasonableness as anything other than objective.

[34] *Minister of Home Affairs and others v Scalabrini Centre, Cape Town and Others* 2013 (6) SA 421 (SCA) paras 57-58.

what Lord Cooke referred to as ‘admonitory circumlocutions’ around what is fundamentally an evidentiary issue? In order to reach a conclusion on that I suggest that it is helpful to examine the approach of the courts in cases of judicial review of administrative action on the grounds of unreasonableness. In other words let us look at what judges do in practice and not at what they say they are doing, especially when that consists of lengthy quotation from earlier cases with no explanation of how they bear upon the actual process of judicial decision-making.

It did not take long for the new approach to review to manifest itself in *Foodcorp*.[35] By a curious coincidence, fishing quotas were the *casus belli*, as they had been in *Bato Star*. After a brief recitation of the relevant principles including a nod to ‘deference’, neatly counterbalanced by a note that this does not mean judicial timidity, Harms JA, proceeded to deal with the straightforward question whether the decision was one a reasonable decision-maker could have reached. Having concluded that the formula used in allocating quotas lead to ‘glaring anomalies’, for which no explanation was proffered, he set the impugned decision aside. Apart from a paragraph early in the judgment to the effect that if readers wished to know something about the pelagic fishing industry they should read the decision at first instance, there is not the slightest consideration of the expertise and experience of the person responsible for making the allocation. Nor when the fresh allocation made after this judgment was set aside on the grounds of unreasonableness[36] did Davis J see fit to do more than make a passing reference to what he described as O’Regan J’s endeavours to bring clarity to the concept of deference.

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[35] *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others* 2006 (2) SA 191 (SCA).
[36] *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others* 2006 (2) SA 199 (C).

The same is true of the next case where the decision in one of our higher courts went off on the ground of unreasonableness. That concerned the appointment of a school principal and deputy principal.[37] The SCA upheld the judgment of the Western Cape High Court setting the decision aside on the straightforward basis that the factors relied on by the MEC were not weighty enough to override the views of the school governing body on the merits of the various candidates. Once again there was no reference to the expertise of the MEC or the officials in the Department of Education who advised the MEC.

In case it is thought that I am focussing unduly on decisions by the SCA, my next case is *Walele*.[38] There the issue was whether the approval of plans was reasonable and the majority judgment, tersely and without any reference to the planning expertise available to the city or the decision-maker, simply looked at what was before the decision-maker when the decision was taken and held that the documents in question were insufficient to found a reasonable decision, because they did not refer to the factors the court held had to be considered. And if you are concerned about my method of selection, for the purpose of this paper I simply followed up every subsequent reported case in the SCA and the Constitutional Court where *Bato Star* was cited. Two interesting features of that exercise were, first, that relatively few cases seem to reach our apex courts by way of judicial review for unreasonableness and, second, that rationality and reasonableness have become blurred in many legal

[37] *Head, Western Cape Education Department and Others v Governing Body Point High School and Others* 2008 (5) SA 18 (SCA).
[38] *Walele v City of Cape Town* 2008 (6) SA 129 (CC) paras 59-60.

minds,[39] notwithstanding the Constitutional Court's insistence that they must be kept distinct.[40]

My next example involved the review for unreasonableness of the findings at a disciplinary hearing for a magistrate charged with improper touching of female colleagues.[41] One searches the judgment in vain for any consideration of matters other than the acceptability of the evidence tendered at the hearing. On a straightforward reading it is no different from one that would be written on appeal from a conviction in the high court. Nor does the judgment of Plasket AJA in *JDJ Properties*,[42] a planning case, approach the matter any differently. He examined the planning decisions in question and held that the planning officer had not been unreasonable. While not strictly an unreasonableness case, the Constitutional Court in *Turnbull-Jackson*[43] adopted a similar approach to a planning decision, without any reference to deferring to the decision of the planning officer.

