The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in *National Treasury v Opposition to Urban Tolling*

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'It is necessary from the very nature of things that power arrests power.'[1]

I Introduction

The place of the doctrine of separation of powers in South African constitutional jurisprudence, in particular, and in modern constitutional theory, generally, remains a hotly contested topic. Its application and relevance in particular cases is often unclear.

The issue most recently arose in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (*OUTA*).[2] The case involved the legality of a controversial government decision to fund an upgrade to freeways in Gauteng through the collection of tolls from road-users. The Respondents sought, and were granted, an interim interdict from the North Gauteng High Court. The interdict prohibited the levying and collection of tolls pending further proceedings for final relief as to whether the government possessed the power to declare certain roads as toll roads.[3]

Before the proceedings for final relief could be heard in the High Court, the National Treasury and the South African National Roads Agency (SANRAL) instead sought leave to appeal to the Constitutional Court against the interim relief granted by the High Court. The Constitutional Court took the unusual step

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[1] Montesquieu *The Spirit of the Law* (1748)(trans A M Cohler, BC Miller & HS Stone, 1989) Book XI Chapter 4 155 cited in S Seedorf & S Sibanda 'Separation of Powers' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition 2005, OS) Chapter 12, 12–7.

[2] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association Intervening)* [2012] ZACC 18, 2012 (6) SA 223 (CC), 2012 (11) BCLR 1148 (CC)('*OUTA*').

[3] The final relief would also require a review of the environmental authorisation for the project to upgrade the freeways on the grounds that the decision-maker had not considered the social impact of tolling on various communities upon which it was imposed. Cf *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* [2007] ZACC 13, 2007 (6) SA 4 (CC), 2007 (10) BCLR 1059 (CC) at para 82. This aspect did not, however, feature in the Court's analysis.

of granting leave in these circumstances.[4] It set aside the interim relief granted by the High Court. In so doing, the Court permitted the implementation of e-tolling to continue pending the finalisation of proceedings in which the courts would determine the lawfulness of the underlying decision to allow tolling.

In dealing with the traditional requirements for interim relief, the *OUTA* Court held that the consideration of the so-called 'balance of convenience' (which is one of four inter-related requirements for interim relief, dealt with further below) must now consider the extent to which interdictory relief 'will probably intrude into the exclusive terrain of another branch of government'.[5] Interim relief suspending an exercise of statutory power is 'competent', the Court noted, but is only 'appropriate' in the 'clearest of all cases' and 'after careful consideration of separation of powers harm'.[6] The Court found that the case before it did not meet this entirely novel, rigorous threshold.

The Court's cautious approach might be explained by procedural concerns. In interim proceedings, a court will invariably *not* make any definitive finding on whether an exercise of a public power is lawful or not. Interim relief can pose problems. The Court noted that the same sensitivity – to issues of institutional comity – will not necessarily be present when a court ultimately considers final relief reviewing the decision to toll the roads. If those decisions are then found to be unlawful and void, then the Court will grant relief.[7]

OUTA is significant for other reasons. The Court, not surprisingly, portrays the body of law regarding the doctrine of separation of powers as being more settled than it is. The *OUTA* Court, in doing so, indicates that, as a general principle, courts should adopt a 'hands off' approach when a matter involves policy making and large-scale resource allocation. While that may make sense when a project is in its very incipient stages, the Court, with powers of judicial review under a basic law committed to constitutional supremacy, cannot *simply* defer to the executive because a dispute is complicated. Virtually all private party versus the state disputes that reach the Constitutional Court are public and polycentric – even if the dispute appears binary on its face. A case brought by the Mail and Guardian that seeks the release of documents from the state has an effect on the entire body politic. It is, furthermore, trite jurisprudence by now to note that the resolution of virtually every piece of litigation that involves enacted law and government policy will have an effect on the public purse. Need one roll out the tired comparison of the changes to government practice made as a result of FC s 35 – criminal procedure – as to the Court's hyper-minimalist but still genuine engagement with socio-economic rights – and the attendant costs of each.

[4] See *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4, 2010 (3) SA 293 (CC), 2010 (5) BCLR 391 (CC) at para 23 (Court held that 'it will not generally be in the interests of justice for this court to entertain appeals against interlocutory rulings which have no final effect on the dispute between the parties'.)

[5] *OUTA* (note 2 above) at para 47.

[6] Ibid at paras 47 and 64–66.

[7] Ibid at para 64.

That the *OUTA* Court appears to need reminding of the basic contours of the separation of powers doctrine as generally understood in South Africa is apparent from the following remarks by Moseneke DCJ:

> Thus the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain. What is more, absent of any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to the budgetary appropriations by Parliament.[8]

The Court's actual practice – over the past 20 years – indicates the truth of Alexander Bickel's observation in relation to the US Supreme Court: the separation of powers doctrine is best understood as a prudential doctrine invoked on an *ad hoc* basis as a way of managing the court's relationship with the political branches.

In matters such as *OUTA*, the budgetary implications and the will of the executive cannot be definitive. A court must, even at the stage of considering interim relief, take serious cognisance of the wide-ranging implications that such a programme has for a panoply of human rights and other constitutional principles. At the same time, we take cognisance of the fact that the Court did not pronounce on the *constitutionality* of the e-tolling scheme, or the lawfulness of declaring certain freeways as toll roads.[9] Nonetheless, in light of the wide-ranging impact of the case on the lives of South African commuters, it is unfortunate that the Court could not seize the initial opportunity to offer a more expansive and sensitive judgment.

Some readers may respond and argue that the nature of interim relief is, in fact, that a court should not pronounce on the substantive merits of an application. However, given the harm the plaintiffs would suffer in the immediate term, a court *is* obliged to view a matter from a rights-based perspective, and not solely on purely procedural grounds. That any harms could be recovered via an enrichment action in the future, as the *OUTA* Court held, fails to takes seriously the (prima facie) rights violations that made the interim interdict necessary.[10]

II E-Tolling Case: Background and Facts

E-tolling emerged as a result of a decision taken by the South African Cabinet to improve certain national motorways through the Gauteng Freeway Improvement Project (GFIP). The first phase of the GFIP saw an upgrade of 185 kilometres of the existing freeway network. The second phase will see a further 376 kilometres upgraded and created.[11]

In order to pay for these upgrades, SANRAL saw fit to toll these routes via gantries situated approximately 10km apart along the freeway network. Vehicles

[8] Ibid at para 67.

