THE SEPARATION OF POWERS AND NEW JUDICIAL POWER: HOW THE SOUTH AFRICAN CONSTITUTIONAL COURT PLOTTED ITS COURSE

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1. Introduction

In the last few years, more and more nations have enacted new democratic constitutions.[1] In some of these new constitutional democracies judges are exercising considerable influence in their country's politics than ever before.[2] As a result, courts in these new constitutional democracies have been perceived in some quarters as getting too powerful. This is because they are seen to have overreached their function and usurped the roles of the other branches of government. This has led to the labelling of some of the new courts as being 'activist'.[3]

The opponents of this enhanced power of the courts have joined other critics of judicial power in established democracies who view judicial review as a threat to the tenets of democratic order.[4] These critics have long opined that judges are unelected and therefore cannot purport to substitute their interpretations of the constitution for those of the elected legislature as it is undemocratic, noting that the legislature, unlike the judiciary, is directly accountable to the electorate.[5] They further stress that the role of the judiciary is not to undermine the policies of any democratically elected government,[6] and that an activist judiciary could be abused by politicians and civil society actors to win political battles.[7]

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[1] Examples include Namibia (1990), Bulgaria (1991), Slovenia (1991), Macedonia (1991), Romania (1991), Estonia (1992), Slovakia (1992), Czech Republic (1992), Lithuania (1992), Latvia (1992), Ghana (1992), Malawi (1995), Nigeria (1999), and Kenya (2010).

[2] SeeDennis Davis, *Democracy and Deliberation* (Juta & Co. Ltd 1999) 47.

[3] Shannon Smithey and John Ishiyama, 'Judicial Activism in Post-Communist Politics' (2002) 36 *Law & Society Review* 719.

[4] Robert Martin *Most Dangerous Branch: How the Supreme Court of Canada Has Undermined Our Law and Our Democracy* (McGill-Queen's Press 2003); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.

[5] Waldron (n 4) 1353; Leighton McDonald, 'Rights, "Dialogue" and Democratic Objections to Judicial Review' (2004) 32 Federal Law Review 1; See also Kent Roach, *The Supreme Court On Trial: Judicial Activism or Democratic Dialogue* (Irwin Law 2001) 107-110.

[6] Patrick Lenta, 'Judicial Restraint and Overreach' (2004) 20 SAJHR 551; Waldron (n 4); Dennis Davis, 'The Relationship Between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What About Separation of Powers?' (2012) 15 Potchefstroom Electronic Law Journal 1, 9 (hereinafter 'PER/ PELJ').

[7] See Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37 The American Journal of Comparative Law 511.

However, as one would note in most countries with new constitutions, the new constitutions were enacted as a result of the loss of confidence by the people in the elected arms of government. Therefore, naturally, in the new constitutions of these countries it becomes incumbent upon the judiciary to rectify the wrongs of the old order.[8] It is largely for this reason that courts under new constitutional democracies occupy a privileged place of being the protectors of the constitution.

The increased judicial role in new constitutional democracies however presents the danger of the judiciary becoming involved in traditionally executive functions which poses a threat to the doctrine of separation of powers. The consequence of an overly intrusive judiciary carries with it the risk of putting it on a collision course with the other branches of government and this may harm its legitimacy. Hence, it is important that new judiciaries develop ways to check that governmental power is exercised appropriately while respectfully coexisting with the other arms of government.

The new judiciaries, therefore, have to constantly grapple with the question of effectively protecting rights while ensuring that they adhere to the doctrine of separation of powers in a majoritarian democracy. However, tensions do arise between the judiciary and the other arms of government as to the proper role of each governmental institution.

Therefore, what are the acceptable limits of judicial power? How should courts carry out their role as the guardians of the Constitution as well as the protector of democratic values while adhering to the doctrine of separation of powers? Can judges remain above the fray of politics?

This article attempts to answer the above questions by exploring how the South African Constitutional Court (hereinafter 'CC') has exercised its mandate and defined the limits of its powers and its place in the scheme of separation of powers in South Africa. It looks at how the doctrine of separation of powers has been navigated by the CC in terms of the interaction between the CC on the one hand and the legislature and the executive on the other. A few early decisions of the CC will form the basis of the analysis leading to a conclusion that the CC has developed a helpful strategy that can be adopted by judiciaries' in other new constitutional democracies.

2. Separation of Powers

[8]Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 2; Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146.

The idea behind the doctrine of separation of powers is that a concentration of too much power in a single entity will lead to the abuse of power.[9] The doctrine notably mooted by Montesquieu[10] and John Locke[11] embodies a number of principles. The first of which is the formal distinction between the legislative, executive and judicial branches of government. The second is of the separation of functions which entails that each branch of government exercises distinct powers and functions. The third is that of separation of personnel, which requires that each of the different branches be staffed with different officials. Lastly, the separation of powers doctrine importantly entails the principle of checks and balances where each branch of government is entrusted with special powers designed to keep a check on the exercise of the functions of others.[12]

The doctrine of separation of powers curtails the exercise of political power in order to prevent its abuse. As a consequence, the principle of checks and balance allows other branches of government a measure of intrusion into another branch's functions.[13] The legislature for example, checks the executive through reserving the power to impeach a President, while the executive on the other hand checks the legislature through presidential assent to make a bill law. The judiciary on its part checks the executive and legislature through its power of review. Conversely the executive and legislature check the judiciary through determining the appointment of the members of the judiciary.[14]

There is however no universal model of separation of powers. As a result, the doctrine of separation of powers is given expression in many different forms and made subject to checks and balances of many kinds in modern democratic systems.[15] It is due to the different systems of checks and balances that the relationship between the different branches of government and the power or

[9] Montesquieu cited in Kate O'Regan, 'Checks and Balances Reflections on the Development of The Doctrine of Separation of Powers under the South African Constitution' (2005) 8 PER/PELJ 120/150, 122/150.

[10] Baron de Montesquieu, *The Spirit of the Laws* (first published 1750, Thomas Nugent Sr, Hafner Publishing Co. 1949) bk 11, chs 6 -20.

[11] John Locke, *Two Treatises of Government* (first published in 1690, Peter Laslett ed, Cambridge University Press 1988) 366-67.

[12] Pieter Labuschagne, 'The Doctrine of Separation of Powers and Its Application in South Africa' (2004) 23 Politeia 87.

[13] Nicholas W Barber, 'Prelude to the Separation of Powers' (2001) 60 Cambridge Law Journal 59, 60.

[14] Sebastian Seedorf & Sanele Sibanda, Separation of Powers, in Stu Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 12, 12-6.

[15] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] (4) SA 744 (CC) [111].

influence that one branch of government has over the other, varies from one country to another.[16]

However, even though all the branches of government stand on equal footing in systems of constitutional supremacy, the judiciary could be argued to be first among equals as it is the final arbiter when it comes to the nature and extent of the powers of the other branches of state.[17] It could be argued though, that the power of the courts is checked by the legislative power to amend the constitution and the executive power to appoint judges. However, these instruments of control are either indirect or cumbersome.[18]

For example, amending constitutions may require high thresholds that cannot easily be achieved. Furthermore, due to the principle of judicial independence there is virtually no other means for the executive and legislative branches of government in many jurisdictions to censure the judiciary other than through the cumbersome measure of impeaching judges. The judicial branch of government therefore wields extensive powers to determine the limits of power of the other branches of government as well its own particularly through the power of judicial review. The abuse of this power can therefore lead the courts to usurping the functions of the other branches of government, and hence, result in judicial activism as will be defined below.