Of necessity this has had to be an incomplete review of the reported judgments in cases of judicial review for unreasonableness. But the picture that emerges from even an incomplete consideration of the decisions at first instance is consistent. The court looks at the decision, the material before the decision-maker and the reasons for the decision and decides whether the decision is reasonable, in precisely the same way in which it decides whether decisions and actions in other spheres of the law are reasonable. This is apparent from cases dealing with recreational

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[39] *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) paras 57-60.
[40] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) paras 29-32.
[41] *Dumani v Nair and Another* 2013 (2) SA 274 (SCA).
[42] *JDJ Properties CC and Another v Umngeni Local Municipality and Another* 2013 (2) SA 395 (SCA).
[43] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).

facilities for prisoners,[44] municipal valuations,[45] refugees,[46] planning approvals (again),[47] and the seriousness of injuries for the purpose of a road accident fund claim.[48] In none of these did the court have regard to the expertise, if any, of the decision-maker. In those instances where the decision-maker selected one of several possible conclusions, or where the decision was informed by a variety of relevant policy factors, the approach of the court in upholding the decision was simply to say that the decision was not unreasonable. A similar approach has been taken in the closely related field of reviews of CCMA arbitration awards.[49]

The only case I have found in which the court explicitly held that considerations of deference meant that it should not intervene on a judicial review is *AIPF v Van Zyl*.[50] That case was decided under the interim Constitution and concerned an attack on the valuation of a pension fund (of which I believe some of you may have been members) and the valuations used when members of the fund were given the option of joining other funds. The context in which Brand JA referred to deference – not I hasten to say to the legislature or any public body, but to the actuarial basis used by the actuary in making his valuation – is by no means clear. There was also a factual dispute between the applicant's actuary on the one hand and Mr van Zyl and three other actuaries on the other. That dispute as Brand JA held, had to be determined in favour of the fund on the basis of the *Plascon-Evans* rule. Why deference was even

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[44] *Ehrlich v Minister of Correctional Services* 2009 (2) SA 373 (E).
[45] *Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg and Another* 2014 (5) SA 485 (GSJ).
[46] *Tshiyombo v Refugee Appeal Board and Another* 2016 (4) SA 469 (C).
[47] *Gerstel and others v Cape Town City and Others* 2017 (1) SA 11 (C).
[48] *JH v Health Professions Council of South Africa and Others* 2016 (2) SA 93 (WCC). Although Rogers J referred to the fact that the review panel had expertise that the court lacked, his decision at the end of the day was simply that the evidence for the applicant did not show that the view taken by the review panel was incorrect.
[49] *Herholdt v Nedbank Ltd (Cosatu as amicus curiae)* 2013 (6) SA 224 (SCA).
[50] *Associated Institutions Pension Fund v Van Zyl* 2005 (2) SA 302 (SCA) para 39.

mentioned is opaque. It was a straightforward case of experts disagreeing with one another.

Assuming that this analysis is correct then in the context of judicial review of administrative action we are not dealing with a high flown principle of constitutional and administrative law, but at most with a matter of the weight to be attached to evidence tendered in support of the validity of a particular administrative decision. If a particular administrator vested with a truly discretionary decision-making power addresses the underlying policy and reasons for that decision from a background of experience and expertise, demonstrating a knowledge of the problems forming the background to the decision and the range of difficult choices that had to be confronted in making it, this evidence should not be dismissed lightly, any more than a court would dismiss lightly evidence by a surgeon about the difficulties attendant on an emergency procedure. In other words, as Lord Hodge said when delivering the Morti Malherbe Memorial lecture at Stellenbosch in 2015, [51] courts in those circumstances rightly attach weight to the conclusion reached by the primary decision-maker, but that is because the conclusion is backed by sound reasons, not because of a deferential approach by the court. Do we need warnings from our highest court that courts should hesitate before rejecting such evidence? And do we need those warnings to be dressed up as issues of legal doctrine?

Perhaps it is necessary to pause here and stress that I am only concerned with challenges to administrative action on the grounds of its substantive unreasonableness. Other considerations arise when dealing with the rationality of executive decision-making; or with the content of constitutionally protected rights or legislation alleged to constitute an infringement of constitutionally protected rights; or with the justification

[51] Lord Hodge 'Judicial lawmaking in a changing constitution' 2015 *Stell L R* 471 at 484.

under s 36(1) of the Constitution of limitations on protected rights. This may seem a narrow focus and no doubt I will be told that there is overlap between this issue and the others I have mentioned, but that is not a justification for importing into the one enquiry, issues that may properly arise elsewhere in a different context.