[9] P de Vos 'E-tolling Judgement: Sorry for Gauteng, but it's Perfectly Lawful' *Daily Maverick* (20 September 2012) available at <http://www.dailymaverick.co.za/opinionista/2012-09-20-e-tolling-judgement-sorry-for-gauteng-but-its-perfectly-lawful/#.UcbJZTswfkY>.

[10] *OUTA* (note 2 above) at para 54.

[11] See website of the South African National Roads Agency <http://www.nra.co.za>.

would pass underneath these gantries, and transponders fitted to each vehicle would pick up transponders attached to the gantries. The user's account would thereafter be debited with the amount to be paid. Vehicles belonging to non-Gauteng residents, rental vehicles, and those without transponders would be photographed, and presented with an account. Failure to pay would result in hefty traffic fines levied against the owner of the vehicle. Government published draft regulations on 27 May 2013 which would exempt public transport and emergency vehicles from the e-toll system. Owners of minibus taxis, for example, will not have to pay for tolls if they are operating the vehicle for the purposes of public transport.[12] The cost of the entire project is enormous. SANRAL financed the first phase of the project to the tune of R21 billion rand. The Government guaranteed R19 billion of debt.[13]

SANRAL's answering affidavit[14] before the High Court[15] details an extensive public consultation process. This process began in 2003. The MEC for Transport and Public Works introduced the Gauteng Toll Roads Bill (Notice 1880 of 2003)[16] to give effect to a proposed toll road network policy produced in April 1998.[17] In October 2007, the then Minister of Transport officially announced the launch of the GFIP,[18] and on 12 October 2007, the Minister published his notice of intent to toll the proposed sections of the freeway network.[19] In terms of s 27(4)*(a)* of the South African National Roads Agency Limited and National Roads Act (SANRAL Act),[20] this notice gave an indication of the approximate position of the toll plazas, and invited interested persons to comment and make representations on the declaration and position of the plazas. The public were given 30 days to make these comments, and public authorities were given a further 30 days to comment.[21]

It is most curious that the affidavit makes no mention of the Gauteng Legislature's Bill to build new roads in a collaborative manner with the national and municipal authorities. The Gauteng Roads Plan was specifically designed to cross-subsidise public transport for the poor and to create new arterial roads to better serve the commercial demands of business in the province.

On 4 February 2011, the Director-General of the Department of Transport published the tariffs for the proposed network[22] in terms of s 27(3)*(c)* of the

[12] Draft Regulations on Exemptions for the Payment of Tolls on the GFIP Toll Roads, *Government Gazette*, Notice 537 of 2013.

[13] See *OUTA* (note 2 above) at para 3.

[14] Available at <http://www.outa.co.za/site/wp-content/uploads/2012/05/SANRAL-Answering-Affidavit-final.pdf> ('Ali Answering Affidavit').

[15] *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd & Others* [2012] ZAGPPHC 63, 2012 JDR 0808 (GNP) ('*OUTA HC*').

[16] Ali Answering Affidavit (note 14 above) at para 11.10.2.

[17] Ibid at para 11.10.1.

[18] Ibid at para 11.10.6.

[19] Ibid at para 11.10.7.

[20] South African National Roads Agency Limited and National Roads Act 7 of 1998.

[21] Ali Answering Affidavit (note 14 above) at para 11.10.9.

[22] Ali Answering Affidavit (note 14 above) at para 11.10.17.

SANRAL Act. Public hearings of a steering committee to address concerns surrounding e-tolling were held on 24 March, 4 April, 5 April and 6 April 2011.[23]

The public outcry against the e-tolling system began in October 2011 when the Minister of Transport instructed SANRAL to halt the tolling process.[24] SANRAL ignored the instruction and announced that tolling would go live in February 2012.[25] On 22 February 2012, the Minister of Finance announced that the e-tolling system would be implemented by 30 April 2012, but with reductions in the toll tariff.[26] On 13 April 2012, a notice was published stipulating the tariffs to be paid. Five days later, a notice entitled 'Conditions of Toll' was published – the draft regulations exempted public transport operators.

A The High Court Decision

By this stage, an NGO, the Opposition to Urban Tolling Alliance (OUTA), had approached the North Gauteng High Court for an interim interdict to restrain SANRAL from implementing the GFIP. The High Court granted the interim interdict.

The High Court began by remarking upon three distinct characteristics of e-tolling. Firstly, e-tolling involves a system of tolling entirely different from long-distance tolling. The former exists within a city-region, and thus the 'sections of road that have been earmarked for tolling, constitute the main arteries for the movement of motor vehicles in and around the two major cities of South Africa [Johannesburg and Pretoria]… the economic and administrative heartland of the country.'[27] Secondly, due to the lack of adequate alternative public transport, a large number of citizens make use of the proposed toll roads, or at least would be affected by the toll roads. Thirdly, due to the lack of viable alternative forms of transport – including alternative non-tolled roads expressly provided for in the Gauteng Legislature Roads Bill – users of roads would effectively be held captive by the new road toll network. The High Court's nuanced understanding of the impact of e-tolling tracked the four requirements for an interim interdict set out in *Setlogelo v Setlogelo*.[28]

First. The applicant must establish a *prima facie* right on the part of the applicant to the relief sought. While Prinsloo J expressly refrained from expressing a firm view on the merits of the grounds of review, he acknowledged a reasonable prospect of success on any one of the grounds of review upon which OUTA relied.[29]

Second. The applicant must establish a well-grounded apprehension of irreparable harm if the interim relief is not granted. Prinsloo J referred to affidavits of a wide range of deleteriously effected individuals – from a pensioner who would have to cough up an extra R6 600.00 per annum if e-tolling were to

[23] Ibid at para 11.10.20.
[24] Ibid at para 11.10.25.
[25] Ibid at para 11.10.26.
[26] Ibid at para 11.10.28.
[27] *OUTA HC* (note 15 above) 17–18.
[28] 1914 AD 221.
[29] Ibid at 26.