3. Judicial activism

The term judicial activism is used by politicians, interest groups and other actors in the public sphere to refer to judicial decisions.[19]Although judicial activism is a phrase widely used to criticise court decisions, the use of the term is varied.[20] For example, a court decision may be termed as judicial activism when it strikes down a piece of duly enacted legislation that is 'arguably constitutional'.[21] Those who define judicial activism in such terms argue that constitutions contain ambiguities that give rise to different outcomes if fairly interpreted.[22] Therefore, when judges substitute the constitutional interpretation of the other governmental branches that

[16] ibid.

[17] See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986) 4.

[18] Seedorf & Sibanda (n 14) 12-55.

[19] See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law 2001) 97; Keenan Kmiec, 'The Origin and Current Meanings of "Judicial Activism" (2004) 92 California Law Review 1443; Craig Green, 'An Intellectual History of Judicial Activism' (2009) 58 Emory Law Journal 1195.

[20] Roach (n 19) 97; Kmiec (n 19); Green (n 19).

[21] Kmiec (n 19)1463.

[22] ibid 1464; See also Lino Graglia, 'It's Not Constitutionalism, It's Judicial Activism' (1996)19 Harvard Journal of Law & Public
293, 296.

cannot clearly be said to be unconstitutional with that of their own, the judges are engaging in judicial activism.[23]

However, the inherent difficulty with the above definition of judicial activism is that it is based on the debatable conception of the role of the courts when it comes to adjudication especially on constitutional issues. Some scholars argue that it is the duty of the courts to declare what the law is even in difficult or politically sensitive cases.[24] On the other hand other scholars argue that the courts should not be the final expositor of the constitution for all branches especially on contentious issues that even the judges themselves may not reach a settled opinion.[25] This definition of judicial activism, which presents judicial activism in the negative light, will therefore remain controversial as long as the debate on the limits to adjudication remains unsettled.

Another definition of judicial activism is when a court fails to follow precedent in its own prior decisions.[26] Those who view it as wrong for the courts to digress from its past rulings argue that it discounts the importance of *stare decisis* by compromising the uniformity and predictability of court decisions.[27] They therefore, see departures from the accepted norm as wrong and an act of judicial activism.

However, this definition rests on fixed assumptions about the law that is the subject of the precedent and fails to consider the nature of constitutional provisions that may justify disregarding the precedent.[28]Furthermore, a charge of judicial activism in terms of disregarding precedent raises complex issues about the nature of judicial decisions especially as regards the amount of deference owed to different types of precedent.[29]

There are those who argue that courts should be cautious when overturning precedent in matters regarding the constitution as compared precedent regarding statutory law.[30] Consequently, a decision departing from precedent where a statute is the subject matter of a decision may not carry as much of a charge of judicial activism as would a departure from constitutional precedent.[31] Judicial activism in these terms may be viewed positively especially by those who argue that some

[23] Kmiec (n 19) 1465.
[24] ibid 1466.
[25] ibid ; See also generally Larry Kramer, 'Putting the Politics Back into the Political Safeguards of Federalism'(2000) 100 Columbia Law Review 215; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press1999) Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004).
[26] Kmiec (n 19)1466.
[27] Kmiec (n 19) 1466.
[28] ibid 1469.
[29] ibid 1471.
[30] ibid 1469.
[31] ibid.

constitutional precedents are as a result wrong interpretation or because society has changed and thus needs judges to disregard them to correct the law.

Judicial activism is also used to describe decisions of judges who digress from applying established canons of interpretation and not to apply them at all.[32] For example, a judge may use different interpretative tools to make a decision compared to another judge in a similar case and this action may be informed that judge's judicial philosophy that make her disregard certain interpretive tools.[33] However this definition of judicial activism is problematic in the sense that it rests on debatable arguments on which interpretive methodology is better than another and whether there are indeed established canons of interpretation.[34] The differences in opinion as to what constitutes an appropriate interpretive tool makes it difficult therefore distinguish principled but unconventional methodologies from one that are of judicial activism.[35]

Judges are also labeled as judicial activists when they make decisions with respect to wide-ranging complex subjects. These complex issues which involve a large number of interlocking and interacting interests and considerations are termed as 'polycentric issues'.[36] It considered judicial activism when a court adjudicates on aspects of polycentric issues as a decision of the court may result in unexpected consequences on other matters not adjudicated upon. The argument against judges making decisions on polycentric matters is that the courts are not suited to adjudicate on polycentric issues since they lack the institutional capacity and expertise that the executive has to deal with multiple repercussions a decision on an aspect of a polycentric issue may cause.[37]

Judicial activism is also used to describe when a judge with an ulterior motive molds and manipulates his interpretation of the constitution to fit his political or moral point of view. However the difficulty with this description of judicial activism is establishing evidence of an ulterior motive which is not easy.[38]

Judicial activism as described above can be considered as either a negative or a positive attribute of a judge's decision. For example, judicial decisions are described negatively as judicial activism when they are politically objectionable especially with respect to subjects that are contentious within the society. On the other hand,

[32] ibid 1473.
[33] ibid 1475.
[34] ibid.
[35] ibid.
[36] For a discussion on the adjudication of polycentric matters see Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353,394.
[37] ibid; See also Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) Public Law 451.
[38] Kmiec (n 19)1476.

judicial activism is seen favourably if it results in judges creatively interpreting the constitution in a reformist way. A definition of judicial activism is therefore dependent on the context in which the phrase is used either as a criticism or an approval of judicial action.[39] Therefore not settling on judicial activism can lead to confusion.

For the context of this article, judicial activism is defined as the action of the courts overruling the actions, policies and laws of the other arms of government in a way that unjustifiably disregards the doctrine of separation of powers. The definition is in recognition of the fact that constitutional interpretation is subject to reasonable disagreement.[40] This therefore implies that the judiciary and the legislature should both have equal discretion in interpreting abstract provisions of the constitution.[41]

Under this definition it is considered judicial activism for the courts to substitute their interpretations for that of the legislature especially if both interpretations are arguably constitutional.[42] Similarly when a court substitutes its own policy decisions for that of the executive it would mean that the court is usurping the roles of the executive branch of government therefore engaging in judicial activism.

4. How the Constitutional Court in South Africa has navigated the Separation of Powers Doctrine

The Constitution of the Republic of South Africa generally provides for separation of powers that demarcates the powers and roles of all the three branches of government. The pre-1994 separation of powers model in South Africa was based on a Westminster model that centralised power in an elected parliament.[43] Although there was distinction between the three arms of government in pre-democratic South Africa, the distinction was only formal. The pre-1994 Parliament incorporated a fused executive and legislature which institutionalised power in Parliament.[44]

Under the Westminster model, Parliament was sovereign and unrestrained in its unlimited power to legislate. In the era of parliamentary supremacy, the courts could only interpret the consistency of statutes which meant that the courts could only question the formal validity of legislation and not question their substantive

[39] ibid.
[40] Lenta (n 6); Mark Tushnet, *Weak courts, Strong rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) 20.
[41] Tushnet (n 40).
[42] ibid.
[43] Seedorf & Sibanda (n 14) 12-16.
[44] Labuschagne (n 12) 88.

validity.[45] As a result, there were no real checks and balances on the power of Parliament.[46]

In order to avoid a similar state of affairs, negotiators of the post-apartheid Constitution ensured that a separation of powers arrangement which included real checks and balances was included in the Constitution.[47] The Interim Constitution[48] had distinct chapters for each of the branches of government. It provided for the power of judicial review of both legislative and executive action and the supremacy of the Constitution. Furthermore, the constitutional principles that would inform the drafting of the Final Constitution[49] contained in schedule 4 of the Interim Constitution included the doctrine of separation of powers.

