CAN CONSTITUTIONAL COURT'S QUESTION RESOURCE ALLOCATION BY THE EXECUTIVE? A SOUTH AFRICAN PERSPECTIVE

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1. Introduction

> it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.[1]

Should the vindication of human rights depend on cost factors? Can constitutional courts decide on budgetary issues? This issue is a perennial hot potato in constitutional democracies. Some consider the question to have an easy answer: the judiciary cannot interfere in questions relating to how government spends its money because according to a traditional understanding this question lies firmly in the domain of the executive. It is also often argued that budgetary issues of this kind are 'untouchable' by the judiciary since it concerns government policy and courts cannot dictate policy to government. Others recognise the complexities of the relationship between the judiciary and the executive and do not think that the answer lies in easy references to 'separation of powers' or 'policy'.

The creation and work of the South African Constitutional Court has been celebrated internationally. The court has been applauded in particular for its groundbreaking decisons on socio

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[1] *I A Watson v City of Memphis* 83 S.Ct. 1314 (1963).

economic rights.[2] In many of the socio-economic rights cases the Constitutional Court was willing to pronounce on questions that traditionally fall in executive terrain, most significantly budgetary questions. In the controversial 'e-tolling case' of 2013 however Deputy Chief Justice Moseneke took a very different view. He stated that a decision such as the decision to legislate on e-tolling falls firmly in the domain of the executive. He indicated that the court would take a 'hands off' approach because the e-tolling case is a particular kind of case: a case involving resource allocation and policy making by the executive.

In the e-tolling case Justice Moseneke made the following centrally important statement:

> The funds allocated to the second and this respondents is a result of an executive decision about ordering of public resources, over which the government disposes and for it which it, and it alone has the public responsibility. The duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain…I will not interfere with the power and prerogative to formulate and implement policy on how to finance public projects and even how the application must be funded. That power resides in the exclusive domain of the national executive subject to budgetary ….inevitably call for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order. There are other competing interests, such as food-security, education, health and human settlement.[3]

This statement by Moseneke was cited with approval in the *Magidiwana* case.[4] The court in *Magidiwana* stated that the course suggested by Moseneke was a 'prudent and appropriate course to adopt.'[5]

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[2] Most notably *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997]; *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), *Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 15, 2002 (5) SA 721 (CC), *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another [2011] ZACC 33, 2012 (2) SA 104 (CC).*
[3] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 ZACC 18
[4] *Magidiwana v President of the Republic of South Africa* [2013] Para 10
[5] Ibid

From the early years of its existence the South African Constitutional Court the court showed an awareness of the negative impact of budget constraints can have on vindicating individual rights. One of the court's first socio-economic rights cases, *Soobramoney*, faltered and disappointed for exactly this reason.

This article will focus on the particular South African model of separation of powers and the impact of that model on the adjudication of constitutional cases that involve resource allocation by the state. Although the Constitutional Court has argued that it will not interfere in government policy such as budget allocation (a position recently articulated by Justice Moseneke in the *e-tolling* case) it is clear that South African courts have occasionally intruded into what can be described as 'executive terrain' even in cases involving resource allocation and budgeting. This was illustrated in the emblematic *Treatment Action Campaign* (*TAC 2*)[6] case as well as in the court's various pronouncements on its understanding of South African style separation of powers. The article will take a comparative approach. In many jurisdictions, most notably in Europe, courts have intervened in matters of resource allocation, specifically to counter the effects of austerity measures taken by governments. It will be argued that the South African Constitutional Court should follow suit and should not cling to the doctrine of the non-justiciability of policy questions.

2.-The Doctrine of Separation of Powers in South Africa and Beyond

The scope of this article does not allow for a full discussion of the origin and history of the doctrine of separation of powers. The division of the power of the state into three distinctive institu-

[6] See *TAC* (note 2 above).

tions is generally attributed to Montesquieu.[7] The essence of the justification concerns the limitation of power: the doctrine of separation of power should prevent the over-concentration of power in any one branch of government.

According to Vile, the division of the government into three branches; the legislature, the judiciary and the executive; is 'essential for the establishment and maintenance of political liberty.'[8] He goes on to describe the doctrine as requiring that each branch holds a separate function; the enacting of a law, the adjudication of disputes in terms of the law, and the execution of the law[9]; and that each branch should not 'encroach upon the functions of the other branches.'[10] Similarly, Madison has stated that 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.'[11]

One of the earliest motivations for the doctrine can be found in John Locke's *Second Treatise of Government*[12] where he argues that the separation of powers is necessary in order to avoid an abuse of power by a person who has the power to both make the law and to determine how it will be executed to his or her own advantage.[13]

[7]Montesquieu *The Spirit of the Law* (1748)(trans A M Cohler, BC Miller & HS Stone, 1989) Book XI Chapter 4 155 cited in Sebastian Seedorf & Sanele Sibanda 'Separation of Powers' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2 ed, 2007) Chapter 12,12–7.
[8] M.J.C Vile 'Constitutionalism and the Separation of Powers' 1998 at 14.
[9] Jeremy Waldron 'The Separation of Powers in Thought and Practice' 2013 *Boston College Law Review* 456.
[10] Vile (note 8 above)1998 at 14.
[11] The Federalist No.47 (2008) Lawrence Goldman Edition 239.
[12] *Second Treatise of Government* 1690 Cambridge University Press, 1988 edition.
[13] John Locke ibid at 364, as quoted by Vile ibid at 68.