be implemented, to a plumber who would be forced to retrench an employee due to the increased costs of travel associated with e-tolling.[30] Prinsloo J found SANRAL's argument unpersuasive that, should the final review application be successful, the tolls collected could simply be refunded to aggrieved motorists.[31]

Third. The balance of convenience must favour the granting of interim relief. The High Court focused on the harm that would be suffered by SANRAL were the interim interdict to be granted. Although that harm would be substantial, the harm that would be suffered by users of e-tolls was, for Prinsloo J, far more burdensome. In addition, the High Court noted that the implementation of the system had *already* been delayed four times. The latest delay occurred a mere two days before judgment was handed down.[32]

Fourth. No other remedy must be available to the litigant. The High Court held that this factor was satisfied because the e-tolling process was not only substantially underway, but veritably complete.[33]

SANRAL and the National Treasury appealed to the Constitutional Court.[34]

III Separation of Powers: The Distinctive South African Model

The justification for the doctrine of separation of powers is well established. The separation of powers should prevent the over-concentration of power in any one branch of government.

Constitutional Principle VI[35] in the Constitutional Principles in the Interim Constitution,[36] provided as follows: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.' Constitutional Principle VI was, however, silent as to the exact model of separation of powers to be established by the Constitutional Assembly. The doctrine acquired distinctly more substantial character in the *First Certification Judgment*:

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[30] Ibid at 12–14.

[31] Ibid at 26.

[32] *OUTA HC* (note 15 above) at 28.

[33] *OUTA HC* (note 15 above) at 29.

[34] Separate litigation was launched to review the *actual* decision to launch e-tolling. It is not necessary to consider this decision; suffice to say that the review application by OUTA was dismissed by the High Court in December 2012. *Opposition to Urban Tolling Alliance and Others v South African National Roads Agency Ltd and Others* [2012] ZAGPPHC 323. OUTA appealed the decision to the Supreme Court of Appeal. The SCA noted that the 'main focus of the debate on the papers was directed at SANRAL's election of e-tolling as a method of funding the GFIP. More particularly, the main thrust of the applicant's case was that SANRAL should have adopted a method of funding other than toll.' *Opposition to Urban Tolling Alliance v The South African National Roads Agency Limited* [2013] ZASCA 148 ('*OUTA SCA*') at para 17. The SCA concluded, primarily, that the challenge to e-tolling was brought too late: The SCA noted that five years had elapsed since the impugned decisions were taken and that, during those five years, 'things have happened that cannot be undone… the clock cannot be turned back to when the toll roads were declared, and I think it would be contrary to the interests of justice to attempt to do so.' Ibid. While the judgment focused primarily on issues of procedure, the judges were aware that its judgment would inevitably have a 'deleterious effect on funding so desperately needed by health care, educators, pensioners, those dependant on social grants, and so forth.' Ibid at para 33.

[35] The Constitutional Principles were contained in the Interim Constitution Schedule 4, incorporated by a reference under the Interim Constitution s 71(1)*(a)*.

[36] Constitution of the Republic of South Africa, Act 200 of 1993.

> Within the broad requirement of separation of powers and appropriate checks and balances, the Constitutional Assembly was afforded a large degree of latitude in shaping the independence and interdependence of government branches. The model adopted reflects the historical circumstances of our constitutional development.[37]

The negotiators of the Final Constitution insisted on the clear *existence* of separation of powers in the final text. It is, therefore, somewhat surprising that the phrase 'separation of powers' is nowhere to be found. However, the very structure of a state predicated upon the doctrine can be found throughout the Final Constitution.[38]

What then is our South African form of separation of powers? The *First Certification Judgment* offers an initial response when it notes that although no universal model of separation of powers exists,[39] an absolute separation of powers is not desirable and that the provisions outlining the functions and structures of various organs of state and their respective independence and interdependence are explicitly laid out in the text.[40] The *Dodo* Court later cited with approval the remark by Laurence Tribe: 'What counts is not any abstract theory of separation of powers but the actual separation of powers "operationally defined by the Constitution."'[41]

In the view of *Seedorf* and *Sibanda*, the Court has, when necessary, used the 'distinctiveness' of the South African model to deviate from the review standard used in other countries.[42] They are of the view that the Court has followed a 'pick and choose' approach.[43] This approach essentially forms part and parcel of a greater 'constitutional project', in which it is believed that a fuller realisation of rights can and should be achieved over time – not only by the judiciary, but also by the executive and the legislature. The approach also recognises the seemingly

[37] *Ex Parte Chairperson of the Constitutional Assembly: In Re Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 ('*First Certification Judgment*') at para 112.

[38] See, for example, FC s 92(2), which indicates that members of the Cabinet are 'accountable collectively and individually to Parliament for the performance of their functions'. In terms of FC s 92(3)*(b)*, Cabinet members are compelled to provide Parliament with full and regular reports concerning matters under their control. In addition the legislature has the power to remove the President and indirectly the Cabinet (which is presidentially appointed) under FC s 89.

[39] *First Certification Judgment* (note 37 above) at para 108 ('There is, however, no universal model of separation of powers, and in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government over another, there is no separation that is absolute.')

[40] Ibid at paras 110–11.

[41] L Tribe *Constitutional Law* (2000, 3 ed) 127. This paragraph was cited with approval in *S v Dodo* [2001] ZACC 16, 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC) at para 17; and *Van Rooyen & Others v State & Others (General Council of the Bar of South Africa intervening)* [2002] ZACC 8, 2002 (5) SA 246 (CC), 2002 (8) BCLR 810 (CC) at para 34.

[42] Seedorf & Sibanda (note 1 above) at 12-36. The idea of a distinctively South African model that would be developed over time was emphasised by Ackermann J in *De Lange v Smuts* [1998] ZACC 6, 1998 (3) SA 785 (CC) at para 60.