Although the doctrine of separation of powers was incorporated in the post-1994 Constitutions, it was neither expressly stated in the Interim Constitution nor in the Final Constitution. The CC nevertheless gave the structure and the provisions of the Final Constitution its stamp of approval by certifying its compliance with the separation of powers doctrine as mandated by the constitutional principles.[50] The CC justified the arrangement in the Final Constitution by asserting that there was no universal model of separation of powers as the power and influence that one branch has on another as a means of checks and balances differs from one country to the other.[51]

The CC has continuously reasserted in its decisions that there is no absolute model of separation of powers but has nevertheless acknowledged that each branch of government has a specific area of competence hence a pre-eminent domain.[52] This implies that any intrusion by one branch of government on another branch's domain should be viewed as an unconstitutional intrusion. Thus, the principle of a pre-eminent domain emphasises that each branch of government has an exclusive area of competence and limits the attribution of powers to the wrong institution.[53]

[45] Seedorf & Sibanda (n 14) 12-17; Labuschagne (n 12).
[46] Seedorf & Sibanda (n 14).
[47] Hugh Corder, *On Stormy Waters: South Africa's Judges (And Politicians) Test the Limits of Their Authority* Delivered as the Geoffrey Sawer Memorial Lecture at the Australian National University on 12th November 2009 2-3; See also Seedorf & Sibanda (n 14) 12-20.
[48] The Constitution of the Republic of South Africa of 1993.
[49] The Constitution of the Republic of South Africa of 1996.
[50] *Certification of the Constitution of the Republic of South Africa* (n 15) para 113.
[51] ibid para 108.
[52] See *South African Association of Personal Injury Lawyers v Heath & Others* [2001] (1) SA 883 (CC), para 19; *Minister of Health v Treatment Action Campaign* [2002] (5) SA 721 (CC), para 98; *Doctors for Life International v Speaker of the National Assembly & Others* [2006] (6) SA 416 (CC), paras 36-37; *Justice Alliance of South Africa v President of the Republic of South Africa* [2011] (5) SA 388 (CC), para 33.
[53] Seedorf & Sibanda (n 14) 12-40.

The judiciary determines the pre-eminent domain of the relevant branches of government when there is a dispute as it is the final arbiter in matters regarding the Constitution. The irony in this is that the judiciary, in this particular regard, regulates itself as it not only defines the mandate and boundaries of the executive and legislature but also its own.[54] Moreover, the power of the courts to check the other branches of government is so wide that it carries an inherent danger of abuse if not restrained in its reach. Therefore, even though the power granted to the CC is an incident of the checks and balances under the separation of powers doctrine, the scope and extent the CC's power as outlined in chapter 8 of the Constitution is not easily defined and has the effect of testing the relationship of the judiciary with the other two branches of government.

The South African judiciary plays a crucial role in transformative constitutionalism which involves righting the wrongs of apartheid as well as ensuring that the spirit, values and provisions of the Interim Constitution were implemented to the letter.[55] This duty goes hand in hand with its role of overseeing and ensuring that all exercise of governmental power is in line with the Constitution. The CC, therefore, has had to determine how to achieve a balance between when it is appropriate to defer to other branches of government and when it has to step in to cure a constitutional wrong. Indeed, the nature of this delicate balance was aptly captured by Albie Sachs, J when he stated that 'excessive judicial adventurism could be as damaging as excessive judicial timidity.'[56]

The CC has in the main exercised restraint founded on the separation of powers doctrine by not interfering with the decisions of the other branches of government, provided that their actions and decisions are in line with the Constitution.[57] Even when the CC has affirmed that certain functions and powers fall squarely within a particular branch, it has nonetheless intruded upon the pre-eminent domain of other branches of government. So, are the intrusions upon these specific mandates of the other branches of government by the CC unwarranted? In the next part I will examine whether the intrusion by the CC upon the pre-eminent domain of the other branches of government in some instances was justified or whether such intrusions are to be considered judicial activism.

5. The Constitutional Court's Interaction with the Legislature

[54] Seedorf & Sibanda (n 14) 12-34.
[55] See Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351.
[56] See *Prince v President, Cape Law Society & Others* [2002] (2) SA 794 (CC) [155]-[156].
[57] Seedorf & Sibanda (n 14) 12-56.

Perhaps the most significant decision in the early period of the CC testing the legislative pre-eminent domain was *Doctors for Life.*[58] Here, the CC wrestled with the question whether the control of parliamentary internal arrangements, proceedings and procedures which are areas of legislative competence, are subject to examination by the judiciary. The applicants in this case had challenged the passing of four bills by Parliament relating to issues of health on the ground that the legislature failed to fulfil its constitutional obligation of facilitating public participation during the process of enacting the laws.

The CC in its decision set out the role of Parliament stating that, as the principal legislative organ of state, it must be free to carry out its functions without interference.[59] It further affirmed that Parliament has the power to determine and control its internal arrangements, proceedings and procedures. The CC reasoned that if Parliament were always to defend its actions in the courts it would paralyse government processes.[60] It then asserted that the constitutional separation of powers doctrine required that other branches of government refrain from interfering in parliamentary proceedings.[61]

Despite setting out why Parliamentary proceedings should not be subject to interference, the CC went on to review the procedure that brought about the statutes in question. The CC declared the Acts of Parliament in dispute unconstitutional since they did not follow the constitutional procedure. The question that arises is whether the CC's decision in this case was judicial activism as it intruded into the legislative domain by reviewing procedures used in law-making, a function that is clearly a role of the legislature.[62]

Before answering the question whether the CC was activist in *Doctors for Life* it is helpful to look at two previous decisions by the CC before the *Doctors for Life* case. Though factually different, these cases share a similarity with *Doctors for Life* in that they involved the question of the CC's role in ensuring participatory democracy is achieved.

In the first case, *New National Party*,[63] an application was made before the CC for an order declaring certain sections of the Electoral Act[64] unconstitutional. The sections in dispute provided that eligible voters had to possess a bar-coded identity

[58] See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] (6) SA 416 (CC).
[59] ibid [36].
[60] ibid.
[61] ibid [36]-[37].
[62] Constitution of South Africa (n 49) s 57.
[63] *New National Party of South Africa v Government of the Republic of South Africa* [1999] (3) SA 191 (CC).
[64] Act 73 of 1998.

document in order to vote. Surveys showed that this particular provision would have the effect of locking out about five million otherwise eligible voters from the elections as they did not possess the required document.[65] The applicant contended that the election body lacked the capacity or ability to issue the voter identity regulations initiated only six months prior to the general elections therefore violating the right to vote of a significant number people.

In its majority judgment the CC observed that requirements for registering in elections facilitated rather than limited the right to vote.[66] Yacoob, J noted that the doctrine of separation of powers made it inappropriate for the CC to determine whether a legislature acted reasonably in relation to the regulation of elections.[67] The CC therefore found that the requirement of the bar-coded identity document was rationally related to the legitimate governmental purpose of facilitating the right to vote.

