

# A decade and a half of deference (part 1)\*

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## 1 Introduction

In 2000 Hoexter published an article on judicial review that became very influential in South African administrative-law scholarship and jurisprudence.<sup>1</sup> In her article Hoexter raised the notion of deference in judicial review of administrative action.<sup>2</sup> While she concluded on the pessimistic note that “the debate about deference ... will be cancelled owing to lack of interest”,<sup>3</sup> her article has been cited with approval in a number of judgments, including the influential constitutional court judgment of O’Regan J in the *Bato Star* case.<sup>4</sup>

A decade and a half later we take stock of the deference debate in South Africa. In her article, Hoexter concluded that the law-makers “got it wrong” regarding deference in the Promotion of Administrative Justice Act.<sup>5</sup> We ask whether the courts got it right in enthusiastically taking up the notion of deference. We argue that despite the courts’ zeal in this regard, Hoexter correctly predicted that there would be no debate. In our view the courts have (at best) misunderstood Hoexter and seized upon the notion of deference in a manner that was never put forward. Instead of a debate on deference, deference has been applied as a *fait accompli*. We continue to explore how the notion of deference can be useful in debating particular aspects of South African administrative law under the constitution<sup>6</sup> and how it cannot.

We start with a close reading of Hoexter’s 2000 article and of the cases adopting Hoexter’s description of deference. On the basis of this discussion we offer an assessment of Hoexter’s intention and compare it to subsequent takes on her work, in particular by courts. We argue that most (if not all) of these cases stray fundamentally from the debate Hoexter called for and that the cases are largely inconsistent. We subsequently return to the bases for a debate on deference in

\* This article draws on Maree *Investigating an Alternative Administrative-Law System in South Africa* (2013 diss U Stell) supervised by Prof Quinot. Our thanks to the Administrative Justice Group at Stellenbosch University for fruitful discussions on the issues raised in this paper and to Prof Hoexter for her comments. The usual disclaimers apply.

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<sup>1</sup> Hoexter “The future of judicial review in South African administrative law” 2000 *SALJ* 484.

<sup>2</sup> In this article we use the term “judicial review” in a narrow sense to refer to judicial review of administrative action, since the article focuses on deference in the context of administrative law. However, we are not suggesting that deference is an issue only in administrative-law adjudication. A number of South African scholars have investigated the role of judicial deference in other contexts such as socio-economic-rights adjudication. See Brand “Judicial deference and democracy in socio-economic rights cases in South Africa” in Liebenberg and Quinot (eds) *Law and Poverty: Perspectives from South Africa and Beyond* (2012) 172; McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009).

<sup>3</sup> Hoexter (n 1) 519.

<sup>4</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

<sup>5</sup> Act 3 of 2000 (“PAJA”).

<sup>6</sup> Constitution of the Republic of South Africa, 1996.

administrative-law adjudication and explore the role that the notion of deference can play in this context within the particular South African administrative-law system. We conclude by renewing a call for a *debate* on deference and set out some of the contours of that debate as we see it.

## 2 *Deference in South Africa: the (non)debate to date*

### 2.1 Hoexter's article and subsequent work

In her article Hoexter called for the development of “an appropriate theory of deference”,<sup>7</sup> situating her argument against the backdrop of the development of administrative law in South Africa.<sup>8</sup> She pointed to the primacy accorded to judicial review as one of the few legal instruments available prior to democratisation to hold the state accountable. Within this context liberal administrative lawyers routinely pursued the expansion of review and grounds of review in order to extend the scope of judicial oversight of the bureaucracy. More judicial review was universally seen as a good thing.

The constitution, however, drastically changed the legal landscape within which administrative law operates. The introduction of a bill of rights and constitutional supremacy meant that administrative law no longer had to do all the work. The need for expansive judicial review powers was far less. On the contrary, Hoexter noted that “unbridled judicial activism” holds particular dangers and may be particularly inappropriate in the South African context given the public administration's social-justice mandate under the constitution.

These developments called for a re-evaluation of the role of judicial review within the administrative-law system, which is essentially what Hoexter proposed. Her point of departure was the conceptualisation of the role of judicial review within the framework of a culture of justification as put forward by Mureinik.<sup>9</sup> Hoexter noted that our new constitutional dispensation “requires justification for the exercise of judicial power as much as any other sort of power”.<sup>10</sup> What was consequently needed in respect of judicial review was, in Cockrell's words, “the articulation of rigorous and coherent principles that will guide legal intervention and non-intervention”.<sup>11</sup> This is the role for a theory of deference Hoexter had in mind. She also elaborated on the nature of her idea of deference:

“the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention”.<sup>12</sup>

<sup>7</sup> Hoexter (n 1) 484.

<sup>8</sup> Hoexter (n 1) 485-494.

<sup>9</sup> Mureinik “A bridge to where? Introducing the interim bill of rights” 1994 *SAJHR* 31 32.