[43] Ibid.

fragile institutional position of the Court.[44] Lest its power be wrestled away by a one-party-dominant legislature, a sensitive executive or a dissatisfied public, it generally tiptoes through the interpretation and enforcement of rights in a way that does not undermine the legislative or executive process.[45] On other occasions, its members are more outspoken. In extra-curial remarks in 2010, Chief Justice Ngcobo pointed out that the Constitutional Court is the final arbiter when it comes to deciding whether a branch of government has exercised its powers in accordance with the Constitution or not: 'It is a necessary component of the doctrine of the separation of powers that courts have a constitutional obligation to ensure that the exercise of power by the other branches of government occurs within constitutional bounds.'[46]

As Seedorf and Sibanda recognise, the formal notion that a completely independent legislature controls an independent executive is illusory.[47] The departure from a model of strict division between the branches is also evident in the overlap of personnel. It is not at all unusual in a democracy that the executive, for example, also comprises members of the legislature. It is also not unusual in a democracy that an effective balance of power exists in a legislature. This state of affairs has been true in South Africa over the first 20 years of multiparty constitutional democracy. In South Africa, the system reflected in the text and worked out in practice results in an executive that holds far more power than the legislature: indeed, thus far there has been little practical separation between the legislature and the executive in the national sphere of government. For this reason, citizens often turn to the judiciary as a check on power wielded by the national legislature and national executive.

The Court's attitude to the separation of powers was shaped not only by 'the large degree of latitude' described in *First Certification Judgment*, but also by the presence of socio-economic rights in the Bill of Rights.By including socio-economic rights in the text of the Constitution, the drafters committed South Africa to a non-absolute model of separation of powers. Judges are permitted to decide whether

[44] In an address to the National Assembly on the occasion of bidding farewell to former Chief Justice Sandile Ngcobo, and welcoming Chief Justice Mogoeng Mogoeng, President Jacob Zuma illustrated the fragile position the Court finds itself in reiterating government's views that courts should not interfere with the work of the Executive, 'especially with regards to policy formulation', because 'the Executive must be allowed to conduct its administration and policy making work as freely as it possibly can', and also because 'we must not get a sense that there are those who wish to co-govern the country through the courts when they have not won the popular vote during elections. This interferes with the independence of the judiciary.' Available at: <http://www.thepresidency.gov.za/pebble.asp?relid=5159&t=79>.

[45] See, especially, T Roux *The Politics of Principle: The First South African Constitutional Court 1995–2005* (2013).

[46] S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 22 *Stellenbosch Law Review* 37 at 40. See also Jaco Barnard-Naude 'Zuma Reignites Separation of Powers Debate' *Thought Leader* (2 November 2011), available at <http://www.thoughtleader.co.za/jacobarnardnaude/2011/11/02/zuma-reignites-separation-of-powers-debate/>.

[47] Seedorf & Sibanda (note 1 above) at 12-15. Notwithstanding the institutional separation of Parliament and the national executive, the Constitution makes provision for the involvement of the executive in the legislative function by allowing members of the Cabinet to initiate and introduce legislation in Parliament (s 73(2)). The President also enjoys the power to summon Parliament to an extraordinary sitting to discuss special business (s 63(2)).

the legislature and the executive have done enough to progressively realise rights to housing, health, water, food and social security.

IV Recent Case Law on the Separation of Powers

A Non Socio-Economic Rights Cases

In *DPP Transvaal v Minister of Justice and Constitutional Development,*[48] Ngcobo J repeated the proposition that it is the executive's duty to develop policy and to determine what should be incorporated in a policy:

> It is not ordinarily the function of [courts]'…'to tell the executive how to formulate policy. To do so is to interfere in the functioning of the executive. The function of the courts is to ensure that the executive observes the limits on the exercise of its power.[49]

Similarly, in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the Court warned that courts should be slow to interfere with the constitutionally mandated powers of coordinate branches of government.[50] Moseneke DCJ stated that the separation of powers doctrine 'must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history.'[51] He then explained:

> [I]t must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system of separation of powers must give due recognition to the popular will as expressed legislatively provided that the laws and policies in issue are consistent with constitutional dictates.'[52]

Moseneke DCJ's acknowledgment that all public power is subject to constitutional control is significant, if now trite law.[53] He acknowledges that courts will

[48] [2009] ZACC 8, 2009 (4) SA 222 (CC).
[49] Ibid at para 184.
[50] [2010] ZACC 6, 2012 (4) SA 618 (CC).
[51] Ibid at para 91.
[52] Ibid.
[53] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC) and *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* ('*Pharmaceutical Manufacturers*') [2000] ZACC 1, 2000 (2) SA 674 (CC) at para 33 stand for the now well-established proposition that: 'The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the 'adoption of the Interim Constitution this control was exercised by the courts through the application of common-law constitutional principles. See also *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4, 2002 (4) SA 317 (CC). On the rule of law, generally, see F Michelman 'The Rule of Law, Legality and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11. On the place of the rule of law in terms of FC s 1, see J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13. Michael Bishop and Alistair Price have recently developed legality or rule of law jurisprudence in new and sophisticated ways that take their cue from Professor Michelman's work. See M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 1; A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 37. *International Trade Administration Commission v SCAW* (note 50 above) at para 24.

occasionally have to interfere in questions of policy: even if they only do so in terms of rationality review. Moseneke DCJ then observes that courts not only have a right to intervene but that they had a *duty* to do so to prevent violations of the Constitution.[54]

The Court in *Doctors for Life International* echoed the above position.[55] The *Doctors for Life* Court adopted a substantive understanding of the duties underlying political rights in the Constitution and recognised that those rights can impose positive duties on the state. Ngcobo J developed a rich tapestry of jurisprudential reasoning in giving content to rights to 'public participation'. He had regard to the historical context[56] of the rights and the cultural backdrop of *lekgotla/bosberade/imbizo*.[57] He also offered an extensive appraisal of international and foreign law.[58] The multiplicity of considerations invoked in this case ensured that the content of those rights and provisions which require public participation was amply developed. These developments – and the strictures placed on coordinate branches – did not result in antagonism towards the other spheres of government. It constituted, instead, a nuanced dialogue with other organs of state as to how the other branches could develop the meaning of the apposite rights and provisions.[59]

B Socio-Economic Rights Cases

The reach of socio-economic rights jurisprudence in South Africa has been both lauded and criticised. Commentators such as David Bilchitz have strongly criticised the Court for failing to give meaning to socio-economic rights because of its reliance on reasonableness in respect of measures taken to implement the goals of such rights.[60] Marius Pieterse suggests, in a different key, that post-1996 courts have developed a unique model of separation of powers to engage socio-economic rights – one dramatically different from the basic model offered by Locke and Montesquieu. He argues that courts are 'constitutionally obliged to pronounce on the validity of legislation and policy in the socio-economic sphere. To the extent that imposing such a mandate on the judiciary may imply a derogation from participatory democracy, such derogation has irrevocably taken place. Denying this reality would be counterproductive.'[61]

On the other hand, the Court's focus on reasonableness has been welcomed as a 'good doctrinal basis for a transformative interpretation of socio-economic

[54] Ibid at para 92.