In her dissenting opinion, however, Justice O'Regan viewed the right to vote as a right of great importance to need a stricter standard of review.[68] She held that the role of right to vote in determining who should exercise political power made the right to vote worthy of particular scrutiny on the ground of reasonableness to ensure that fair participation in the political process is afforded.[69] She concluded that that Parliament acted in a manner which was unreasonable in the circumstances and held that the impugned provisions infringed the right to vote. [70]

In *UDM v President of RSA*,[71] a case which involved a challenge to floor-crossing laws passed by Parliament, the issue was whether a closed-list proportional representation system that allowed floor-crossing contravened the guarantee to multi-party democracy and the right to make free political choices. In a unanimous judgment in the name of 'the Court', as opposed to the names of the judges as is usually the case, the CC held that the term democracy was too indeterminate to permit it to substitute its own view of the appropriate form of South Africa's electoral system for that of the legislature.[72] On the issue of whether political rights recognised in the Constitution were infringed, the holding was that those rights were relevant only at the time of elections. Therefore, citizens had no right to control the conduct of their representatives once elected.[73]

[65] *New National Party* (n 63) [29]-[30].
[66] ibid [15].
[67] ibid [24].
[68] ibid.
[69] ibid 122.
[70] ibid 159.
[71] *United Democratic Movement v President of the Republic of South Africa* [2003] (1) SALR 495 (CC).
[72] *UDM* (n 71) [23] – [75].
[73] ibid [49].

It could be argued that in the *New National Party* and *UDM* cases, the CC was reluctant to scrutinise political rights deeper and was in effect deferential to Parliament as the nature of the matters in contention involved political issues of which the CC was wary of imposing its own view against that of the legislature.

Coming back to *Doctors for Life*, the CC's finding that the Act of Parliament in question was unconstitutional was based on its view on participatory democracy as an essential constitutional obligation. But, in the *New National Party* and *UDM* decisions the CC tended to be deferential to the legislature. In the case of *New National Party* the CC relied on the separation of powers to lessen its level scrutiny of the electoral legislation. The decision resulted in the exclusion of a large number of citizens from voting and this was despite the CC asserting the importance of the right to vote. In the *UDM* decision, the CC did not give a strong explanation of democracy and was also largely deferential.[74] The CC in the *Doctors for Life* case, by asserting the importance of a strong public participatory role in the parliamentary process was clearly dissimilar to its earlier jurisprudence. So, did the CC overreach in the pre-eminent domain of the legislature?

The CC justified its intrusion into the legislative role in *Doctors for Life* by affirming its constitutional mandate to ensure that all branches of government act within the remit of the Constitution.[75] It stated it could only intrude in exceptional circumstances where an aggrieved person cannot be allowed substantial relief once the process is completed because the underlying conduct would have violated the constitutional rights of that person.[76] The CC was also careful to set out the role of Parliament compared to its own.

The CC in its decision walked a tightrope between maintaining its constitutional obligation to an aggrieved party and being cautious not to further breach the doctrine of separation of powers. As a result, the CC did not unjustifiably intrude into the legislative domain hence the decision could be said not to be judicial activism. Nonetheless, the constitutional mandate of the CC as expressed in the decision poses a threat in terms of the pre-eminent domain principle of separation of powers since it does not preclude the CC from interfering with the legislature in future.

The correcting of a defect in an invalid statute also poses a threat to the doctrine of separation of powers. This occurs through the CC's remedying of unconstitutional

[74] Jason Brickhill & Ryan Babiuch, 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2008) Chapter 45, 45-17.
[75] *Doctors for Life* (n 58) [38].
[76] *Doctors for Life* (n 58) [69].

statutes by 'reading-in'[77] especially when an impugned statute may elicit diverse opinions as to its correction. The correction may range from making minor adjustments to the legislation, to a major redesign of the entire scheme, which often involves policy decisions which are not within the judiciary's domain.[78] The CC has therefore had to seek to act within the doctrine of separation of powers when remedying unconstitutional aspects of a statute. This is exemplified in the *Fourie* decision.

The *Fourie*[79] case involved a challenge to the common-law definition of marriage as well as the Marriage Act.[80] Having concluded that the impugned law of marriage was inconsistent with the Constitution, the CC considered how to remedy the impugned provisions of the law. The CC had the option of either remedying the defect through reading-in the omissions or referring the legislation back to Parliament for amendment. The CC in its decision considered whether it was obliged to provide immediate relief to the applicants in the terms sought in the application through reading- in or whether it should suspend the order of invalidity to give Parliament a chance to remedy the defect.

In the majority decision, Sachs, J held that even though the constitutional outcome would be the same if the court was to read -in the rights to cure the defect in the law, the legislature could adopt a different format for reaching the end-point.[81] He noted that symbolism and other intangible factors played a particularly important role in devising a remedy for the invalid laws.[82] He further noted that what might appear to be options of a purely technical character could have quite different resonances for life in public and in private.[83]

The CC was in support of a comprehensive remedy that would reconcile the constitutional right to equality of same and opposite-sex couples on the one hand, with religious and moral objections to the recognition of these relationships on the other in accordance with the proposal from the South African Law Reform Commission.[84] The majority therefore held that equality claims could best be served by respecting the separation of powers and giving Parliament an opportunity to deal appropriately reforming the marriage laws. The CC consequently suspended its

[77] For a discussion on reading-in see Chuks Okpaluba "Of 'Forging New Tools' and 'Shaping Innovative Remedies': Unconstitutionality of Legislation Infringing Fundamental Rights Arising from Legislative Omissions in the New South Africa" (2001) 12 Stellenbosch Law Review 462.
[78] Seedorf & Sibanda (n 14) 12-74.
[79] *Minister of Home Affairs and Another v Fourie and Another* [2006] (1) SA 524 (CC).
[80] Act 25 of 1961.
[81] *Fourie* (n 79) [139].
[82] ibid.
[83] ibid.
[84] ibid [131].

holding of invalidity of the Marriage Act for one year to give Parliament time to cure the defect in the law.[85]

However, O'Regan, J in her dissenting judgment was for granting immediate relief to the applicant through reading-in the applicant's rights into the law. In her judgment she considered the appropriateness in this case for the CC to suspend an order of invalidity in order to give Parliament an opportunity to enact legislation. She observed that the fact that Parliament was faced with a number of choices was not sufficient for the CC to refuse to develop the common law and, remedy a statutory provision, which is unconstitutional.[86] She asserted the importance of the doctrine of the separation of powers but stated that it should not be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to litigants who successfully raise a constitutional complaint.[87]

If this decision is seen in light of institutional competency in the separation of powers doctrine, the majority opinion correctly pointed out that Parliament was better placed to make the legislative adjustments as it involved a variety of issues. Although the reading-in of the applicant's rights into the law would have been a simple remedy, the CC noted that legislature was in the process of legislating on the issues involving marriage. The CC thus avoided being activist by giving Parliament time to make its own choices on how best to accord same-sex partners their constitutional rights. An order of reading-in would have resulted in the CC usurping the role of the legislature which was involved initiatives to redesign the laws relating to marriage. The CC exercise of deference to the legislature especially in legislation that may have alternative opinions promotes the doctrine of separation of powers.