If, as I suggest, this is not a matter of deference, where does it leave the separation of powers and deference in the field of judicial review of administrative action? My tentative conclusion is that they have no effective role to play in judicial decision-making in that field. Perhaps I am stepping into a minefield of controversy, but I suggest that all decisions in that field can be taken without any need to defer, or to have regard, to the proper role of administrators or their expertise or the expertise of those who advise them, save where that has some evidential significance. Courts can simply consider whether on all the evidence the decision was reasonable. The fact that a decision was taken by an administrative functionary with vast experience in the subject matter under consideration cannot be determinative of whether their decision was reasonable, any more than whether a surgeon or a pilot behaved unreasonably and hence was negligent can depend on their level of skill and experience. It is so that in weighing up the evidence the court will be more reluctant to characterise the conduct of such a person as unreasonable, but that is a natural hesitation that may prompt closer scrutiny of their decision and the allegations of unreasonableness, and is not dictated by legal doctrines. The issue in cases of judicial review is not a separation of powers issue, because the Constitution and PAJA have resolved the question of the permissibility of judicial review of administrative action, including review of the substantive reasonableness and rationality of the decision itself. What occurs after that in the course of the review does not need a further immunisation to prevent the courts

from improperly intruding into the sphere of the other arms of government.

You may say that this is after all of no great moment and that little harm is done by what I have called a ritual invocation of a broad and harmless doctrine. There are two reasons why I disagree. First, I can recall what it was like to practice in an environment where people could make decisions and give no substantive reasons for them, because there was no obligation on them to do so. I can also recall the bland statements that passed for reasons. Have a look if you like at the decision in *Chetty's Transport*[52] and the summary of the contents of the opposing affidavit in which the chair of the National Transport Commission said that he and his colleagues were aware of the facts relied upon by the applicant; knew the locality in which it was desired to provide a bus service; gave full consideration to the arguments presented to them; made a decision in good faith; were unbiased and honestly and unanimously decided to refuse the application. That was sufficient to win the case. I leave aside the affidavits deposed to in security cases where senior police officers defended gross intrusions into personal liberty by saying that they had reason to believe that the person concerned was a terrorist or had committed sabotage or the like.

We have rightly created a democracy in which that is no longer allowed, much less is it tolerable. Reasons now have to be given by decision-makers and can be interrogated by the courts. That does not stop many decision-makers giving artificial and frequently dishonest reasons, often constructed with the assistance of their lawyers, but at least the merits of these can be explored and are often shown to be false or misleading. Why then should we be prepared to tolerate judges providing reasons by rote instead of engaging with the facts of matters and

[52] Fn 14 supra

explaining why the decisions that are challenged before them in review proceedings are either unreasonable or not unreasonable? Why should the dismissal of a review application be justified on the simple basis that it was a polycentric decision, or by a bald statement that the nature of the decision required deference from the court? This transforms the court into what Davis J referred to as 'a jurisprudential slot machine'[53] where you feed your issue into the judicial maw and it spits out the answer with standardised reasons. In other words my approach is directed at achieving greater transparency in legal reasoning.[54]

In fairness to our judiciary I do not believe that this is happening. Instead, in their judgments they are engaging with the facts of cases and articulating why a particular decision either survives or fails judicial scrutiny. But if we can do that objectively, without resorting to an indeterminate doctrine of the separation of powers, and without referring to notions of deferring to administrative functionaries on the grounds of their actual or perceived expertise or the range of policy options open to them, why can't we scrap what is unnecessary and irrelevant to the actual decision? When I said in *Endumeni*[55] that in interpreting documents we should stop referring to expressions such as the plain meaning of words, or the intention of the legislature, or the intention of the parties, the hope was that abandoning these archaic misnomers would move judges towards articulating openly and honestly, by reference to language, syntax, context and practical effect, the reasons for construing a statute or a contract in a particular way. The issue I am seeking to raise here is whether jettisoning reference to deference and its suggested role in the review of administrative action will compel judges to engage with the

[53] Dennis Davis 'To Defer and When? Administrative Law and Constitutional Democracy' 2006 *Acta Juridica* 23 at 34.
[54] Geo Quinot and Sandra Liebenberg 'Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa' 2011 *Stell LR* 639 at 640.
[55] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

substantive merits of administrative decisions and explain clearly and openly why they are to be upheld or condemned as unreasonable.

It is a perennial problem of the law that we create structures and reasons at various times in the development of the law, which either from the very outset are in fact fictions, or which become fictions in its development. Instead of abandoning them we then try to fit new situations into the old paradigm – new wine into old wineskins to use a biblical metaphor – frequently with disastrous results, or at least thereby stultifying an open and honest development of the law. In a context with which I suspect I am more familiar than most of you, namely the nature of the action *in rem* of the admiralty law, the problem arose under statute whether an action *in rem* in England was an action between the same parties as a conventional action in India between the same claimant and the owner of the ship. In holding that it was and rejecting the notion that an action against the ship could be anything other than an action against the owner of the ship,[56] Lord Steyn made these perspicacious remarks:

'The role of fictions in the development of the law has been likened to the use of scaffolding in the construction of a building. The scaffolding is necessary but after the building has been erected scaffolding serves only to obscure the building.'