In further examining the doctrine, Waldron advances many possible reasons for the existence of the separation of powers doctrine including to avoid the concentration of too much power in one set of hands and thus limit the amount of damage to liberty and other interests that could be inflicted by corruption; the fact that competition between different branches of government may be healthy and productive; to provide a system of checks and balances; or perhaps to provide citizens with numerous avenues of recourse.[14] Apart from these reasons, Waldron advances an observation that the separation of powers is linked to the advancement of the rule of law in that its purpose is not to restrict the conduct of the other branches, but to channel it and ensure that is undertaken in terms of the law. As a result, the system requires the enactment of laws to authorise the government to take such action.[15] Above all, Waldron writes that the separation of powers implies that each branch holds

> an integrity of their own, which is contaminated when executive or judicial considerations affect the way in which legislation is carried out, which is contaminated when legislative and executive considerations affect the way the judicial function is performed, and which is contaminated when the tasks specific to the executive are tangled up with the tasks of law-making and adjudication.[16]

The existence of judicial review is largely accepted as necessary in democratic countries in order to serve as a basis of checks and balances and ensure that executive and legislative decisions are within legal and reasonable boundaries, and further, to prevent an abuse of power and to protect individuals[17]. Palmer identifies one of the main reasons for the separation of powers in that '…the reasonableness of authority discretion is more appropriately controlled through the ballet

[14] Waldron (note 13 above) 440.
[15] Ibid 457.
[16] Ibid 460.
[17] Elizabeth Palmer 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' (2000) *Oxford Journal of Legal Studies* fn. 4.

box than by any sporadic interventions of non-elected judges in the affairs of the executive government.'[18]

In South Africa's recent constitutional history, the doctrine was initially included as Constitutional Principle VI[19] in the Constitutional Principles in the interim Constitution of 1993.[20] This principle served as a yardstick to the Constitutional Assembly in drafting the Final Constitution. Constitutional Principle VI provided: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.'

But Constitutional Principle VI was silent on the model of separation of powers to be established. The doctrine acquired a more distinct character in the *First Certification* judgment in which the Court stated:

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.[21]

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[18] Ibid 70.

[19] The Constitutional Principles were contained in the interim Constitution schedule 4, which was incorporated by a reference under Interim Constitution 71(1)(a).

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

[21] *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 (1) BCLR 1253 (hereafter referred to as *First Certification Judgment*) para 112.

In 2005 Judge O'Regan wrote that 'we may have not yet achieved a fully articulated doctrine of separation of powers.'[22] It can be argued that the Constitutional Court's jurisprudence shows that this is still the case. Whereas there is still a great deal of indeterminacy in the interpretation and application of the separation of powers and the doctrine has not been fully articulated.

However, whilst the traditional reasons for the creation of the doctrine have been described briefly above, it is important to understand the reason why the judiciary is reluctant to encroach upon considerations of policy, or to interfere with the allocation of state resources in the promotion of human rights. However, before this is done, an explanation of the term 'policy' is necessary.

3. Definition of the term Policy

One of the standard reasons why courts are reluctant to interfere in matters of resource allocation by the state is that this would involve interference in policy matters and that courts should defer to government in the formulation and implementation of policy. The basic position was stated in *DPP v Minister of Justice and Constitutional Development.*[23] In considering whether to uphold an intrusive order of the High Court, 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]', he held, '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

[22] Kate 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 at 146.
[23] [2009] ZACC 8, 2009 (4) SA 222 (CC).

executive observes the limits on the exercise of its power.'[24] The term 'policy' is however very vague and open to misuse and overuse. What does it mean?

In the South African context Rautenbach[25] has defined a policy as a 'plan, course of action, strategy or programme for action.'[26] He goes on to say that 'policy-making or planning forms the basis of rational action…is therefore an on-going and essential process in all governmental and management processes'. Dworkin further adds that policy refers to a decision relating to a collective goal of the greater community rather than those decisions made in respect of the protection or advancement of a particular individual or group right, and therefore aims to promote and protect societal values.[27] Bucci,[28] on the other hand defines public policy as 'a governmental programme…aiming at coordinating the means available to the state and the private activities in order to realise the objectives socially and politically defined.' She is of the view that public policy ought to 'express a selection of priorities, the reserve of the necessary means to its implementation, and the period of time needed to the expected results.'