[55] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11, 2006 (6) SA 416 (CC).

[56] Ibid at paras 112, 174 and 244.

[57] Ibid at para 101.

[58] Ibid at paras 90 to 109.

[59] See T Roux 'Democracy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 10.

[60] See D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2008) 176–177.

[61] M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-economic Rights' (2004) 20 *South African Journal on Human Rights* 383, 404.

rights'.[62] The key to the Court's understanding of government's responsibilities in respect of socio-economic rights is the notion of reasonableness. The wording is derived from those sections of the Bill of Rights which require the state to take 'reasonable measures' to achieve the purpose of the right. The Court in *Grootboom*[63] sought to give meaning to this idea of reasonable measures, saying that these would be 'balanced and flexible',[64] require 'continuous review',[65] and could not exclude a 'significant segment of society'.[66]

In defining 'reasonableness' so broadly, the Court in *Grootboom* was mindful of its perceived role within the three coordinate branches of government. In analysing the actual policy at play, it was diplomatic in its review of the state's housing obligations. It acknowledged that, whilst the state has faced major difficulties in the implementation of housing in some areas,[67] it had made significant strides.[68] But it did not refrain from evaluating government policy. In particular, it found that the policy did not provide for relief for those in desperate need,[69] such as those denied access to housing due to evictions or natural disasters. The Court even delved into the use of provincial budgets and held that it was essential that a reasonable part of the national housing budget be devoted to those in desperate need, even as it stressed that the precise allocation of such budget was for national government to decide.[70] The Court further found that effective implementation was required for the fulfilment of the right, requiring national government to at least plan, budget and monitor for the fulfilment of immediate needs and the management of crises.[71]

In *TAC 2*,[72] the Court was tasked with determining the reasonableness of the state's policy towards the provision of nevirapine. The Court did not shy away from evaluating the policy. It looked at issues around the efficacy of the drug itself,[73] the resistance posed by the drug,[74] the safety of the drug,[75] the capacity of government in implementing the policy in respect of the drug,[76] the facilities available for the implementation of the policy,[77] as well as the availability of formula-feed in public hospitals as a substitute for breast-feeding.[78] These

[62] See C Steinberg 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-economic Rights Jurisprudence' (2006) 123 *South African Law Journal* 264.

[63] *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

[64] Ibid at para 43.

[65] Ibid.

[66] Ibid.

[67] Ibid at para 53.

[68] Ibid.

[69] Ibid at para 66.

[70] Ibid.

[71] Ibid at para 68.

[72] *Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 15, 2002 (5) SA 721 (CC).

[73] Ibid at paras 57–58.

[74] Ibid at para 59.

[75] Ibid at paras 60–64.

[76] Ibid at para 65.

[77] Ibid at para 84.

[78] Ibid at para 91.

considerations would normally fall exclusively within the domain of the executive. But the Court found that if a court should hold that the state has failed to meet its constitutional obligations:

> … it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.'[79]

The Court accordingly ordered the government to remove the restrictions that prevented nevirapine from being made available at public hospitals and clinics, as well as *permit* and *facilitate* the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission.[80] Although the order was premised on allowing government to adapt its policy in accordance with its constitutional obligations, and despite the fact that the order has been criticised convincingly for its lack of specificity,[81] it nevertheless spearheaded an eventual change in policy. The order demonstrates the transformative power of the Court, and the fact that the judiciary can play an effective role in the development of policy more generally.

In *Blue Moonlight*[82] the Court took the City of Johannesburg's budgeting ability to task. It contended that 'it is not good enough for the City to state that it has not budgeted for something, if it *should* indeed have planned or budgeted for it in the fulfillment of its obligations'.[83] The case turned on the reasonableness of the City's housing policy in respect of its provision for temporary housing in the event of evictions by private owners. The policy simply did not provide for such housing in this regard – it only applied to evictions instituted by the City. The Court then held that this differentiation in the City's policy between relocations undertaken by the City and those evicted by private landowners was unreasonable and therefore constitutionally infirm.[84]

Grootboom, *TAC 2*, and *Blue Moonlight* demonstrate that the Constitutional Court has not shied away from telling the state how to fulfil its duties in terms of the Constitution, or delving substantially into policy. This stance is particularly apparent in *TAC 2*. The Court acknowledged that the decision made by the Court would 'call for a change in policy'.[85] Thus, where a decision does call for a change in policy because that policy constitutes a prima facie violation of rights – as was the case in *OUTA* – the Court cannot, according to its own precedent, unduly hide behind separation of powers. It should rather recognise its role as a court or forum of last instance – not only as a court in the true judicial sense of the word, but potentially also a court in the democratic sense of the ability to exercise influence over policy.

[79] Ibid at para 99.

[80] Ibid at para 135.

[81] See Bilchitz (note 60 above) at 162–163. Bilchitz notes further that the lack of specificity in the order meant that several months after the judgment, government in several provinces had made little attempt to comply with the Court's order.

[82] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC).

[83] Ibid at para 74 (our emphasis).

[84] Ibid at para 89.

[85] Ibid at para 115.