<sup>10</sup> Hoexter (n 1) 500.

<sup>11</sup> Cockrell ““Can you paradigm?” – another perspective on the public law/private law divide” in Bennett *et al* (eds) *Administrative Law Reform* (1993) 247, quoted by Hoexter (n 1) 500.

<sup>12</sup> Hoexter (n 1) 501-502 (footnotes omitted).

The remainder of the article explored a number of themes that Hoexter considered “particularly important in giving shape to an appropriate theory of deference in South African administrative law”.<sup>13</sup> These sections provided some indication of the contours and elements of the contemplated theory. Under the theme of “variability” Hoexter indicated that deference can be linked to “the intensity of judicial scrutiny” applied in a given case.<sup>14</sup> She indicated that administrative action need not always be held to the same standard under the same administrative-law rules. Hoexter clearly had two distinct aspects of judicial review in mind here. Firstly, there can be variability in the standard of review that is applied to the action. Secondly, there can be variability in the courts’ “willingness to intervene in a particular case” once it has found the action potentially wanting in the first stage. She listed some factors that may inform this type of variability: policy in the decision, scope of discretion, expertise, impact, “degree of public participation” in taking the decision, and availability of internal remedies.<sup>15</sup> Hoexter also indicated that the theory must be premised on “the minimum content of administrative justice”.<sup>16</sup> Deference involves the choice of moving beyond that minimum content.

Hoexter’s conception of deference clearly also relates to the amenability of actions to judicial review. Under her theme of “administrative action” she discussed in detail what type of actions are subject to judicial review and how such actions are to be identified.<sup>17</sup> However, she also warned against using the justiciability threshold too broadly when redrawing the boundaries of judicial review. Rather, Hoexter called for justiciability and variability to be viewed together so that use of the latter can reduce reliance on the former.

Finally, Hoexter indicated that deference impacts on the content of particular rules of administrative law. She focused on the constitutional requirement that all administrative action must be reasonable and showed how that rule can have a variety of meanings. An approach in terms of deference insists on the recognition of “legitimate diversity” at the heart of this rule.<sup>18</sup>

Hoexter concluded her article by showing how the Promotion of Administrative Justice Act had failed to respond meaningfully to the need for a theory of deference. She was particularly critical of the definition of “administrative action” in section 1 of the act and the reasonableness ground of review in section 6(2)(h), noting that section 1 “does little to advance the debate about deference” and that neither section will contribute to lawyers spending their time “working out the factors relevant to judicial intervention and non-intervention”.<sup>19</sup>

Thus, the argument Hoexter proffered in her article was the dire need for a theory of deference, given the absence of such a theory in South African administrative law. While she indicated what might contribute to the development of such a theory, she noted that at least the Promotion of Administrative Justice Act did not support

<sup>13</sup> Hoexter (n 1) 502.

<sup>14</sup> Hoexter (n 1) 502.

<sup>15</sup> Hoexter (n 1) 503.

<sup>16</sup> Hoexter (n 1) 504.

<sup>17</sup> Hoexter (n 1) 505-509.

<sup>18</sup> Hoexter (n 1) 512. Thus, Hoexter foreshadows the interpretation of the reasonableness standard later adopted in the *Bato Star* case (n 4). However, Hoexter seems to indicate that the variability of reasonableness is itself deferential. Once the standard of review has been determined in relation to the circumstances of the case, the reasonableness test can be applied. The question is whether the court has to assume a deferential stance in applying the reasonableness test, by not scrutinising a purported rational connection too closely, for instance.

<sup>19</sup> Hoexter (n 1) 517, 519.

such a development. Her diagnosis was that a “rich debate about deference” would in all likelihood not take place in South Africa.<sup>20</sup> A theory of deference would accordingly not develop.

In Hoexter’s subsequent work, she has affirmed the persisting need for “the development of a doctrine of deference”, despite the changed political circumstances since 2000,<sup>21</sup> the transformation of the judiciary<sup>22</sup> and a clearer understanding of the role of courts in our democratic system.<sup>23</sup> In these writings Hoexter confirmed that there is no theory of deference in South Africa yet and that she has not put forward such a complete theory. She refers to her contributions in this regard as a “view of deference, because ‘theory’ is too ambitious a word”.<sup>24</sup>

## 2.2 The courts

Despite Hoexter’s intention to introduce a debate, the South African courts have applied her description of deference as a legal definition and principle. The higher courts have contributed little to the development of the content of deference and their treatment of the notion reveals a distinct ambivalence to deference’s constitutional pedigree and its role in administrative-law adjudication.<sup>25</sup>

The first judgment in which the higher courts expressly noted the principle of deference was *Logbro Properties CC v Bedderson NO*.<sup>26</sup> In this case Cameron JA identifies the task before the decision-maker as a “prime instance of what commentators have dubbed ‘polycentric decision-making’”.<sup>27</sup> The decision was characterised as polycentric because various public interests required balancing, such as the “fair reconsideration of the appellant’s tender” and the “broader responsibilities” of the decision-maker.<sup>28</sup> The court finds that “[i]t is in just such circumstances that a measure of judicial deference is appropriate to the complexity of the task that confronted” the decision-maker.<sup>29</sup> Thus, where a decision-maker is confronted with a polycentric issue the court should act with judicial deference because of the complexity of the decision. The court quotes from Hoexter’s 2000 article and endorses her description of judicial deference.<sup>30</sup> On this basis, the court finds that the “conclusion is unavoidable” that the decision-maker “acted

<sup>20</sup> Hoexter (n 1) 485.