Further, it has been argued that the courts may at times be 'ill-equipped' to decide on matters of policy, lacking the necessary expertise and access to information required to understand the consequences of their decision, whilst the executive possesses this expertise to make such deci-

[24] Ibid at para 184.
[25] Ig Rautenbach 'Policy and Judicial Review – political questions, margins of appreciation and the South African Constitution' (2012) *Journal of South African Law* (*TSAR*).
[26] Ibid 22.
[27] Ronald Dworkin as quoted by Koch Jr *Judicial Review of Administrative Policymaking* (2002) 378.
[28] Maria Paula Dallari Bucci 'O conceito juridico de política publica em direito' 2006, as quoted by Kozicki 'Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court' 2013 *Diritto e question pubbliche* 424.

sions[29]. Due to arguments of courts lacking democratic legitimacy (in that judges have not been elected whereas the executive has been elected) and that institutional capacity requires judges to exercise judicial restraint in hearing cases relating to questions of politics and public policy. Bickel adds another potential reason, in that the judiciary may possess a fear that the legislature or executive will blatantly disregard the decision and that the judiciary's authority and legitimacy will be undermined as a result.[30]

Although it is generally accepted that policy-making falls in the realm of the executive, it has been argued that when the design or implementation of such policy will impact on rights guaranteed in the bill of rights, the courts are not only permitted to intervene, but are constitutionally obliged to do so.[31] The question that remains unclear is what the scope of such intervention is permissible, and does this extend to the allocation of state resources?

4. The Budgetary Implications of Socio-Economic Rights: *Soobramoney*; *Grootboom* and *TAC* Revisited

A study of the body of case law of the South African Constitutional Court leads one to conclude that the Constitutional Court seems to have made a somewhat artificial distinction between socio-economic rights cases, and non-socio-economic rights cases. This court clearly articulates when it is dealing with a socio-economic rights case. The application of the category of socio economic rights sections in the Constitution also indicates that a case is a so-called 'socio-economic' rights case. This enables it to show a greater degree of institutional confidence in tak-

[29] Tiberiu Dragu and Oliver Board 'On Judicial Review in a Separation of Powers System' 1;P Lenta 'Judicial Restraint and Overreach' 2004 *South African Journal of Human Rights* 546.
[30] as quoted by Redish 'Judicial Review and the "Political Question"' *Northwest University Law Review* (1985) 1043.
[31] Section 172(a) of the Constitution.

ing a more interventionist stance on the particular case, ostensibly because pro-poor issues are often inherent in such cases.

Geoff Budlender has warned that one should be careful in making stark distinctions between socio economic rights and civil and political rights.[32] In this regard he refers to a Constitutional Court decision in which the court had no hesitation in making an order which had significant costs for government.[33] It is of course only socio economic cases that can be complex and involve budgetary questions. It is not only socio economic cases that are complex from this point of view.[34]

(i) Soobramoney

From its inception the South African Constitutional Court showed an awareness of the negative impact budget constraints can have on vindicating individual rights. One of the court's first socio-economic rights cases, *Soobramoney*,[35] faltered for exactly this reason. *Soobramoney* is an excellent example of a case in which the availability of resources played a central role in the decision. In *Soobramoney* the applicant was in the final stages of chronic renal failure.[36] The Constitutional Court essentially had to decide whether the right to emergency medical care included

[32] See the wording of General Comment 9 of the Committee on Economic, Social and Cultural Rights stating that: 'The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.'
[33] *August v Electoral Commission* 1999 (3) SA 1 (CC)
[34] Geoff Budlender 'The Judicial Role in Cases Involving Resource Allocation' (April 2011) *Advocate* 35 at 36.See para 130 It is submitted that on this analysis, all of the identified factors militate towards less rather than more deference. The only possible exception is the complexity of the matter. Here, the decisions are no more complex than any others which have budgetary implications - and that complexity is a necessary consequence of the enforcement of the positive constitutional obligations of the state.
[35] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997].
[36] See Craig Scott and Philip Alston 'Adjudicating Constitutional Priorities in a Transitional Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise' *South African Journal of Human Rights* (2000)

a claim to ongoing treatment of chronic illnesses that would prolong life. The court found that the right to emergency medical care did not apply in this particular situation. The plaintiff's situation was not an emergency which called for immediate remedial treatment, and thus it did not come within the scope of the constitutional provision, observed the court. Chaskalson J also emphasized the polycentric implications of upholding the applicant's claim.[37]

Crucially, the *Soobramoney* court stated that:

> These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.[38]

Scott and Alston point out that this paragraph has often been interpreted as indicating a strong, even absolute deference to the political branches of government.[39] They are however of the view that the words 'slow to interfere' indicate that the courts *can* interfere but should act cautiously. Liebenberg has pointed out that the scrutiny of policy in *Soobramoney* has failed to address the question of whether the budgetary allocation for dialysis was sufficient.[40]

Soobramoney stands in contrast to the Court's earlier position articulated in the *First Certification* judgment. Commenting on the two decisions, Scott and Alston wrote that constitutional adjudication on positive obligations cannot help but put pressure on the state to find the necessary resources, whether from within existing budgetary allocations or by converting societal resources