This position is less controversial than it appears. The nature of contemporary South African democracy means that courts are often relied upon to resolve what are essentially political disputes. Neither the legislature nor opposition parties have enough support to effectively challenge this executive power.[86] The Court may well end up retreating into less of an 'activist' role – but in the context of the constitutional text that governs South African democracy, it is not strange for the Court to have a say in policy. Indeed, as Pieterse argues, 'it is short-sighted to view direct representative democracy as the only "true" form of democracy and then to characterise all alternative avenues of human rights protection as undemocratic',[87] particularly where 'resort to the judiciary is justified when necessitated by a lack of responsiveness on the part of the "democratic" branches'.[88]

Theunis Roux has echoed this view.[89] In his view, the Court often starts a judgment by acknowledging that separation of powers constraints require that it not interfere in the terrain of executive policy. The Court then proceeds to interfere nevertheless. It is almost as if the Court seeks to soften or ameliorate the effect of its intervention by stating that it will not run roughshod over the terrain of the other branches – as if by respectfully acknowledging that it should not intervene, the intervention is more acceptable.[90] The Court followed this pattern of reasoning in cases such as *Grootboom* and *TAC 2* and does so too in *International Trade Administration Commission*. In Roux's view this adjudicative model was not mandated by the Constitution but rather constitutes a *modus vivendi* with the political branches at a time when the Court still needs to build legitimacy and support.[91]

It can also be argued that the socio-economic rights provisions in the Constitution would not make sense if they did not require the courts to occasionally review policy. Objectives inherent in claims for housing, health, water and the like invite the Court to interrogate and 'intervene' in policy issues quite comfortably, as does the fact that the Constitution itself mandates and permits the Court to consider the progressive realisation of rights by the state.

[86] For more on the appropriate role of courts in a one-party dominant democracy, see S Choudhry 'He had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

[87] Pieterse (note 61 above) at 392.

[88] Ibid.

[89] T Roux *The Politics of Principle* (note 45 above); T Roux 'Principle and Pragmatism in the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106; T Roux 'The Constitutional Framework and the Deepening of Democracy in South Africa' (2005) 18(6) *Policy, Issues and Actors* 1.

[90] See S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming the Distinction between Law and Politics' (2013) 24 *Stellenbosch Law Review* 242 (Good reasons exist for the Court to claim that it is engaged solely in legal interpretation, and not the hurly burly of politics.)

[91] According to Roux, the Court has positioned itself as a necessary 'conversationalist' in the democratic process. Roux (note 89 above).

V Separation of Powers in Outa

In *OUTA* Moseneke DCJ made three different points regarding the separation of powers doctrine:

(a) '*absent any proof of unlawfulness or fraud or corruption*, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive, subject to budgetary appropriations by Parliament';[92]

(b) 'the collection and ordering of public resources almost inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order';[93] and

(c) 'a court considering the grant of an interim interdict against the exercise of power within the camp of executive government or legislative branch must have the separation of powers consideration at the forefront.'[94]

This series of statements demonstrates the difficulties presented by the Court's 'pick and choose' tactic in relation to disputes that call the separation of powers doctrine into play. A litigant will invariably be unsure about which direction his or her case may take because decisions which call for 'policy-laden and polycentric decision making' are premised on uncertainties – sometimes courts *are* well suited to make a decision of this order, whilst at other times, they are not. Sometimes they are willing. Other times they are not.

If this imperfect dilemma is to be accepted, then the question that needs to be asked is whether, in the context of a broader political environment, the Court was well-suited to rule on this interim interdict. Here, perhaps, it is necessary to differentiate between what the Court *did* within the broader political environment in which it operates, and what we submit the Court *should* have done.

Although the issue at hand dealt with an interim interdict, and thus did not invite consideration of the merits of e-tolling, we submit that the Court *should* have engaged on a *prima facie* level with the merits of e-tolling. Certainly, the e-tolling policy would be a decision best made by those qualified to do so. However, its potential impact on the rights of South Africans of e-tolling is not marginal. We provide three examples:

- A range of socio-economic rights would be compromised by the increased costs of transportation, and particularly that of access to food. The extent of this is not yet clear, but it is certain that e-tolling did not differentiate between single-occupant private motor vehicle users, for example, and vehicles transporting such basic necessities as food. The price of food (and other vital commodities) will increase, hitting the most vulnerable in society most severely. The fact that the e-tolling system does not make this differentiation demonstrates a lack of consideration on the part of government to consider the impact of the system on the actual lived circumstances of those affected by it.

[92] *OUTA* (note 2 above) at para 67.
[93] Ibid at para 68.
[94] Ibid.

- The right to freedom of movement would be harmed by the fact that an individual cannot move freely and independently around the car-centric Gauteng city region, unless that individual has the available resources to pay for e-tolling. Although it may convincingly be argued that e-tolling encourages the use of public transport, the Gauteng city region has a predominantly informal public transport system. Despite its efficacy in transporting many Gautengers to and from their destinations of choice – and despite the fact that public transport is exempt from e-tolling – many elect to use a private motor vehicle if one is available. They are perceived to be safer and more convenient.
- The right to just administrative action would be undermined by the fact that existing mechanisms of public consultation, as envisaged by the SANRAL Act,[95] failed to recognise that *urban* tolling, where people's livelihoods are more at risk, is less desirable than, say, a tolling system from Johannesburg to Durban. The SANRAL Act was not created for the purposes of tolling *urban* roads *within* a city. The implementation of the Act did not provide for the kind of consultation an urban tolling system requires.

Consideration of the above factors would not necessarily have resulted in a decision in favour of OUTA. But had they been considered, the Court would have had to enter into a broader discussion about the impact of urban tolling on a variety of rights, and specifically the impact of urban tolling on Gauteng's urban environment.

Instead, the Court was at pains to stress its ostensibly limited role within the constitutional matrix that is the separation of powers. It held that 'a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is *constitutionally appropriate* to grant the interdict.'[96] Beyond the common law, the Court argued:

> The separation of powers is an even more vital tenet of our constitutional democracy … . [T]he Constitution requires courts to ensure that all branches of government act *within the law*. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.[97]

However, contrary to the Court's finding, upholding the High Court's order would not have resulted in harm to its institutional legitimacy. The granting of an interim interdict would not have overturned the state's policy, but rather sent a signal to the executive of the need to further reflect on the actual impact of e-tolling on users. It would have required the executive to take into account *how* e-tolling could impact on the rights of road users. In other words, politically it would have been 'safe' for the Court to have ruled against government in the e-tolling case because a negative decision would not have resulted in a *permanent* end to the system. Instead it would have initiated a rights-based conversation on

[95] SANRAL Act.
[96] *OUTA* (note 2 above) at para 66.
[97] Ibid at para 44.

the impact of the policy. This interim finding does not involve an intrusion *per se* on policy, but rather an exercise of the Court's constitutional responsibility to voice concerns on policies that have a palpable effect on the rights of those affected by such policy.