The CC decision in *Fourie* illustrates that the CC is cautious not to substitute its decisions with that of the legislature. The legislature under the doctrine of separation of powers is well equipped to consider a myriad of issues and find accommodate diverse opinions in law making. Indeed as Sachs, J observed the granting an immediate relief was 'far less likely to achieve the right to equality than would a lasting legislative action compliant with the Constitution'.[88]

6. The Constitutional Court's Interaction with the Executive

The judiciary reviews the executive branch of government more than the legislature since the executive is the main administrative branch of government. The power of judicial review of administrative action has, post-1994, derived from the

[85] ibid [156].
[86] ibid [169].
[87] ibid [170].
[88] ibid [136].

Constitution as opposed to the case prior to 1994 when this power was derived from common law.[89] Through its power to review, the CC has among other things, reviewed the former prerogative powers of the executive and held that the power of the president is subject to review.[90] The CC has however advocated for deference by courts where they lack the expertise especially in polycentric decisions.[91] Importantly, the CC has been keen to adhere to the doctrine of separation of powers when adjudicating on matters that are within the executive arm's purview. Nevertheless, the CC has signalled that it has power to intervene in certain areas of executive competence under certain circumstances.

One such case is *Glenister,*[92] where the applicant sought to challenge a decision taken by the cabinet to approve a draft legislation dissolving the Directorate of Special Operations (hereinafter 'DSO'), commonly known as the Scorpions. The applicant a declaration that the decision taken by cabinet to initiate legislation disestablishing the DSO was unconstitutional and invalid and, direct that the relevant minister to withdraw the Bills from Parliament. However by the time the CC heard argument in the matter, the Bills were before Parliament.

The CC considered, in view of the doctrine of separation of powers, whether it was appropriate for it to make any order setting aside the decision of the national executive through the cabinet to submit bills before Parliament. The CC in making the ruling considered the circumstances in the present case where the Bills that were subject of the suit were still before Parliament and the legislative process still underway.

The applicant had submitted that it was a necessary component of the doctrine of separation of powers that the courts have a constitutional obligation to ensure that the executive acts within the boundaries of legality.[93] The applicant further contended that there were exceptional cases in which an aggrieved litigant could not be expected to wait for Parliament to enact a statute before he or she challenges it in court especially if effective redress could be given after the legislation enacted.[94]

Langa CJ, for a unanimous court, in finding against the applicant, discussed the importance of the separation of powers doctrine and in this case stating that the executive had carried out its constitutionally mandated task of initiating and preparing legislation.[95] He held that since the draft Bills were before Parliament, it

[89] Cora Hoexter, *Administrative Law in South Africa*, (Juta & Co. Ltd 2007) 12.
[90] *President of the Republic of South Africa & Another v Hugo* [1997] (4) SA 1 (CC).
[91] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* [2004] (4) SA 490 (CC) [46].
[92] *Glenister v President of RSA and others* [2009] (1) SA 287 (CC).
[93] ibid [19].
[94] ibid [20].
[95] ibid [67].

was Parliament's primary responsibility to oversee the executive's actions. [96] He however noted that the courts could still intervene in principle at the stage of the legislative process when the resultant harm of the signing into law of the bills will be material and irreversible.[97]He observed that this approach took into account the proper role of the courts in South Africa's constitutional order in the sense that while the courts are duty-bound to safeguard the Constitution, they are also required not to encroach on the powers of the executive and legislature.[98]

Although the CC's decision in this case was in line with the doctrine of separation of powers, the fact that the CC stated that it could still intervene if irreversible harm could be found poses a threat to the doctrine of separation of powers and would be judicial activism. It is the pre-eminent domain of law making to scrutinise Bills before parliament. It may set a bad precedent, therefore, if the courts were to used to get around the authority of Parliament in checking the Executive through scrutinising draft bills brought before they are brought to Parliament as the courts will be overstepping their mandate.It is noteworthy though, that after the impugned Bills were signed into law, the applicant successfully challenged their validity of the national legislation that disbanded the DSO on various grounds.[99]

Another case that tested the extent of judicial authority *vis-à-vis* executive power was *Kaunda v President of RSA*.[100] Here the CC considered whether the Executive could be obligated to make diplomatic representations on behalf of its citizens. The case concerned a group of South African citizens arrested in Zimbabwe for allegedly being mercenaries *en route* to Equatorial Guinea. They subsequently applied to the CC that the State make diplomatic representation to protect them as regards their prison conditions and to prevent them from being extradited to Equatorial Guinea where they argued they would not receive a fair trial.

Chaskalson CJ, for the majority held that on issues of foreign policy such as the timing and language of representations to be made and, the sanctions to be issued, courts were ill -equipped to intervene. [101] He noted that diplomats were better placed than judges to secure relief for a national in whose interest diplomatic action is taken and that the attendant publicity of court proceedings revolving around diplomatic issues may harm the delicate and sensitive negotiations involved. [102]

[96] ibid [37].
[97] ibid [44].
[98] ibid [44].
[99] *Glenister v President of the Republic of South Africa and Others* [2011] SA 347 (CC).
[100] *Kaunda and Others v President of the Republic of South Africa* [2005] (4) SA 235 (CC).
[101] ibid [77].
[102] ibid.

He asserted that courts have jurisdiction to deal with issues concerned with diplomatic protection.[103] Nonetheless, he noted that this power did not give the courts leeway to substitute their opinion for that of the executive or order the executive to provide a particular form of diplomatic protection.[104] He held that the executive has a broad discretion in matters regarding diplomatic protection which must be respected by the courts.[105] He therefore held that the government was under no obligation to apply for the extradition of the applicants from Zimbabwe.

In her dissenting judgment O'Regan, J considered the role of the state in light of the Constitution and held that the state had a diplomatic duty to protect its citizens.[106] She then considered whether it was proper for the CC to enforce this obligation in light of the doctrine of separation of powers. She noted that the courts were not properly suited to dictate to the Executive on how to carry out its foreign relations role.[107] She nonetheless held that because the Executive's power to conduct diplomatic relations was derived from the Constitution, it was therefore justifiable.[108] She therefore held that the Executive had a constitutional obligation to provide diplomatic protection to the applicants to seek to prevent the egregious violation of their rights and issued a declaratory order to that effect.[109] Her argument for issuing a declaratory order as opposed to a mandatory order was to give flexibility in determining the appropriate steps to be taken in the circumstances.

Interestingly, the majority judgment in the *Kaunda* case, though deferential to the executive, departed from the CC's earlier jurisprudence in similar cases. A case in point is *Mohamed v President of RSA*[110] which challenged the constitutionality of the state extraditing a foreign national wanted for terrorism to the United States of America. The applicant in this case sought from the CC a mandatory order requiring the executive to urgently intercede on his behalf with the authorities in the United States ensure that the applicant's rights are not infringed by the receiving government.

The State contended that such an order would go against the doctrine of separation of powers.[111] The CC rejected this argument. The CC asserted that any order issued for the enforcement of the Bill of Rights would be appropriate and that such an

[103] ibid [78].
[104] ibid [79].
[105] ibid [81].
[106] ibid [237].
[107] ibid [243].
[108] ibid [244].
[109] ibid 271.
[110] *Mohamed and Another v President of the Republic of South Africa and Others* [2001] (3) SA 893 (CC).
[111] ibid [70].

order could not be negated on the ground of the separation of powers doctrine since the supremacy of the Constitution meant that the Bill of Rights is binding on all organs of state.[112] The CC held that the government was under an obligation to secure an assurance that the death penalty will not be imposed on a person whom it causes to be removed from South Africa to another country.[113]

The fact that the CC approached both cases differently raises questions. If the CC's decision in *Mohamed* were followed in *Kaunda,* then the CC would have held that there was an obligation upon the state to seek assurances that the death penalty would not be imposed or, if imposed, not carried out on the applicants. The *Kaunda's* decision departure from its principle it set in *Mohamed* shows the CC backtracked from its previous stance on diplomatic protection. Perhaps the different contexts can explain the differences in these two cases as I will elaborate upon below.