[37] *Soobramoney* (note 35 above) paras 28, 30.
[38] Ibid para 29.
[39] Scott & Alston (note 36 above)
[40] Sandy Liebenberg 'The interpretation of socio-economic rights' in S Woolman (eds) *Constitutional Law of South Africa* (2003) 33. See also Marius Pieterse 'Enforcing the right not to be refused emergency medical treatment : towards appropriate relief' *Stellenbosch Law Review* 18 (2007) .

into state resources.[41] The authors wrote that the duty to progressively realise human rights entails

> an information capacity that is able to disaggregate information so as to know which persons and groups are most in need; and preparation of targeted plans of action (linking service-delivery objectives both to the raising of financial resources and budgetary allocation) for progressively addressing the needs of everyone while treating the situation of the most disadvantaged and the seriously suffering on a special priority basis.[42]

In her analysis of *Soobramoney* McLean[43] compares the case to the UK case of *Rogers*.[44] This judgment concerned the decision of a local health authority to refuse the provision, at state expense, of a drug that could treat early stage breast cancer. The reason for the refusal was that the applicant could not demonstrate 'exceptional circumstances' as to why she should be given the drug (as the policy of the local authority required). On appeal the court found that since the matter concerned the 'life or death' of the appellant, it would subject the decision of the local health authority to 'rigorous scrutiny'.[45] The court found that since the health authority did not provide evidence to the court that it could on medical grounds distinguish exceptional and non-exceptional circumstances for the provision of the drug, the policy was irrational and therefore unlawful.[46]

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[42] Scott & Alston (note 36 above) 254.
[43] See Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 125, 26.
[44] *Rogers v Swindon NHS Primary Care Trust, The Secretary of State for Health* [2006] EWCA civ 392.
[45] Ibid para 56.
[46] Ibid para 81.

Soobramoney was not the only early case in which Chaskalson resisted upholding a right that would require the court to decide on budgetary questions. In *S v Lawrence* he remarked that courts are 'ill equipped' to sit in judgement on legislative policies on economic issues.[47] He said that in a democracy 'it is not their role to do so'.[48] Sachs J supported this position in *Du Plessis v De Klerk.*[49] Sachs stated that the judicial function simply does not lend itself to decisions of budgetary priority and that this is the domain of the legislature.

(ii) Grootboom

The outcome in *Soobramoney* has often been juxtaposed to the considerably more progressive case of *Grootboom*. The *Grootboom* case involved the claim to the right to housing by a homeless community in the Western Cape, has been discussed extensively in academic literature[50] and will not be discussed in detail here. The adventurous decision in this case – to review the state's housing obligations- was considered groundbreaking not only domestically but internationally. The case provides important insights in the judges' positions on resource allocation. The portions of the case that specifically refer to budgetary issues will receive attention.

[47] *S v Lawrence* 1997 (4) SA 117 CC para. 42.
[48] *Du Plessis v De Klerk* 1996(3) SA para 180.
[49] 1996 3 SA 850 CC.
[50] For a sample see: S Liebenberg '*Grootboom* and the seduction of the negative/positive rights ... enforcement of socio-economic rights' (2007) 4 *South African Law Journal* 882; S Liebenberg "The right to social assistance: The implications of *Grootboom* for policy reform in South Africa" (2001) 17 *South African Journal on Human Rights* 232 - 257; Pierre de Vos '*Grootboom* , the Right of Access to Housing and Substantive Equality as Contextual Fairness' *South African Journal on Human Rights* (2001

The Court in *Grootboom* did not refrain from evaluating government policy. In particular, it found that the policy did not provide for relief for those in desperate need,[51] such as those denied access to housing due to evictions or natural disasters. The Court even delved into the use of state 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.

In the *Grootboom* case O'Regan J stated:

> Determining a dispute with budgetary implications is a classic polycentric problem. Each decision to allocate a sum of money to a particular function implies less money for other functions. Any change in the allocation will have a major or minor impact on all the other decisions relating to the budget.[52]

O'Regan statement regarding the polycentric nature of the decision echoes the view of Chaskalson in *Soobramoney.* It is however debatable whether she is correct in her view that allocating money to one function necessarily implies less money for another function.

Roux, on the other hand, has applauded *Grootboom* for remaining respectful of the political branches' primary priority-setting and policy-making powers'.[53] Whereas ideally parliament and the democratic process should be used to hold the executive accountable to their constitutional obligations, in South Africa the courts have often assumed this role.

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[51] *Grootboom* para 65.
[52] Para 113
[53] Theunis Roux 'Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court' *Democratisation* 10 (2003) 98.

The *amici curiae* in the case stated that *Grootboom* challenges unidentifiable, arbitrary and misconceived decisions on the allocation of resources and emphasises that the relief could substantially transform the lives of some of the most vulnerable people in our society.[54]

(iii) Treatment Action Campaign (TAC)

In *TAC* 2[55] the Constitutional Court had to determine the reasonableness of the state's policy regarding the provision of Nevirapine, a controversial medicine for the treatment of HIV. In this case the Court did not shy away from evaluating the policy. *TAC*2 is one of the best examples of the Constitutional Court's willingness to take the plunge and assert itself towards the state with regard to budgetary issues.