VI Comparative Jurisprudence: The Whithering of Non-Justiciability

Keen observers of constitutional law can detect increasing signs that, even in matters of policy which may previously have been regarded as on (or outside) the periphery of courts' jurisdiction, courts in the United States and the United Kingdom are increasingly willing to intervene in what has been traditionally regarded as the domain of the executive. Theunis Roux writes of the connection between democratisation and the expansion of judicial power.[98] We refer to this phenomenon as the erosion of the doctrine of non-justiciability.

In the UK it has been stated that if a matter engages in one or more rights enshrined in the European Convention on Human Rights and Freedoms, this puts an end to questions of justiciability . Some have even detected signs of the complete abandonment of non-justiciability doctrine.[99] In the context of the UK, Laws LJ has observed, extra-curially, that 'save as regards the Queen in Parliament there is in principle always jurisdiction in the court to review the decisions of public bodies'.[100] In jurisdictions such as the US the idea of a judicial 'no go' area – known as the 'political question doctrine' – has effectively been replaced by a more flexible and pragmatic test of deference.[101]

A Political Question Doctrine

The political question doctrine can trace its modern origins to *Marbury v Madison*.[102] This doctrine aims to codify and clarify the extent to which US courts should be permitted to interfere in matters traditionally understood as falling within the domain of the executive. The political question doctrine holds that questions that

[98] Theunis Roux writes that internationally over the past 30 years, the tendency has been for the judicial branch to be given (or to claim for itself) greater oversight powers over the legislative and executive branches. See Roux (note 91 above) at 4, citing C Tate & V Torbjörn (eds) *The Global Expansion of Judicial Power* (1995).

[99] I Leigh & L Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) at 103.

[100] J Laws 'Law and Democracy' (1995) *Public Law* 72, n 49.

[101] This also evident from the fact that the political question doctrine is increasingly under attack in the United States. In recent years the US Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional questions. See R Barkow 'More Supreme than the Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237.

[102] 5 US (1 Cranch) 137 (1803) at 165–166 (Justice Marshall stated: 'By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to this country in his political character and to his own conscience… . The acts of such an officer can never be examinable by the courts.' According to Franck the judgment in *Marbury v Madison* was a Faustian pact in which 'a fragile federal judiciary bent first on establishing its supremacy in domestic matters' was looking for 'a convenient, relatively inexpensive "giveback" to throw to the political branches and the states'. T Franck *Political Questions/Judicial Answers* (1992) 10–12.

can be labelled as 'political' should be authoritatively resolved, not by the courts, but rather by one (or both) of the political branches.[103] The political nature of such questions therefore renders them non justiciable. The doctrine was first developed most expansively in *Baker v Carr.*[104] In *Baker v Carr,* the Supreme Court set out the following six criteria for determining the threshold issue of whether a matter is 'political' and therefore non-justiciable:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[105]

If any one of the *Baker* criteria is met a claim can be dismissed as non justiciable.

The plain effect of *Baker v Carr* is to oust the Court's jurisdiction with regard to issues characterised as political issues. Unsurprisingly, the *Baker* criteria have been described as 'unsatisfactory', 'useless' and 'confusing'.[106] Whereas rumours of the death of the political question doctrine may be greatly exaggerated,[107] constitutional scholars increasingly argue that the political question doctrine is in decline because it is at odds with the doctrine of judicial supremacy developed over recent years.[108]

The sentiment that the doctrine is no longer relevant[109] became especially prevalent in the wake of *Bush v Gore.*[110] The Supreme Court essentially decided the outcome of the 2000 US presidential election.[111] The constitutionality of a unilateral judicial determination of the outcome of an election is still a matter of much debate. Most academics agree that the matter was *justiciable* (courts are not barred by *Baker v Carr* from determining election controversies)[112] but wrongly decided. Although the case may not strictly have been barred by the *Baker* factors,

[103] J Choper 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1456.
[104] 369 US 186 (1962).
[105] Ibid at 217.
[106] E Chemerinsky *Constitutional Law: Principles and Policies* (2002, 2 ed) 129–130.
[107] See M V Gillen 'The Rebirth of the Political Question Doctrine' (2008) 23 2 *Natural Resources & Environment* 23.
[108] See M Tushnet 'Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine' (2002) 80 *North Carolina Law Review* 1203.
[109] See, for example, American academic commentary in this regard: E Chemerinsky '*Bush v Gore* was not Justiciable' (2001) *76 Notre Dame Law Review* 1093; Tushnet (note 108 above); and Barkow (note 103 above).
[110] 531 US 98 (2000).
[111] *Bush v Gore* 531 US 98 (2000) at 110–11. See L Weinberg 'When Courts Decide Elections: The Constitutionality of *Bush v Gore*' (2002) *Boston University Law Review*. See also Chemerinsky (note 106 above); Tushnet (note 108 above); and Barkow (note 101 above).
[112] See also *Baker v Carr* (note 104 above) at 237 (held that inequitable apportionment of the suffrage is actionable under the Equal Protection Clause and does not present a nonjusticiable 'political question').

the case and its outcome was so intensely *political* that it is not surprising that this case led Mark Tushnet to write of the disappearance of the political question doctrine. Tushnet writes of a new constitutional boldness 'refusing to temper legal with political judgment'.[113]

South Africa has declined to adopt any doctrine resembling the political question doctrine. The Court cannot simply label a matter as 'political' and decline to subject it to constitutional scrutiny. This stance has been attributed to the Constitutional Court's strong conception of judicial review.[114] The specific reference to the executive and the legislature in the application provision – FC s 8(1) – means that the executive is bound by the Constitution.[115] The US Constitution does not have a similar section which indicates unambiguously that the executive is bound by the Constitution. Section 83*(b)* of the South African Constitution requires the President to uphold and defend the Constitution as supreme law of the land. According to Currie and De Waal, our courts are likely to subject all executive action to the courts, but defer to the executive in certain matters such as matters relating to foreign policy.[116] We agree with the view of Justice Ackermann in *De Lange v Smuts* that, in a substantive constitutional state such as ours, there can be no so-called political question doctrine leading to a conclusion different to that dictated by the Constitution.[117]

Theunis Roux has supported the view that there is no equivalent of the political question doctrine in South African constitutional law.[118] He cites the judgment in *President of the RSA v SARFU*,[119] where the Court held that one of its functions was to exercise exclusive jurisdiction 'in a number of crucial political areas…in respect of issues which would inevitably have important political consequences.'[120] Roux concludes that political decision-making is a systemic function of the Constitutional Court.