In the *Mohamed* case, an order was sought for the South African State to intercede on behalf of the applicant and engage with the government of the United States to ensure that he does not face the death penalty. However it was evident that Mohamed had been irreversibly surrendered to the power of the United States. It could therefore be argued that although the CC was aware of the futility of its order being enforced, it nevertheless felt obliged to set out the legal position on the Bill of Rights in this matter.

In the later decision of *Kaunda*, the context was different since the applicants were held in a country in which the Republic of South Africa has diplomatic influence. It was therefore plausible to expect that the State could succeed in diplomatically interceding on behalf of its citizens. However, this expectation is predicated on the assumption that the State viewed that it was in its interest to appeal on behalf of its citizens. What is or what is not in the interest of a country is a matter best known to the Executive since the conduct of foreign relations is within its ambit.

In the *Kaunda* decision, therefore, the CC might have taken into consideration the resultant awkwardness if it followed the jurisprudence it had set in *Mohamed.* This is because if the CC had made mandatory order in the same terms as the declaratory order in *Mohamed* and the State could not comply, it would therefore require that it take further measures to direct the state to act in a certain way diplomatically which the CC it could be argued was wary of not doing.

It is clear that CC in *Kaunda* decided to adopt a strategic approach to avoid coming into conflict with the Executive. Therefore, the CC in the *Kaunda* decision properly exercised deference avoiding judicial activism that may have had awkward results.

[112] ibid [72].
[113] ibid [61].

7. Socio-economic rights

The CC's attempt not to intrude upon the pre-eminent domain of the Executive is particularly heavily tested with regard to the enforcement of socio-economic rights.[114] Even before the enactment of the Interim Constitution, the appropriateness of including socio-economic rights in the Constitution was questioned in terms of the extent to which courts could legitimately and credibly pronounce on the constitutional validity of socio-economic legislation in a liberal democracy.[115]

The enforcement of socio-economic rights, more than civil and political rights, given that they are 'positive rights',[116] seems to give the courts more leeway to intrude upon the role of the Executive. This intrusion may result in the courts determining executive budgetary allocation. However, the CC has rejected the foregoing argument as unfounded and has stated that even in the civil and political rights some orders have an impact on the budgetary allocation of Government. Therefore, the enforcement of socio-economic rights would not necessarily be different from civil and political rights.[117]

The *Soobramoney*[118] case was the CC's first decision in which substantive socio-economic rights was at issue. The applicant in the case, a patient with renal failure, had been denied dialysis since he did not meet the necessary criteria. He brought his application on the grounds that he had an equal right to free health care and that the budget allocated to provincial health unjustifiably restricted this right. He argued that the State must provide extra funds available to the hospital to treat those suffering from chronic renal failure.

In its decision, the CC held that it could not intrude on government's budgetary allocation to the hospital as those decisions involved difficult political choices.[119] The CC used the rationality standard of review and found the decisions taken by the political organs and medical authorities for the purposes of enforcing the right to health rational.[120] The CC further stated it would be slow to interfere with decisions taken in good faith by the political organs and medical authorities whose

[114] Lenta (n 6) 555; Patrick Lenta, 'Judicial Deference and Rights'(2006) 3TSAR 464.
[115] See Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 383; Dennis Davis, 'The Case Against the Inclusion of Socio- economic Demands in a Bill of Rights except as Directive Principles' (1992) 8 SAJHR 475; Nicholas Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-economic Rights' (1992) 8 SAJHR 451.
[116] Pieterse (n 115) 389.
[117] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] (4) SA 744 (CC), as cited in Seedorf & Sibanda (n 14) 12-62.
[118] *Soobramoney v Minister of Health (Kwazulu-Natal)* [1998] (1) SA 765 (CC).
[119]ibid [29].
[120] ibid.

responsibility it was to deal with such matters.[121] The CC also held that it was not its institutional role to make budgetary determinations because democracy requires that such decisions be made by elected representatives and that the courts lack the capacity to review these choices in an informed way.[122]

In terms of the argument against judicial activism, the CC's decision in *Soobramoney* was clearly in observance of the doctrine of separation of powers. However, the decision was too cautious of the CC intruding into the executive policy making domain that it failed to give content to the right of access to health care services. In effect this decision confirmed fears alluded to during the debates on the inclusion of socio-economic rights in the Interim Constitution that the rights were not enforceable. Then the seminal decision in *Grootboom*[123] was decided.

This time round the CC upheld a challenge to the state's housing policy on the grounds that it was inconsistent with the right to housing in as much as it failed to provide for relief to those in urgent need. The CC held that the State had an obligation to 'devise and implement within its available resources a comprehensive and coordinated program progressively to realise the right of access to adequate housing'.[124] The CC applied a reasonableness standard to review the measures taken by the state and subsequently declared that the state had breached its duty. A declaratory order was issued requiring the State to 'devise, fund, implement and supervise measures to provide relief to those in desperate need within available resources'.[125]

In contrast to the *Soobramoney* case, *Grootboom* gave content to socio-economic rights showing that they could be enforced. However, the *Grootboom* decision was more intrusive upon the separation of powers doctrine due to the effect it had on Government policy. Therefore, the question follows whether the *Grootboom* decision was an example of judicial activism.

A reading of the judgment indicates the CC was keen to demonstrate that it did not intrude into policy formulation. It stated that the precise measures to be adopted were primarily a matter for the Legislature and the Executive and that the Court's role was ensuring that the measures adopted were reasonable.[126] The CC declined to prescribe to the Executive a mandatory order in which competing needs are to be met, leaving the Executive free to provide for a number of different needs at the same time. In considering reasonableness; the CC did not enquire whether other more desirable or favourable measures could have been adopted, or whether public

[121] ibid.

[122] ibid.

[123] *Government of the Republic of South Africa v Grootboom and others* [2001] (1) SA 46 (CC).

[124] *Grootboom* (n 123) [99].

[125] ibid [96].

[126] ibid [41].

money could have been better spent, but whether the measures taken by Government were reasonable.[127] The CC also rejected the application that the Government should be obliged to provide a 'minimum core'[128] level of services.[129]

The CC therefore did not dictate Government policy and allowed the executive flexibility in developing policy. If the court would have set the minimum core level of services that constituted the right to housing it would been forcing a policy down government's throat. Consequently, the *Grootboom* decision is not considered an example of judicial activism.

The *Grootboom* decision set the stage for the next decision on socio-economic rights in the *Treatment Action Campaign (TAC)* case.[130] The case was an appeal from a mandatory order of the High Court that Government must extend its program to prevent mother to child transmission of HIV after a challenge to the constitutionality of the HIV policy by a well organised non-governmental organisation, the TAC.

The HIV prevention program was to start off as a pilot project in a few areas and would later be implemented nationally. In the meantime, during the two years of the pilot program, doctors were not allowed to dispense the drug Nevirapine outside the pilot sites. TAC challenged the restriction on the drug's availability under the right to have access to health care services at the High court. They subsequently secured an order of mandating the Government to supply the drug forthwith or other suitable drugs if medically indicated.[131] The State then appealed to the CC.