The Court considered the efficacy of the drug itself,[56] the resistance posed by the drug,[57] the safety of the drug,[58] the capacity of government in implementing the policy in respect of the drug,[59] the facilities available for the implementation of the policy,[60] as well as the availability of formula-feed in public hospitals as a substitute for breast-feeding.[61]

[54]Heads of Argument on behalf of Amici Curiae in *Government of the Republic of South Africa v Grootboom* CCT 11/00 para 142.1.
[55] *Minister of Health & Others v Treatment Action Campaign & Others* [2002] ZACC 15, 2002 (5) SA 721 (CC).
75 Ibid
[56] Ibid para 57 – 58.
[57] Ibid para 59.
[58] Ibid para 60 – 64.
[59] Ibid para 65.
[60] Ibid para 84.
[61] Ibid para 91.

TAC 2 confirmed that the South African judiciary has a constitutional obligation to adjudicate upon the lawfulness of legislation and policy.'[62] The Constitutional Court 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. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as this constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. [63]

Heinz Klug has pointed out that *TAC2* goes beyond *Grootboom* because the Court's directive to the government was quite specific: government had to provide the drug to prevent mother-to-child transmission of HIV without delay.[64] The case was also significant in that it spearheaded an eventual change in government policy.

In the subsequent case of *New Clicks,* a case concerning regulations that sought to determine an appropriate dispensing fee for pharmacists Chaskalson stated that 'I do not agree that a court should refrain from examining the lawfulness of the dispensing fee simply because the decision as to what it should be involves economic and political considerations.[65] In this case he did not support the view that government policy is a no-go area for the courts.

5. The E-Tolling (*OUTA*) Case

[62] See Keith Syrett *Law, Legitimacy and the Rationing of Healthcare* (2007)
[63] 2002 (5) SA 721 paras 99, 113.
[64] Aarti Belani 'The South African Constitutional Court's Decision in TAC: A "Reasonable" Choice?' CHRGJ Working Paper No. 7 (2004).
[65] *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) para 313.

The so-called 'e-tolling' case[66] is one of the best recent examples of the Constitutional Court taking a conservative position and refusing to 'interfere' in budgetary matters. E-tolling emerged as a result of a decision taken by the South African Cabinet to improve the national motorways throughout the Gauteng city region by installing toll roads.

The respondents, the organisation Opposition to Urban Tolling Allowance (OUTA), 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

The e-tolling judgment focused primarily on issues of procedure, and the judges in this case were acutely aware that its judgment would inevitably have a polycentric effect in which upholding

OUTAs appeal against e-tolling – would have a 'deleterious effect on funding so desperately needed by health care, educators, pensioners, those dependant on social grants, and so forth.'[67]

When the case reached the Constitutional Court, Moseneke DCJ made three points on 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';[68]

[66] *National Treasury and Others* (note 2 above)
[67] Ibid para 33.
[68] Ibid para 67.

(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';[69] 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 consid

This 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.

The Court in e-tolling was at pains to stress its ostensibly limited role within the constitutional matrix that is the separation of powers.'[70] But in matters such as e-tolling the budgetary implications and the policy of the executive cannot be definitive.[71] The Constitutional Court still has a responsibility to assess whether the policy is rational and reasonable and to uphold the Constitution.

7. The Political Question Doctrine

[69] Ibid para. 68.
[70] Ibid.
[71] Mia Swart & Thomas Coggin 'The Road not taken: E-Tolling and Why Separation of Powers allows courts to question policy' *Constitutional Court Review* (2015)

The so-called Political Question Doctrine or the doctrine of non-justiciability disallows the review of certain matters due to political sensitivity[72] and advocates that certain issues are more appropriately dealt with by the political branches of government.[73] 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 can be labelled as 'political' should be authoritatively resolved, not by the courts, but rather by one (or both) of the political branches.[74] The political nature of such questions therefore renders them non justiciable. The doctrine was developed and codified in *Baker v Carr*.[75] In this case 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 department on one question.[76]

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

Cohn identifies three key features, being that the doctrine is considered to be a preliminary barrier exempting courts from considering difficult or complicated issues; the Respondent is granted

[72] Margit Cohn 'Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems' *American Journal of Comparative Law* (2011)677.
[73] Martin Redish 'Judicial Review and the "Political Question"' *Northwest University Law Review* (1995) 1031.
[74] J Choper 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1456.
[75] *Baker v Carr* 369 US 186 (1962).
[76] Ibid at 217.

an absolute shield; and the doctrine is viewed as an established rule of judicial behaviour.[77] In 1924, Finkelstein noted that the doctrine is invoked at times when a court 'fears the vastness of the consequences that a decision on the merits might entail…a feeling that the court is incompetent to deal with the particular type of question involved…a feeling that the matter is "too high" for the courts.'[78]