<sup>21</sup> When Hoexter put forward the need for a debate on courts’ intervention and non-intervention in 2000, South African democracy was just over five years old and the first national and provincial elections under the final constitution had recently been held, compared to 21 years of democracy with four free and fair national and provincial rounds of elections by 2015.

<sup>22</sup> For example, in 1994 only three of the 166 judges were black, compared to 2014 when 63% of judges were black, including all but one head of court. Regarding gender, there were only two female judges in 1994 compared to 81 in 2015; Albertyn “Judicial diversity” in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 275; Department of Justice and Constitutional Development *Justice Today* (August 2015) 5.

<sup>23</sup> Hoexter *Administrative Law in South Africa* (2012) 147.

<sup>24</sup> Hoexter (n 23) 151.

<sup>25</sup> Contrast, for instance, *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 (SCA) with *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA).

<sup>26</sup> 2003 2 SA 460 (SCA).

<sup>27</sup> the *Logbro* case (n 26) par 20.

<sup>28</sup> the *Logbro* case (n 26) par 20.

<sup>29</sup> the *Logbro* case (n 26) par 21. This raises the question whether the deference referred to by Cameron JA operates in addition to the distinction between appeal and review, constitutional constraints on the branches of state and the existing rules of litigation, or whether deference describes these limits of the judicial function.

<sup>30</sup> the *Logbro* case (n 26) par 21.

unimpeachably” in taking supervening circumstances into consideration. Deference thus comes into play in the court’s assessment of the fairness of the administrator’s conduct (while deciding on the merits of the ground of review).<sup>31</sup> The court makes this finding without further explaining why deference is required at polycentric decision-making, why deference is appropriate under the circumstances of the particular case, or what role deference plays in the case. Arguably, the court could have reached the same conclusion on the basis of the distinction between appeal and review<sup>32</sup> or simply with reference to the separation of powers.<sup>33</sup>

Subsequently, in *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd*,<sup>34</sup> Schutz JA reviewed a decision on reasonableness grounds, among others. The court found that since the decision-maker “[had] a wide discretion to strike a balance, in furtherance of the objectives and principles” of the relevant legislation and was “[giving] effect to government economic policies”, “judicial review of the exercise of powers calls for deference, in the sense stated in *Logbro Properties CC v Bedderson NO*”.<sup>35</sup>

The court quotes<sup>36</sup> from *Du Plessis v De Klerk*<sup>37</sup> and *S v Lawrence*<sup>38</sup> for authority that courts are not adept at factual, economic or political inquiries,<sup>39</sup> that courts should therefore exercise restraint in making findings on them, and that this restraint is linked to the different roles of the courts and other branches. The court elaborates along this vein in characterising the decision as polycentric and states that the court cannot prefer one decision over another on the basis that the one is better than the other.<sup>40</sup> As authority for this statement, the court quotes<sup>41</sup> from *Bel Porto School Governing Body v Premier, Western Cape*,<sup>42</sup> where Chaskalson P said that “[c]ourts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable”. The court’s function is not to test the correctness or the “substance” of

<sup>31</sup> The court paints “the core of the appellant’s case” here as the argument that the administrator acted “capriciously or for an improper or unjustified reason”, which could be viewed as either a lawfulness or reasonableness argument.

<sup>32</sup> The courts often refer to their awareness of the distinction between review and appeal, possibly to allay fears of judicial overreach. In *Carephone v Marcus* 1999 3 SA 304 (LAC) the purpose of considering the merits of a decision under review was distinguished from taking the administrator’s place, thus retaining the distinction between review and appeal in the face of review for substantive fairness, that is reasonableness. Essentially the judiciary does not perform the executive function in scrutinising in detail the merits of a decision; the purpose of the scrutiny is the distinguishing factor. A court does not consider the merits in order to take a new decision or to pronounce on the desirability of the decision, but to determine whether the executive function has in actual fact been performed, or whether the executive branch has exceeded its powers. Depending on the matter at hand, this determination may require varying levels of scrutiny. That complex matters may be less protected than simple matters, because of the role of deference in instances of review of “polycentric decision-making”, is concerning in a system of constitutional supremacy. The temptation arises to frame arguments demonstrating the complexity of a matter rather than justifying it.

<sup>33</sup> It is not clear whether the court is describing the nature of review or whether it is describing deference as a principle additional or new to the distinction between appeal and review.