On appeal the Minister for Health argued that the High Court order infringed the separation of powers doctrine.[132] The State further insisted that policy formulation was an executive function. However, the CC rejected this argument and in a unanimous judgment stated that it was well within its powers to deal with the matter.[133]

The CC held that even though there were certain matters that are pre-eminently within the domain of one or other of the arms of government, this did not mean that

[127] ibid.

[128] The concept of 'minimum core' originates in General Comment 3 (1990) of the United Nations Committee on Economic, Social and Cultural Rights that obliges a State party to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. See U.N. Economic & Social Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Report on the Fifth Session, Supp. No 3, Annex III, para10, U.N. Doc. E/1991/23 (1991).

[129] *Grootboom* (n 123) [33].

[130] *Minister of Health v Treatment Action Campaign (No. 2)* [2002] (5) SA 721 (CC).

[131] *Treatment Action Campaign v Minister of Health* [2002] (4) BCLR 356 (T).

[132] *TAC* (n 130) [22].

[133] ibid [98]-[99].

courts could not make orders that have an impact on state policy.[134] The CC held that where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations.[135] The courts were therefore obliged to point out where government has failed to fulfill its constitutional obligations and in so far as that constitutes an intrusion into the domain of the executive, the CC held that the intrusion was mandated by the Constitution itself.[136]

The CC then upheld the High Court order and directed the Government to extend its program and make Nevirapine immediately available. Therefore, compared to *Soobramoney* and *Grootboom*, the *TAC* case was most intrusive because it handed the State a specific directive to extend its program of providing Nevarapine despite the budgetary implications.

The decision of the CC in *TAC* noted that orders about policy choices must be formulated in a manner that did not preclude the political branches from making other legitimate policy decisions.[137] The CC also stated that it was not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining the minimum core standards.[138] The CC also overturned the High Court's order to have the Ministers of Health submit reports to the Court outlining their progress, due to the Government's track record of complying with decisions of the Court which was good as the government had always respected and executed orders of the CC.[139]

In its decision the CC therefore gave consideration to the separation of powers. The CC's rejection of minimum core standards demonstrates that the CC can issue a powerful remedial order to enforce socio-economic rights while giving the Legislature and the Executive flexibility in dealing with the implementation of the rights. [140] The *TAC* decision in sum was a cautious intrusion into the Executive domain that gave the Executive flexibility to Government to deal with implementation. Therefore, the decision is not considered to be an example of judicial activism.

After *TAC* came the *Mazibuko*[141] decision which involved the right of access to water entrenched in the Constitution that provides that everyone has the right to

[134] ibid [98].
[135] ibid [99].
[136] ibid.
[137] *TAC* (n 130) [114].
[138] ibid [37].
[139] ibid [129].
[140] Mark Kende, 'The South African Constitutional Court's Embrace of Socio-economic Rights: A Comparative Perspective' (2003) 6 *Chapman Law Review* 137, 153.
[141] *Mazibuko and Others v City of Johannesburg and Others* [2010] (4) SA 1 (CC).

sufficient water. Like *Grootboom*, the CC reviewed the right from a position of the reasonableness of the action of the Executive. The CC however once again rejected the minimum core argument reasoning that it is not appropriate for it to give a quantified content to what constitutes sufficient water because it was a matter best addressed in the first place by the State.[142] This decision in effect set back the jurisprudence of socio-economic rights to the time of *Soobramoney* when it failed to give substance to the right to water and it was because, like *Soobramoney,* the CC was too deferent to the Executive.

It is quite evident from the South African experience that relying on a strict doctrine of separation of powers does not work in the enforcement socio-economic rights. Socio-economic rights by their nature require the courts to intrude into the Executive policy-making role. However, the courts' role is to ensure that government measures are in line with the realisation of these rights. It is when the courts unjustifiably intrude into the Executive role for example by substituting government policy for its own that it could be said to be unjustifiably intruding into the domain of the Executive. In failing to give substance to the specific rights in favour of deference the CC in the *Mazibuko* decision therefore failed to ensure that the Executive work towards the realisation of the right to water.

On the whole, what the above cases demonstrate is that the judiciary can enforce socio-economic rights while taking notice of the separation of powers. It could also be argued that the CC has not been consistent in its judgments. For example in *Soobramoney* and *Mazibuko,* the CC decisions asserted that the Executive was best placed to make the appropriate decision. In its defence, the CC relied on the doctrine of separation of powers. On the other hand, in *Grootboom* and *TAC* the CC was much more assertive in the enforcement of socio-economic rights notwithstanding that it could intrude in executive policy making role. The *TAC* case is also a good example of this as the CC ordered that the executive distribute the drug Nevaripine.

Furthermore, in terms of the scrutiny applied in the review of alleged breach of socio-economic rights, the CC has had no fixed standard of review. The review standard has varied as in some cases the CC has adopted a rationality standard whereas in others, it adopted the reasonableness standard, which is more intensive.[143] This shows that the CC, in using different standards of review, has attempted to constrain any negative impact its decisions may have on the doctrine of the separation of powers.

8. Pragmatism of the South African Constitutional Court

[142] ibid [56] – [61].

[143] Pieterse (n 115) 410.

The inconsistency of the decisions of the CC is not only restricted to socio-economic rights but also to the other cases addressed in this article. Therefore the question arises as to why the CC, in some similar cases, has not developed a more predictable jurisprudence.

Roux argues that the decisions of the CC are strategic in order to minimise the CC coming into conflict with the executive and legislature in South Africa.[144] According to Roux, the success of constitutional courts in new democracies depends on how they ensure that its decisions are legally appropriate ('legal legitimacy'),[145] gain public support ('institutional legitimacy')[146] while at the same time, be able to survive any attacks on its independence by the political branches of government ('institutional security').[147] The relationship between legal legitimacy, institutional legitimacy and institutional security varies from country to country.[148]

In the case of South Africa it is possible for the CC to pursue legal legitimacy at the expense of institutional legitimacy but not its institutional security.[149] This situation is brought about by the peculiar nature of South African politics where a dominant party, the African National Congress (hereinafter 'ANC') overwhelmingly controls Parliament, forms the Executive and is unlikely to lose the support of the majority of the population for quite some time. Therefore loss in institutional legitimacy would not be detrimental to the CC because it can rely on the ANC to shield it from public displeasure resulting from its decisions.[150] It therefore follows that in order to keep its relationship with the political arms and to ensure its institutional security the CC has in some cases had to strategically craft its decisions in a manner that is deferential to the political branches of government.

Indeed some of decisions looked at above only make sense in the light of the argument that CC has had to depart from its earlier rulings so as not to go against the political branches of government. It could therefore be argued that the CC in the interest of its institutional security has rendered somewhat contradictory stances in similar cases. It explains why decisions such as *New National Party*, where the CC failed to thoroughly scrutinise the right to vote, and *UDM,* where the CC was also deferential to the legislature, were different from *Doctors for Life* which strongly emphasised the importance of the courts enforcing participatory democracy. It also explains the majority decision in *Kaunda*, strategically employed the separation of

[144] Theunis Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106, 131.
[145] ibid 109.
[146] ibid.
[147] ibid.
[148] ibid 110.
[149] ibid 130.
[150] ibid 111.

powers as the device to minimise its scrutiny of the Executive, to minimise the risk to its institutional security.[151]

In some instances, however, the CC has exploited the political situation to hand down decisions that enhanced its legal legitimacy. An example is the *TAC* case where despite the ANC elite's opposition to a Court holding that would force the state to expand its HIV treatment program, the CC did so anyway. The CC's decision relied on the overwhelming public support to the expansion of the HIV treatment program which had isolated the executive elite who were in opposition to it from the ANC's ranks.[152] The CC was thus shielded from direct confrontation with the political branches of government and, as a result, was able to hand down a decision of constitutional principle while maintaining its legal legitimacy.