The concern over the undemocratic nature of the judiciary should not hamper its ability to review the decisions of the other branches of government. The reason for this is that the judiciary is meant to serve as a check and balance, and to ensure the constitutional restraint on the will of the majority as well, and in this sense, is independent, whilst the other branches reflect the will of the majority.[79]

Redish, in discussing the reluctance of courts to consider political questions due to a lack of institutional capacity states that "…if the constitutional limitations on majoritarian power are to mean anything, at some point the judiciary must be able to question the political branches' assertion of factual necessity" and further that '[t]he claim that the judiciary may often lack access to information available to the executive cannot justify abandonment of the review function, because the judiciary may simply require the executive to justify its actions by supplying the information which led it to act.'[80] While Redish goes on to note that requesting access to information may still not allow the courts to fully understand the complexity of an issue, or the poten-

[77] Cohn (note 72 above) 667 - 668.
[78] Maurice Finkelstein 'Judicial Self-Limitation' *Harvard Law Review* (1924) 344.
[79] Redish (note 73 above)1045.
[80] Ibid1051.

tial repercussions of a decision made by the court, it is no reason to decline to review the matter in its entirety.

However, a point which is not often considered is whether the exercise of judicial review, and in the context of this paper, whether extending the scope of judicial review to include intervention in the allocation of resources could potentially hamper the accountability of the executive branch of government.

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 has been attributed to the Constitutional Court's strong conception of judicial review.[81] The specific reference to the executive in the application provision – s 8(1) – means that the executive is bound by the Constitution.[82] 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.

5. Marikana and the Question of State Funding

[81] Seedorf & Sibanda (note 7 above) 12-52.
[82] See Iain Currie & Johan de Waal *The Bill of Rights Handbook* (5 ed, 2005).

The Marikana massacre took place at a platinum mine operated by the multinational firm Lonmin in the North West province of South Africa. The victims were rock drill operators striking for better wages. On 16 August the police shot at 112 striking miners, killing 34. In the days after the massacre it was reported that some of the 260 arrested men who were detained after the massacre were tortured at the police station where they were held.[83]

Instead of subjecting the massacre to the ordinary criminal courts, the South African government decided to appoint a commission to investigate the events at Marikana. The mandate of the Marikana Commission of Inquiry was to investigate matters of public, national and international concern arising out of the incidents at the Lonmin mine in Marikana[84]

The Commission's legitimacy was threatened by the withdrawal of the legal teams representing the families of the killed miners as well as of the injured and arrested miners because of a dispute about the funding of the lawyers of the injured and arrested miners.[85]

In July 2013 Raulinga J of the High Court dismissed the urgent application for temporary relief.[86]

In August 2013 the Constitutional Court dismissed a leave to appeal application for state funding[87] by lawyers representing 29 arrested and injured Marikana miners before the Commission of

[83]De Waal, 2012 & Hlongwane, 2012.
[84] Government Gazette, 2012.
[85] Pierre de Vos 'Justice: That elusive prize: and how to get it' *Daily Maverick* 17 October 2013.
[86] *Magidiwana and Another v President of the Republic of South Africa and Others* (37904/2013) [2013] ZAGPPHC 292; [2014] 1 All SA 76 (GNP) (14 October 2013)

Inquiry.[88] The Department of Justice claimed that it could find 'no legal framework through which government can contribute to the legal expenses of any of the parties who participate in the commission of inquiry'.[89]

Interestingly, Makgoka J cited the statement of Moseneke in the e-tolling case with approval.[90] The court stated that 'the collection and ordering of public resources inevitably calls for policy-laden and polycentric decision making. Courts are not always well suited to make decisions of that order.'[91]

The court further justified its decision by stating that the applicants were not children nor detained persons and that the Bill of Rights allows only these categories of applicants would be entitled to state-funded legal representation.[92]

Remarkably, the Constitutional Court held that no substantial injustice would result as a result of not granting the application for state funding.[93] The Court also did not acknowledge that withholding state funding could infringe on the provisions on access to court[94] or on the equality.[95]

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[87] *Magidiwana v President of South Africa* 2013 CCT 100/13The applicants approached the Minister of Justice and Constitutional Development, Jeff Radebe to fund the costs of their participation in the Commission's proceedings
[88] Niren Tolsi 'Buckets for Donations as Con Court dismisses Marikana funding appeal' *Mail & Guardian* 19 August 2013.
[89] Ibid.
[90] Ibid para 77.
[91] Ibid.
[92] Para 12 The court referred to sections 28 (1) (h); section 35 (2) (c)
[93] Para 12 referring to section 35 (3) (g)
[94] Para 13. Section 34 of the Constitution provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[95] Section 9 of the Constitution.

The court concluded that the fact that unfairness may result from the lack of funding does not mean that the court can interfere with executive decisions regarding budgetary issues.

On 14 October 2013 the North Gauteng High Court ordered Legal Aid South Africa to fund the legal representation of the arrested and injured miners at the Marikana Commission. The court recommended to Legal Aid that that the miners' current legal team - consisting of two counsel and a firm of attorneys - be maintained. The court found that Legal Aid's decision to fund the legal representation of the families and not the miners 'cannot be justified on any rational basis' and refusal to provide funding to the miners was unlawful.