<sup>34</sup> 2003 6 SA 407 (SCA).

<sup>35</sup> the *Phambili Fisheries* case (n 34) par 47.

<sup>36</sup> the *Phambili Fisheries* case (n 34) par 48-49.

<sup>37</sup> 1996 3 SA 850 (CC) par 180.

<sup>38</sup> 1997 4 SA 1176 (CC) par 42.

<sup>39</sup> See, generally, Fuller “The forms and limits of adjudication” 1978 *Harvard Law Review* 353-409.

<sup>40</sup> the *Phambili Fisheries* case (n 34) par 51.

<sup>41</sup> the *Phambili Fisheries* case (n 34) par 51.

<sup>42</sup> 2002 3 SA 265 (CC) par 45.

the decision, but the “procedure by means of which it was arrived at”,<sup>43</sup> otherwise the distinction between review and appeal is lost.<sup>44</sup>

The court points out that judicial deference “simply manifests the recognition that the law itself places certain administrative actions in the hands of the Executive, not the Judiciary”.<sup>45</sup> This amounts to no more than a clear statement of the separation of powers in terms of which different functions are apportioned to the branches of the state. In concluding the discussion on the alleged capriciousness of the decision, the court summarises this preceding reasoning:

“Judicial deference is particularly appropriate where the subject matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director [the decision-maker]. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds.”<sup>46</sup>

With that the court finds that the application fails on reasonableness grounds. Deference and rationality are interwoven in this discussion. Although the supreme court of appeal clearly identifies the facts upon which the decision was made,<sup>47</sup> why they were relevant<sup>48</sup> and why the decision-maker dealt with them rationally in the circumstances,<sup>49</sup> it is unclear what role deference plays or should play in the analysis of the reasonableness of decisions or how the analysis would have differed without deference.

The *Phambili Fisheries* matter came before the constitutional court on appeal in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>50</sup> which has subsequently become the standard case on deference in administrative-law adjudication.<sup>51</sup> In one of the two majority judgments, O’Regan J discusses deference under the heading of reasonableness.<sup>52</sup> Thus, in this judgment deference seems to be treated as an aspect of reasonableness review. With reference to Hoexter’s 2000 article the constitutional court endorses<sup>53</sup> the supreme court of appeal’s negative

<sup>43</sup> the *Phambili Fisheries* case (n 34) par 52.

<sup>44</sup> the *Phambili Fisheries* case (n 34) par 52. The court’s reasoning could simply have been based on the nature of review. Citing deference does not clarify the court’s approach to review.

<sup>45</sup> the *Phambili Fisheries* case (n 34) par 50. The court’s discussion of deference takes the nature of administrative decision-making, as well as the constitutional status of the administration, into consideration. However, the court does not weigh these considerations against constitutional supremacy and the constitutional court’s role as final arbiter on constitutional matters. It is concerning that the judiciary’s descriptions of deference would not seem out of place within a system of parliamentary sovereignty.

<sup>46</sup> the *Phambili Fisheries* case (n 34) par 53. Unfortunately this paragraph raises as many questions as it attempts to answer. Does the word “unless” in this paragraph suggest that no deference is due if a decision is irrational? How does the court apply deference to determine whether the decision is rational or not in the first place?

<sup>47</sup> See, eg, the court’s approval of the reasons furnished by the decision-maker – the *Phambili Fisheries* case (n 33) par 39-45.

<sup>48</sup> the *Phambili Fisheries* case (n 34) par 54.

<sup>49</sup> the *Phambili Fisheries* case (n 34) par 41-43, 45, 51 (the decision-maker “[was] obliged to have regard to a broad band of considerations and the interests of all that may be affected”).

<sup>50</sup> (n 4).

<sup>51</sup> See, eg, *Nyathi v MEC for Department of Health, Gauteng* 2008 5 SA 94 (CC), where Madala J held that “[t]he separation of powers doctrine needs to be respected and due deference afforded to the other arms of government, especially when the matter relates to complex procedures beyond the expertise of this Court”. Madala J refers to the *Bato Star* case as authority for the meaning of deference and for the contention that deference flows from the separation of powers (par 88).

<sup>52</sup> the *Bato Star* case (n 4) par 41.

<sup>53</sup> *Bato Star* case (n 4) par 46.

description of deference: “[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function”.<sup>54</sup> O’Regan J clearly states that deference or respect derives from the doctrine of separation of powers. She quotes<sup>55</sup> from the House of Lords judgment, *R (on the application of ProLife Alliance) v British Broadcasting Corporation*,<sup>56</sup> where Lord Hoffmann indicates that

“[i]n a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the courts.”<sup>57</sup>

Lord Hoffmann reasons that where a court determines the decision-making competence of any branch of state, it is merely deciding the law.<sup>58</sup> The decision-making competence of a branch is determined by the separation of powers. Where a court determines the content of the separation of powers and other law in the context of allocating powers it is not acting with deference and is not required to act out of deference.