I said earlier the doctrine of the separation of powers may be seen as a fundamental building block in the justification of judicial review, both of administrative action and other actions by the other two branches of government, but that does not mean that it is a useful or necessary tool for determining whether in the area of judicial review of administrative action, and especially review on the grounds of unreasonableness, the review should succeed or fail. There is little evidence that judges are using it to determine cases. I contrast that with a hypothetical judgment in which the judge said that the administrative functionary was extremely

[56] *The Indian Grace (No 2), Republic of India and Another v India Steamship Company Ltd* [1997] 4 All ER 380 (HL).

experienced in this field and therefore it would be inappropriate to interfere with their decision, notwithstanding its lack of any reasoned basis and its unreasonable effect on those at whom it was directed That would prompt an outcry and a rapid application for leave to appeal. If it emanated from that unappealable tribunal, the Constitutional Court, which in Justice Jackson's famous aphorism[57] is infallible because it is final, not final because it is infallible, I suspect that many of you would be heading for your computers to decry it in blogs, press commentary and articles in legal journals.

That point leads to my second reason for rejecting the notion that we should just keep quiet and carry on.[58] It is that such an approach inhibits judges, and especially academics, from developing an appropriate analysis of the impact of the doctrine of separation of powers on the scope the judicial function. I return to my point about demarcation. The broad scope of judicial review that now exists in South Africa, not only of administrative action, but of legislative decisions, the workings of the legislature and quintessential executive action, such as presidential appointments, has brought to the fore the question of the proper province of judicial intervention. Added to this is the impact of adjudication on rights in terms of the Bill of Rights. No judge, required to determine whether a person dying of a terminal disease should be entitled to end their life with the assistance or by the hand of a medical practitioner,[59] or whether medical treatment should be given to or withheld from a person,[60] can fail to wonder whether this is the proper province of the judiciary. Similar questions arise when we are asked to adjudicate on

[57] *Brown v Allen* 344 US 443 540 (1953).
[58] Or KBO as Winston Churchill would express it.
[59] *Minister of Justice and Constitutional Development and Others v Estate late Stransham-Ford (Doctors for Life and others as amici curiae)* 2017 (3) SA 152 (SCA).
[60] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

foreign policy, intervene in the workings of parliament, abolish toll roads or determine the content of the broad swathe of socio-economic rights guaranteed under our Constitution. Yet it is an area where we obtain little or no assistance from the academy. As early as 1993 Alfred Cockrell called for 'the articulation of rigorous and coherent principles that will guide legal intervention and non-intervention'[61] and Professor Hoexter repeated that call in 2011,[62] but there seems to have been little progress. There is a vast array of writing about the separation of powers, and some summaries of the cases in the Constitutional Court forming part of the endeavour to design a 'distinctly South African model of separation of powers',[63] but almost all of this is directed at justifying the range and ambit of judicial review in South Africa, not at helping judges to discern when it is permissible to decide issues and when they are outside judicial competence. There is an enormous amount of work to be done in this area and I am afraid that nothing has yet come from the Constitutional Court to guide the judges in determining their proper province. There are of course several cases in which the court has carefully defended its own sphere of operations, but the boundaries that confine the courts are far less clear. It is all well and good to be told that courts no longer have to 'claim space and push boundaries to find means of controlling public power',[64] and the evidence is that they have not been hesitant in controlling the exercise of public power. That is understandable given our history, but I think it legitimate to ask, as it is being asked in other countries, where this stops. Where are the boundaries of the courts? In my view this is where our efforts need to be concentrated if we are to translate the theory of the separation of powers into a meaningful tool to

[61] Alfred Cockrell '"Can you Paradigm?" – Another perspective on the Public Law/Private Law Divide' in TW Bennett et al (eds) *Administrative Law Reform* (1993) 227 at 247.
[62] Hoexter, supra fn 6, 147.
[63] *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 60.
[64] *Pharmaceutical Manufacturers*, supra, fn 5, para 45.

guide courts in the adjudication of real cases. Invoking it in relation to matters where it has no practical role to play is a distraction from that task.

Thank you.