In general, in cases that are likely to bring it in conflict with the elected branches of Government, the CC has chosen in principle to be pragmatic to maintain its institutional security. Indeed the CC's actions and pragmatic approach to the ANC are valid given that the threat to its institutional security by the political branches is real. In fact the ANC government has demonstrated its intent to have some measure of control in judicial affairs.[153]

However, the CC's pragmatic approach should not be mistaken for abdication of the CC's constitutional duty to uphold the Constitution. On the contrary, this strategy has been helpful in promoting the institutional strength of the political branches of government in South Africa's young democracy. In decisions that the CC has been deferential to the political branches of government it has always set out the terms of compliance within the framework of the Constitution. The CC's guidelines ensure that either the legislature passes legislation or, the executive implements policy that is constitutionally compliant. An example *Fourie* case the CC while deferring to Parliament nevertheless set out parameters to be guide the legislature when fashioning the marriage legislation.

Furthermore, the pragmatic approach has served to subtly help the political branches of government define the limits of their institutional power. The CC recognition of institutional competence as a reason of deference has created a sort

[151] Roux (n 144) 130.

[152] ibid 125.

[153] In 2005 the executive drafted bills that proposed a ministerial role in the administration of finance in the judiciary and rule- making of court. The bills were however shelved after much criticism particularly from the legal profession. These bills were Superior Courts Bill, the 14th Constitution Amendment Bill, the Judicial Tribunals Bill, the Judicial Service Commission Amendment Bill, and the SA National Justice Training College Bill. For a discussion of the tension between the South African executive and judiciary see David Hulme and Stephen Pete, 'Vox Populi? Vox Humbug! Rising Tension between the South African Executive and Judiciary Considered in Historical Context-Part One' (2012) 15 PER/ PELJ16.

of 'dialogue'[154] between the judiciary and political branches of government. In way, when the executive and the legislature initiate policy or enact legislation they have taken account the jurisprudence of the CC.[155]

The CC's pragmatic approach has also promoted the doctrine separation of powers in terms of reducing tension between the judiciary and the other branches of government. It could be argued that had the CC not adopted some principle of deference to the other two branches of government in some of the cases discussed, the political branches would have perceived, rightly or wrongly, that the CC as encroaching into its domain. This would have the risk of creating hostility between the courts and the political branches of government. The CC's role as an independent arbiter of issues involving the delineation of powers between the various branches of government against Constitution would have therefore been undermined by this hostility. This would not be healthy for the nascent South African democracy.

It is particularly the CC's avoidance of judicial activism that has helped promote the separation of powers in South Africa's democracy. The CC by strategically working within the confines of the doctrine of separation of powers has managed delineate the powers of government without being perceived by the political branches of government of substituting the choices of the legislature and executive for that of its own. The CC has therefore has earned the respect of the other branches of government by handing down restrained but principled decisions and avoiding situations of direct confrontation with the legislature and the executive.

It is also worth noting that other factors have aided the CC to earn the respect of the other branches of Government. This includes the membership of the CC which comprised of individuals with first-hand knowledge of the political and socio-economic situation of South Africa having been closely involved with the liberation struggle from apartheid.[156] This was further reinforced by the apparent good leadership and unity of the judges of the CC as no factions or groupings have emerged.[157] The light case load also helped the CC deal adequately with the cases brought before it.[158]The CC has also been helped by a responsive Executive and Legislature early on, that were willing to respect Court decisions led by President Mandela, who reacted positively to the CC decisions, even if unfavourable.[159]

[154] See Dennis Davis, 'Adjudicating the socio-economic rights in the South African Constitution: towards 'deference lite'? (2006) 22 SAJHR 301, 324; see also Davis (n 6)10.
[155] Davis (n 6)10.
[156] Hugh Corder, 'Judicial Authority in a Changing South Africa' (2004) 24 Legal Studies 266.
[157] ibid.
[158] ibid.
[159] Hoyt Webb, 'The Constitutional Court of South Africa: Rights Interpretation And Comparative Constitutional Law' (1998-1999) 1 University of Pennsylvania Journal of Constitutional Law 278.

On the whole, the CC has in its decisions shown a keenness to maintain the doctrine of separation of powers. This is seen in the CC's deference to the decisions of the other branches of government when it has found that either the Legislature or the Executive is institutionally more competent to deal with an issue. The CC by being pragmatic in its interaction with the Legislature and the Executive has therefore retained its legitimacy and reduced instances of conflict between it and the other arms of Government. In light of this, the CC has fulfilled its role in the sustenance of democracy. Most importantly, in its relationship with the executive and the legislature, the CC has shown that no exercise of power is beyond review by the Courts.

9. Conclusion

The South African experience has shown that an expanded role of judiciary challenges the traditional notions of separation of powers.[160] Inevitably, therefore, Courts in new constitutional democracies are required to involve themselves in areas that were the traditional domain of the other branches of government. A key lesson from the CC's early case law has been that courts need to justify adjudication on matters that are within the competence of the other branches of government. It is also important that new courts enjoy public support, as the judiciary may not always enjoy the support of the political branches of Government and may be subject to institutional attacks by them. In most multi-party democracies institutional security flows from public support.[161]

However there will always be a temptation to turn to the judiciary when the citizenry lose confidence in their elected leadership.[162] This should be discouraged. When the citizenry solely relies on the courts, the judiciary will be exposed to political pressures that they might not be able to withstand.[163] Their credibility and legitimacy can therefore, easily be eroded.

It should be emphasised that it is not the role of courts to govern countries. The judiciary needs the cooperation of the executive and the legislature to enforce court decisions and orders.[164] If the court enjoys public support, however, it is unlikely

[160] Pieterse (n 115) 389. Davis (n 6); Hulme & Pete (n 153).

[161] Roux (n 139).

[162] A good example is of where citizens, dissatisfied by their elected officials, have turned to courts is India. See Ronojoy Sen, 'Walking a Tightrope: Judicial Activism and Indian Democracy' (2009) 8 India Review 6; See also Pratap Mehta, 'The Rise of Judicial Sovereignty' (2007)18 Journal of Democracy 80.

[163] Mehta (n 162).

[164] Alexander Hamilton 'The Federalist Papers No. 78: The Judiciary Department' The Federalist Papers (1788). See also
Sandile Ngcobo, 'Sustaining Public Confidence in the Judiciary: An Essential Condition for Realising the Judicial Role' (2011)128 *South African Law Journal* 5.

that the political branches would threaten the courts as there would be no political advantage to do so.

On the whole, what has emerged from looking at how the CC has exercised its mandate is that, it is possible for the court to uphold constitutions in general and to protect rights in particular while being respectful to the doctrine of separation of powers at the same time. The South African CC's decisions reflect a dialogue between the Courts and the elected arms of government as they require the elected branches to justify the limitation of certain rights as provided for in the Constitution. Indeed the CC's body of case law in South Africa offers insights on how courts should relate with the other branches of government and therefore presents a useful model for other judiciaries in conflict with either the executive or the legislature.