O’Regan J adopts this analysis to hold that, “[i]n treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution”.<sup>59</sup> In other words, respect amounts to an appreciation of competence. However, we submit that this amounts to nothing more than an application of the separation of powers. Deriving deference from the separation of powers in this manner is problematic, and we shall return below to the link between separation of powers and deference. At this point it is worth noting a few questions that emerge from this alignment of deference and separation of powers. How does deference influence the court’s approach to judicial scrutiny in cases where both parties are organs of state? Should a court defer when the administration believes it has erred in its original decision? Does the court defer to the argument brought to court, to the original decision or both? How does this differ from an ordinary case between a private citizen and the state? Finally, does deference apply whenever the administration acts, or only when it performs administrative action? If the latter, why would deference not be relevant to administrative action performed by a decision-maker that is not an organ of state?

O’Regan J also attempts to combine the idea of respect and reasonableness review in the following terms:

“A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area *must be shown respect by the Courts*. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a *Court should pay due respect* to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not

<sup>54</sup> *Phambili Fisheries* case (n 34) par 50.

<sup>55</sup> *Bato Star* case (n 4) par 47.

<sup>56</sup> 2003 2 All ER 977 (HL).

<sup>57</sup> the *ProLife Alliance* case (n 56) par 75.

<sup>58</sup> the *ProLife Alliance* case (n 56) par 76.

<sup>59</sup> the *Bato Star* case (n 4) par 48. However, “the proper role of the executive” is not absolute. The constitutional role of the executive only has meaning in relation to the constitutional roles of the other branches; when their roles change the other branches will be affected.

reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court *may not review* that decision.<sup>60</sup>

If the reasonableness of the decision is the decisive criterion, what role does deference play? It seems that no deference is due to an unreasonable decision; the court must declare it invalid. Does deference make any difference, then? The court is obliged to consider the arguments of both parties as a matter of procedure in line with section 34 of the constitution. What does showing respect add to the proceedings in actual fact?

O'Regan J has already indicated that respect requires courts to acknowledge the proper role of the executive when she pointed out that deference cannot preclude review on reasonableness grounds. How are courts to acknowledge the proper role of the executive where an executive decision is scrutinised, though? This question is the crux of how respect and reasonableness review interact. In the preceding quotation, O'Regan J says that where the executive has a polycentric issue before it, or has a discretion regarding the route to be taken, courts must respect the *decision*. Thus, courts can respect the proper *role* of the executive by respecting the executive's *decision*. In our view this is not particularly helpful as it merely shifts the question to: how do courts respect executive decisions under reasonableness review? Furthermore, O'Regan J qualifies the entire approach by stating that respect cannot preclude review for unreasonableness.<sup>61</sup>

If the decision-maker "did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him"<sup>62</sup> a reasonableness challenge cannot succeed. Thus "[t]he court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances",<sup>63</sup> regardless of the respect the courts owe to executive decisions, such decisions will always be subject to reasonableness review. Initially, in quoting Lord Hoffmann, O'Regan J seems to state that respect is at least a factor in deciding whether a decision is reviewable under the rubric of competence.<sup>64</sup> By then qualifying this assertion, respect becomes a factor in reasonableness review. The question remains, how does respect operate in reasonableness review?

O'Regan J partially detracts from her original position that respect originates in the separation of powers and that respect is concerned with competence: she explicitly considers respect and reasonableness review together. Lord Hoffmann analyses deference as a principle determining and allocating the competences of the branches of government and does not seem to see a need for such a principle.<sup>65</sup> O'Regan J, however, applies Lord Hoffmann's reasoning in the context of reasonableness review which is concerned not with the allocation of power, but with the manner in which that power is exercised. The allocation of power and

<sup>60</sup> the *Bato Star* case (n 4) par 48 (emphasis added). O'Regan J alludes to complexity and expertise as factors triggering the need for deference. However, the emphasis on the separation of powers suggests that it is the identity of the decision-maker as an independent branch that triggers deference, rather than the nature of the decision. If the nature of the decision is decisive it is difficult to see how decisions taken by decision-makers outside of the separation of powers are not also owed deference. If respecting the proper role of the executive is the ultimate concern of deference, then arguably deference would be due to simple decisions taken by low-ranking officials especially.

<sup>61</sup> the *Bato Star* case (n 4) par 48.

<sup>62</sup> the *Bato Star* case (n 4) par 50.

<sup>63</sup> the *Bato Star* case (n 4) par 49.

<sup>64</sup> the *Bato Star* case (n 4) par 47.

<sup>65</sup> the *ProLife Alliance* case (n 56) par 74-77.

the content of that power are related but distinguishable. For instance, where the separation of powers allocates the judicial function, *ie* the function of stating the law, to the judiciary this allocation in itself does not define the content of the judicial function. However, where deference informs reasonableness review the content of the judicial function, in relation to the administrative function, is affected. This raises the question whether deference is concerned with the allocation of powers, the scope of powers or both? Seemingly, deference is a principle that permeates law in a very wide sense, from the inquiry of the allocation of functions to the content and application of those functions.