Judge Makgoka held that the goals of the Marikana Commission could not be achieved 'without the full and effective participation' of the miners. The Judge found that the families' rights to dignity would be infringed by a failure to ensure the miners' participation. He also accepted arguments made, on behalf of the families of the deceased miners that, without the surviving miners, the families' participation in the Commission would be meaningless.

The *Magidiwana* case is a good example of a case that will not be classified by the court as a socio economic case. Since the case involves funding for legal representation it would be classified as a case on civil and political rights. It is however clear that the case indirectly involves socio economic rights since the issue of poverty and poor wages lay at the heart of the Marikana protest which led to the massacre.

6. Comparative Jurisprudence: The Demise of Non Justiciability

It is increasingly evident that even in matters of high policy which may previously have been regarded as on (or outside) the periphery of the court's jurisdiction, courts in the United States and United Kingdom are increasingly willing to intervene in what has been traditionally regarded as the domain of the executive. In the UK it has been stated that if a matter engages in one or more Convention rights this will put an end to questions of justiciability in its fact stating sense. Some have even detected signs of the complete abandonment of non justiciability doctrine.[96] In the context of the UK Laws LJ has observed that 'save as regards the Queen in Parliament there is in principle always jurisdiction in the court to review the decisions of public bodies…' In jurisdictions such as the US the idea of a judicial no go area has effectively been replaced by a more flexible and pragmatic test of deference.[97]

Theunis Roux writes of the connection between democratisation and the expansion of judicial power. [98] One can speak of an international trend towards the erosion of the doctrine of non-justiciability.

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.

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[96] I Leigh and L Masterman *Making Rights Real: The Human Rights Act in its First Decade* 103

[97] This clear 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.

[98] Theunis Roux writes that internationally over the last thirty 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 106 above) at 4, citing C Tate & V Torbjörn (eds) *The Global Expansion of Judicial Power* (1995).

(i)United Kingdom

The idea of 'non-justiciability' is one that has been used in the United Kingdom for some time. Generally, this doctrine is understood as one where there are certain decisions which cannot be challenged in court, including both claims for damages as well as judicial review[99]. The judiciary in the United Kingdom has traditionally declined to review decisions involving resource allocation.[100]

The case of *ex parte B*[101] dealt with a matter whereby the decision of the Health Authority in allocating resources and declining the further treatment of a 10 year old girl was challenged. The court showed a reluctance to intervene and stated that 'Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgment that the court can make…'

The cases of *Tandy*[102] and *Mohammed*[103] have now confirmed that non-justiciability does not apply to matters dealing with a breach of duty. In fact, Palmer argues that UK judgments have revealed a movement towards a more "rights-based" approach of the judiciary in showing a willingness to intervene in matters relating to welfare and resource allocations determined by the executive. Although the courts' decisions did not center around the amount of resources allocated in these matters, the courts found that the government has an obligation to deliver services *irre-*

[99] Palmer 'Resource Allocation, Welfare Rights – Mapping the Boundaries of Judicial Control in Public Administrative Law' (2000) *Oxford Journal of Legal Studies* 64.
[100] Palmer at 74.
[101] *R v Cambridge Health Authority, ex parte B [1995] 1 FLR 1055, 2 All ER 129.*
[102] *R v East Sussex ex parte Tandy [1998] AC 714, [1998] 2 All ER 769, [1998] 2 WLR 884, [1998] 2 FCR.*
[103] *R v Birmingham City Council, ex parte Mohammed [1998] 3 All ER.*

spective of available resources; a judgment which will inevitably impact on the financial resources of the State.

(ii)Brazil

Recent case law in Brazil further indicates the development of a willingness of the judiciary to intervene in matters of public policy. In fact, the Superior Court of Justice has ruled that there is a possibility of judicial review of public policies through the budgeting, and although the exact amount to be allocated and the details of the policy to be adopted remain in the domain of the executive sphere, the Court is able to direct the specific destination of funding of the next budget in order to ensure the fulfilment of human rights[104]. In the special appeal[105], the Court confirmed that the necessary funding to supplement the lack of equipment in the hospitals should have been provided.

(iii)Europe: Latvia, Lithuania, Ukraine, Germany

The Constitutional Courts in Lithuania[106], Latvia[107] and the Ukraine[108] have all embarked on considerations of matters relating to the allocation of state resources during an economic crisis. All three have held that the reduction of state pensions and other social benefits is permissible in an economic crisis, however they have unanimously held that such reduction is based on the