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[113] Tushnet (note 108 above) at 1234. The demise of the doctrine has also been predicted in states such as Nigeria, which has adopted the US constitutional structure. See E Nwauche 'Is the End Near for the Political Question Doctrine in Nigeria?' paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa (Nairobi, April 2007, copy on file with the authors)(Supremacist tendencies of the Nigerian judiciary are encouraged by the immense popularity which the judiciary enjoys. Nwauche attributes the demise of the political question doctrine in Nigeria to the fact that judges locate their legitimacy in the people; this may make them less cautious and encourage a head-on collision with other branches of government.)

[114] Seedorf & Sibanda (note 1 above) 12-52.

[115] See S Woolman 'Application' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, OS, 2006) Chapter 31; I Currie & J de Waal *The Bill of Rights Handbook* (5 ed, 2005).

[116] See *Kaunda v President of the Republic of South Africa* [2004] ZACC 5, 2005 (4) SA 235 (CC), 2004 (10) BCLR 1009 (CC) at para 77.

[117] *De Lange v Smuts* (note 42 above) at para 60.

[118] Roux 'Principle and Pragmatism' (note 89 above). See also *Mlokoti v Amathole* 2009 (6) SA 354 (E) and *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C).

[119] [1999] ZACC 9, 1999 (4) SA 147 (CC).

[120] Ibid at paras 72–73. See also *King v Attorneys Fidelity Fund Board of Control* [2005] ZASCA 96, 2006 (1) SA 474 (SCA).

B The Impact of Austerity

The question of whether courts can interfere in matters concerning resource allocation by the state has acquired a particular currency in the context of economic austerity. In some European jurisdictions, courts have recently shown a willingness to interfere in austerity measures taken by governments.

A 2012 decision (*Harz 1*)[121] of the German Federal Constitutional Court illustrates the willingness of an apex court to pronounce on a government's resource allocation. The German Constitutional Court was asked to decide whether the cash benefits for asylum seekers provided under the Asylum Seekers Benefit Act complied with the constitutional right to a minimum standard of living. It ruled that the relevant provisions were incompatible with the fundamental right to a minimum standard of living, guaranteed by article 1 (right to human dignity) in conjunction with article 20 (social state principle) of the German Constitution. The Court emphasised that an existential minimum must be guaranteed. *Harz 1* is significant because, for the first time, the German Constitutional Court declared that social benefits provided for by law do not live up to the constitutionally protected standards.

The Latvian Constitutional Court has also been fairly progressive in intervening in government policy on resource allocation. In a case on the constitutionality of the state pension law, the court essentially pronounced on austerity measures taken by government.[122] Since the Latvian economy was rapidly declining in 2009, the Latvian Parliament enacted a Disbursement Law[123] which decreased the allowance received by current pensioners by 10 per cent and decreased the amount to be received by future pensioners by 70 per cent. It is interesting that, in defending the law, the government referred to the liabilities it had under loan agreements with international creditors.[124] The Latvian Court found the law unconstitutional and in violation of an individual's right to a pension. It did so, in large part, because Parliament had not considered less restrictive alternatives to the limitation of the right.[125] Significantly, the Court refused to recognise loan conditions as a valid justification for the reduction in pension. Constitutional courts, as the Latvian Court shows, need not necessarily accept that a government's arguments regarding resource constraints trump individual rights.

VII Conclusion

Geoff Budlender has observed that cases involving resource allocation often lead to an almost reflex contention by government that policy and polycentric

[121] BVerfGe, BvL 10/10 of (18 July 2012).

[122] Case No 2009-43-01. The case is also known as: On Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009 insofar as it applies to State Old-Age Pension with Article 1, Article 91, Article 105 and Article 109 of the Satversme.

[123] Law on State Pension and State Allowance Disbursement (referred to as Disbursement Law).

[124] These creditors included the EU and the IMF.

[125] The Court also argued that the law was unconstitutional since it had not provided an adequate transition period before the new law came into effect and it had not included a future compensation for the reduced pensions. See the summary of the case at ESCR Net available at <http://www.escr-net.org/docs/i/1285934>.

questions are involved, and that a court should adopt a position of deference or abstinence.[126] By labelling the e-tolling cases as falling in the heartland of the executive function, Moseneke DCJ adopts a position of abstinence. The door for academic enquiry into the constitutionality of the e-tolling scheme is, however, not closed.

Not long ago, Judge O'Regan wrote that 'we may have not yet achieved a fully articulated doctrine of separation of powers.'[127] Twenty years after the drafting of the Constitution, the Court's current jurisprudence suggests that her analysis still holds. No clear doctrine on the separation of powers exists. The Court has proceeded to approach cases that raise such concerns on an ad hoc basis. And yet, whether one adheres to a distinction between socio-economic rights cases and non-socio-economic cases, it is clear that South African courts regularly intrude into what can best be described as the 'executive terrain' of resource allocation and budgeting.

Judicial review would be toothless if it did not allow judges to intervene in even the most sensitive policy issues. The principle of separation of powers should ultimately also be interpreted as a check on the powers of the executive and the legislature. Checking executive and legislative powers is not only a core function of the doctrine, it is also explicitly required by the text of the South African Constitution and the extant jurisprudence of the Constitutional Court.

[126] G Budlender 'The Judicial Role in Cases Involving Resource Allocation' (April 2011) *Advocate* 35 at 36.

[127] K O'Regan 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8(1) *Potchefstroom Electronic Law Review* 120, 146.