The fact that courts cannot interfere with different options falling within the boundaries of reasonableness, even where one decision is patently better than another, is in itself an acknowledgement of the constitutionally ordained function of the executive branch and, therefore, an incidence of deference as employed by O'Regan J. The scope of reasonableness review derives from the nature of judicial review, which maintains the difference between review and appeal. In this sense, deference does nothing new. Thus, is deference merely descriptive, describing the courts' position in relation to the executive during review proceedings as opposed to appeal or does it add something new or different to judicial review?

In a subsequent judgment in the *Foodcorp* case,<sup>66</sup> Harms JA refers to the view of the court *a quo* on deference: "this was one of those cases in which due judicial deference should be accorded to policy-laden and polycentric administrative acts that entail a degree of specialist knowledge and expertise that very few, if any, judges may be expected to have".<sup>67</sup>

The administrative decision to which deference was ostensibly due was based on an algorithm that a professor of mathematics had developed.<sup>68</sup> On appeal the appellant asked for the mechanical application of the formula to be reviewed in terms of section 6(2)(h) of the Promotion of Administrative Justice Act.<sup>69</sup> The formula itself was not challenged.<sup>70</sup>

Harms JA explains his understanding of deference with reference to the *Bato Star* case, noting "[i]n exercising its review jurisdiction a court must treat administrative decisions with 'deference' by taking into account and *respecting the division of powers* inherent in the Constitution".<sup>71</sup> Here, once again, an aspect of the definition of the separation of powers is stated succinctly. Thus, Harms JA does not contribute to the content of deference. It seems, however, that deference is a feature of the review process itself and its content amounts to recognition of the allocation of functions.

After considering the outcome of the formula's application, Harms JA responds to the high court's view on deference: "[o]ne does not need to understand the 'complex processes, mathematical or otherwise' ... to realise that at least some of the results produced by the simple application of the formula were irrational and inexplicable and consequently unreasonable".<sup>72</sup>

<sup>66</sup> (n 25).

<sup>67</sup> the *Foodcorp* case (n 25) par 2.

<sup>68</sup> the *Foodcorp* case (n 25) par 8.

<sup>69</sup> the *Foodcorp* case (n 25) par 11-14.

<sup>70</sup> the *Foodcorp* case (n 25) par 13.

<sup>71</sup> the *Foodcorp* case (n 25) par 12 (emphasis added).

<sup>72</sup> the *Foodcorp* case (n 25) par 18.

Harms JA does not explain at all why the results are irrational. He states that the appellant was “prejudiced” without explaining why.<sup>73</sup> He notes certain differences in allocation and that there were “glaring anomalies”,<sup>74</sup> without explaining why these differences amount to anomalies. In this context, it is rather puzzling that Harms JA concludes that the “simple application of the formula” was unreasonable. Assuming that “some” of the results were “irrational and inexplicable”, and Harms JA does not specify whether he means inexplicable in terms of formal logic, statistics, mathematics, law or a combination of these, an imperfect formula does not necessarily make the decision unreasonable in terms of administrative law: Harms JA would have to explain why some distorted results render the decision unreasonable in law. It could be that some distorted results are unavoidable given the complexity of the matter. It could be that this formula produced the least distorted output. Strangely, having said that the formula itself is not at issue, Harms JA mentions that noticing the anomalies would have called for “[a] reconsideration of the formula”. Above all, it is unclear how one could know that the output is irrational without knowing exactly how the mathematical formula producing the output operates. The terms of the formula would at least partially dictate whether any result was distorted or not; one would expect deference to enter the analysis at this point. Furthermore, whether these inconsistencies result in prejudice or favour is not a given and, as mentioned, the presence of prejudice or favour does not necessarily make the application of the formula unreasonable in law. Occasional mathematical or statistical inconsistency does not automatically amount to unreasonableness in law.<sup>75</sup>

It appears that where the unreasonableness of the decision is apparent without the need for non-judicial expertise in the court’s view, little or no deference is due. This approach raises several questions. If deference flows from the separation of powers, why is it not relevant whenever the administration performs an administrative function? Why should the court not defer to the administration’s decision to apply the formula mechanically? These questions are not addressed by the court, though, despite Harms JA’s reference to the separation of powers and the allocation of functions.

In the *Foodcorp* case the formula for the allocation of fish quotas was developed by the department of environmental affairs and tourism in terms of the Marine Living Resources Act<sup>76</sup> with the expert assistance of a mathematician.<sup>77</sup> Thus the administration was closely involved in the process leading to the final formula. As a result, considering the crucial link between the separation of powers and deference that was established in the *Bato Star* case, the presence of administrative expertise and experience is apparent and the reference to deference understandable. What is puzzling is that Harms JA does not find it necessary to rely on deference to come to his decision.