[104] STJ, Resp 493.811, Rel Justice Eliana Calmon, DJ de 15.3.2004, as quoted by Kozicki "Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court" 2013 *Diritto e question pubbliche* 436.
[105] STJ, Resp 1.041.197, Rel. Justice Humberto Martins, DJ de 16.9.2009, as quoted by Kozicki "Judicialization of Politics and the Judicial Review of Public Policies by the Brazilian Supreme Court" 2013 *Diritto e question pubbliche* 437.
[106] In its ruling of 23 April 2002; 25 November 2002; 23 August 2005; 28 March 2006; 5 January 2009; 20 April 2010; 6 February 2012; 27 February 2012
[107] The Constitutional Court of the Republic of Latvia ruling of 21 December 2009.
[108] In its ruling of 26 December 2011

condition that it must be temporary in nature and a system of compensation for loss after the economic crisis has come to an end must be put into place. The Constitutional Court of the Ukraine[109] further extended its conditional acceptance of the reduction of social benefits in that such reduction may not be lower than the level set in Paragraph 3 of Article 46 of the Constitution of Ukraine and may not be reduced to the level in which persons will be denied adequate living conditions and a violation of human dignity.

The Latvian Constitutional Court has also been fairly progressive in intervening in government policy on resource allocation. In Case No. 2009-43-01[110], a case on the constitutionality of the state pension law, the court essentially pronounced on austerity measures taken by government. This is an important indication that constitutional courts will not necessarily accept that a government's arguments regarding resource constraints trumps individual rights.

Similarly, in the case of *Acordao,*[111] the Portuguese Constitutional Court rejected several austerity measures adopted by the Government in March 2013 in that they were unconstitutional, violating the right to equality by unfairly discriminating against public employees, and further violating the right to social security. The impact of this decision on the national budget is significant in that the inability of the Government to implement such measures will deprive it of between

[109] Decision of the Constitutional Court of Ukraine No. 20-rp/2011 dated December 26,2011 in the case upon the constitutional petitions of 49 People's Deputies of Ukraine, 53 People's Deputies of Ukraine and 56 People's Deputies of Ukraine concerning conformity with the Constitution of Ukraine (constitutionality) of item 4 of Chapter VII 'Transitional Provisions' of the Law of Ukraine "On the State Budget of Ukraine for 2011 as referred to by Birmontiene˙ 'Challenges for the Constitutional Review: Protection of Social Rights During an Economic Crisis' 16.
[110]

[111] Tribunal Constitucional [Port. Const. Ct.] 353/2012 (Port.).

900 million[112] and 1.4 billion Euros.[113] However, whilst the Court declared such measures unconstitutional, it suspended the effects of its decision by allowing the law implementing the measures to continue.[114]

(iv)Germany

A well-known 2012 case (the so-call *Harz 1* case) [115] of the German Constitutional Court illustrates the willingness of the court to pronounce on resource allocation. The German Constitutional Court was asked to decide whether the cash benefits for asylum seekers provided under section 3 paragraph 2 of the Asylum Seekers Benefit Act comply with the constitutional right to a minimum standard of living. The Constitutional Court 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 significance of the case lies inter alia in the fact that this was the first time, the Constitutional Court declared that social benefits provided for under the law do not live up to the constitutionally protected standard. The Court emphasised that an existential minimum must be guaranteed.

7. Conclusion

What patterns can be discerned from the South African Constitutional Court's intervention in budgetary issues? Whereas the willingness of interfere has generally increased with time, the

[112] According to Reuters, accessed at http://www.reuters.com/article/2013/04/05/us-portugal-austerity-court-idUSBRE9340VJ20130405.
[113] According to the European Industrial Relations Observatory online, accessed at http://www.eurofound.europa.eu/eiro/2013/04/articles/pt1304019i.htm.
[114] Pires 'Private versus Public or State versus Europe? A Portuguese Constitutional Tale' *Michigan Journal of International Law* (2013)105.
[115] BVerfGe, BvL 10/10 of (18 July 2012).

court has also shown a progressive attitude towards separation of powers and the courage to challenge the executive in its early years, notably in *First Certification* and the subsequent important cases of *Grootboom* and *TAC*. The court's own pronouncements on its understanding of South African style separation of powers indicates that the judiciary cannot simply declare that budgetary issues are non-justiciable. The Constitutional Court has proceeded to approach cases that raise separation of powers 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. Whereas it has often proved easier for the Court to have adopted a slightly more interventionist approach in its socio-economic rights jurisprudence, its approach has not been consistent or consistently justified.

In the e-tolling case the Constitutional Court portrays the body of law regarding the doctrine of separation of powers as being more settled than it is. In doing so the Court indicates that, as a general principle, courts should adopt a 'hands off' approach when a matter involves policy making and large-scale resource allocation. This is not only inconsistent with its own previous jurisprudence but also with the international trend towards the demise of non-justiciability. In light of the long established practice of superior courts not interfering I matters of resource allocation, the trend towards judicial interention in this terrain is both dramatic and promising.

In upholding a progresssive Constitution, the Constitutional Court cannot hide behind the vague argument that courts cannot interfere in policy. In as far as policy involves priority-setting, the Court should intervene if the priorities of government are not in line with its obligations under

the Constitution. In light of the ambitious social and political goals of the South African Constitutional Court, it is correct that the Court should progressively develop not only the socio economic rights in the Constitution but also intervene in government policy in upholding civil and political rights.