The *Foodcorp* case seems to reflect the ambivalence in the *Bato Star* case about treating administrators’ expert decisions with respect on the one hand and the courts’

<sup>73</sup> the *Foodcorp* case (n 25) par 19.

<sup>74</sup> the *Foodcorp* case (n 25) par 14-18.

<sup>75</sup> Cf the opinion of the experts who created and applied the formula, Butterworth, De Oliveira and De Moor “Are South African administrative law procedures adequate for the evaluation of issues resting on scientific analyses?” 2012 *SALJ* 461-477. Ultimately the *Foodcorp* case provides no guidance to decision-makers on how they should proceed in the future.

<sup>76</sup> 18 of 1998.

<sup>77</sup> the *Foodcorp* case (n 25) par 1, 3-4, 8.

independent assessment of the reasonableness of such decisions on the other. While the former can be labelled as deference, it is seemingly cancelled by the latter.

In the case of *Associated Institutions Pension Fund v Van Zyl*<sup>78</sup> the link between administrative expertise and deference appears more tenuous. The central issue was the methodology adopted by the actuary for the appellants, an organ of state, in the determination of a formula for the transfer of pension funds.<sup>79</sup> Brand JA explains the relevance of deference to the case as follows: “Particularly in the light of the training, skills, experience and intricacies involved in the application of actuarial science, I believe that this is a matter where judicial deference is appropriate.”<sup>80</sup>

The key question to ask in light of the preceding quotation is whether the expertise that ostensibly triggered deference in this matter is linked adequately to the administrative function. Or, is deference triggered purely by the technical expertise of the actuary? It would be curious if the court owed the actuary any deference, in the *Bato Star* sense, purely because of his expertise, which is completely divorced from the position of the administrative decision-maker.<sup>81</sup> Such a view would be difficult to reconcile with the repeated alignment of deference with the separation of powers.

In this case, as with most others discussed above, it is difficult to see what role deference plays in the analysis. By the time Brand JA refers to deference he has already found the actuary’s calculation rational on established rules of reasonableness review and without any reliance on deference. This case also raises a number of questions concerning the content of deference, particularly where expertise in a particular field is required, but it is neither the administrator who possesses that expertise nor is it clear that the expertise relates to the administrative function at hand. The case law discussed above indicates that in certain circumstances the court should defer to the relative expertise of the administrator. However, in the *Van Zyl* case, the court purports to defer to actuarial determinations<sup>82</sup> with little or any involvement of administrators. This points to an unresolved inquiry in the application of deference: once it has been shown that courts should defer to relative expertise these questions remain: “expertise in relation to what?” and “the expertise of whom?” A principle of deference to mere expertise as such could entail absurd implications: the administration could, for example, consult or employ experts simply to activate due deference. If expertise per se becomes the justification for deference, the constitutional basis for deference in the separation of powers also becomes questionable. And finally, why would deference come into play in these cases, but not other instances of adjudication involving highly technical questions?<sup>83</sup>

<sup>78</sup> (n 25).

<sup>79</sup> the *Van Zyl* case (n 25) par 9, 17-18, 35. Should the court not have assessed the question whether the administrator acted reasonably in relying on *this* particular actuary?

<sup>80</sup> the *Van Zyl* case (n 25) par 39.

<sup>81</sup> Particular questions that emerge in this context and that remain unanswered include the following. What makes an administrator an expert administrator, as opposed to an expert in another discipline such as actuarial science? Why would one recognise actuarial expertise rather than expertise in other disciplines, including law? Is deference due whenever experts are involved in the decision-making process?

<sup>82</sup> the *Van Zyl* case (n 25) par 39.

<sup>83</sup> Arguably, deference is owed to administrative expertise. However, the content of “administrative expertise” requires attention. Dyzenhaus calls for the respect of “administrative determinations”, which lends some support to the preceding contention “The politics of deference: judicial review and democracy” in Taggart (ed) *The Province of Administrative Law* (1997) 279-307 279. Therefore, the content of administrative expertise and determinations requires development before an appropriate theory of deference can be formulated on this basis.

The judgment of Langa CJ in *MEC for Education KwaZulu-Natal v Pillay*<sup>84</sup> sheds some light on these questions, albeit in the context of discrimination rather than administrative justice. The applicants contended that deference should be shown to school authorities<sup>85</sup> and that it was a factor to be taken into consideration in determining fairness.<sup>86</sup> They also linked deference to the doctrine of the “margin of appreciation” applied by the European court of human rights and the house of lords.<sup>87</sup> Langa CJ first points out that “the doctrine [of the margin of appreciation] is not a useful guide when deciding either whether a right has been limited or whether such a limitation is justified”.<sup>88</sup> Then he succinctly disposes of the contention that deference is appropriate in the circumstances:

“This court has recognised the need for judicial deference in reviewing administrative decisions where the decision-maker is, by virtue of his or her expertise, especially well-qualified to decide. It is true that the court must give due weight to the opinion of experts, including school authorities, who are particularly knowledgeable in their area, depending on the cogency of their opinions. The question before this court, however, is whether the fundamental right to equality has been violated, which in turn requires the court to determine what obligations the school bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This court cannot abdicate its duty by deferring to the school’s view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the school to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.”<sup>89</sup>

Langa CJ acknowledges the role of deference in the context of judicial review of administrative decisions.<sup>90</sup> However, he seems to indicate that the weight that should be attached to the determination of experts depends on the “cogency” of those determinations. Thus, it is unclear what the role of deference is, since deference seems to amount to no more than according due weight to arguments based on their cogency.

This judgment takes a strong stance on deference in human-rights adjudication generally, holding in essence that no deference is due in establishing whether a right has been violated. At the same time, the court acknowledges a role for deference in administrative-law adjudication, which suggests that adjudication under section 33 of the constitution is an exception to this general position. This ambivalence may be the same as that reflected in the *Bato Star* case and to a lesser extent in the *Foodcorp* case, where the courts seem to indicate the need for deference to expert administrators’ choices as part of a reasonableness assessment on the one hand, but insist on retaining an overriding power to test the reasonableness in law on the other hand.

The judgments discussed above all dealt with deference as part of the assessment of the grounds of review: deference either informed the interpretation of the ground of review itself, as was the case in the *Bato Star* case in relation to reasonableness under section 6(2)(h) of the act, or it entered the picture in assessing the administrator’s choice against the ground of review, as in the *Foodcorp* case. In *Minister of Defence*

<sup>84</sup> 2008 1 SA 474 (CC).

<sup>85</sup> the *Pillay* case (n 84) par 26, 80.

<sup>86</sup> the *Pillay* case (n 84) par 79.

<sup>87</sup> the *Pillay* case (n 84) par 80.

<sup>88</sup> the *Pillay* case (n 84) par 80.

<sup>89</sup> the *Pillay* case (n 84) par 81 (footnote omitted).

<sup>90</sup> This prompts the question whether deference is only relevant when s 33 of the constitution is applied.

and *Military Veterans v Motau*,<sup>91</sup> however, the court referred to deference as part of a threshold assessment of justiciability under administrative law. In this matter the court had to decide whether the minister's removal of two persons from the board of directors of a state-owned company is subject to administrative-law review. The minister is granted the statutory power to "terminate" any person's membership of the board "on good cause shown".<sup>92</sup> The court, however, found that the minister's decision is not reviewable under administrative law, as it does not amount to administrative action under the act. The decision is in the court's view rather a purely executive decision linked to the minister's policy-making functions under the relevant statute. The court justified this view by pointing out that executive decisions bearing on "particularly sensitive subject matter or policy matters" should be shown greater deference by courts.<sup>93</sup> Such deference is ostensibly shown by subjecting the impugned decision to a lighter level of scrutiny under the principle of legality rather than the "higher level of scrutiny" of administrative law.<sup>94</sup>

Deference is used here both in dealing with the threshold question of justiciability, *ie* determining whether the decision qualifies as administrative action and is subject to administrative law, and in considering variable standards of review in general. In contrast to the *Bato Star* case, where the variability of the standard of review was dealt with *inside* administrative law, variability is shifted to the earlier stage of the review process in the *Motau* case. However, deference seems to be a key factor in both approaches.

The judgments in which the higher courts have expressly relied on deference in reaching their conclusions show very little coherence in their application of deference. In most of these cases it is not clear that deference makes any independent contribution to the reasoning. In none of these cases is deference given any detailed content. The particular stage of the review process in which deference is to play a role is also not clear, with varying approaches adopted by the higher courts. At best, deference seems to capture aspects of the separation-of-powers doctrine in the context of administrative-law review. However, it is clear from the overview above of the higher courts' application of deference that there has as yet been no debate of any significance on any of these matters. Instead, deference is simply referenced as if it has a self-evident meaning and role to play in adjudication.

In the following section we return to Hoexter's call for a debate and for the *development* of a theory or notion of deference. We note the work of other scholars in this area in an attempt to return to the theoretical basis from which Hoexter made her contribution and which, as we shall argue, has largely been side-lined by our courts' enthusiastic adoption of a deference rhetoric. From that basis we engage with critiques of deference and in particular with the shortcomings that exist in the South African context that may undermine any sensible role for deference in our administrative-law system. We then suggest ways in which the debate can be taken forward in line with Hoexter's invitation for such a debate.

[to be concluded]

<sup>91</sup> 2014 5 SA 69 (CC).

<sup>92</sup> s 8(c) of the Armaments Corporation of South Africa Limited Act 51 of 2003.

<sup>93</sup> the *Motau* case (n 91) par 43.

<sup>94</sup> the *Motau* case (n 91) par 43.