Is TheRE 'A' Separation of powerS Doctrine in South AfricA And other Democracies Both old and new?[1]

Stu Woolman*

The concept of practical reason as a subjective capacity is of modern vintage. Converting the Aristotelian conceptual framework . . . had the advantage . . . of relating practical reason to the 'private' happiness and 'moral' autonomy of the individual. [P]ractical reason was thenceforth related to the freedom of the human being as private subject who could assume the roles of member of civil society and citizen, both national and global. . . . Hegel remained convinced, just like Aristotle, that society finds its unity in the political life and organization of the state. . . . However, modern societies have since become so complex that these two conceptual motifs – that of a society concentrated in the state and that of society made up of individuals – can no longer be applied unproblematically. . . . [I]n the Marxist concept of a democratically self-governing society . . . both the bureaucratic state and the capitalist economy were [largely] supposed to disappear. Systems theory erases even these traces. The state forms just one subsystem alongside other functionally specified social subsystems. . . . The development of constitutional democracy along the celebrated 'North Atlantic' democracies has certainly provided us with results worth preserving, but once those who do not have the good fortune to be the heirs of the Founding Fathers turn to their own traditions, they cannot find criteria and reasons that would allow them to distinguish what would be worth preserving from what should be rejected.

Jurgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996)

I. Introduction: In the Beginning . . . was the Constitution of Moldova

The separations of powers doctrine is about power. More specifically, it's about how power, how much power, may be used by a given person, a constellation of persons or an institution when governing a state (or a portion thereof). Many tend to attribute its modern incarnation to Montesquieu, or better still, to the authors of *The Federalist Papers* and the drafters of the US Constitution. Yet philosophers and public officials in antiquity and early modernity have shared similar concerns.

Plato and Aristotle had decidedly negative views about democracy. After all, Plato's mentor and alter ego, Socrates, didn't have the last word about Socrates fate: a democratically-run Athens did. After offering a series of terribly unconvincing responses as to why he should *not* escape (as dubiously recounted by Plato in the *Euthypro*, *Apology*, *Crito* and *Phaedrus*), Socrates dutifully drinks his Hemlock. Plato may have had good reason to have Socrates go swiftly, given his swing to the Philosopher-King in *The Republic*. Plato separated powers much as we do in modernity. He imagined a state in which each person took decisions about matters that fell within her unique remit of merit. The notion of a few pure idealists ruling the roost did not last long in Athens. Aristotle adopted a far more pragmatic approach. Mastery of various practices required well-educated and wise persons who, in concert with others, could be expected to administer a state effectively.[1] (While rule by a well-informed aristocracy is anathema to *modern* academic democratic thought, in this, our second Gilded Age, such rule is, perhaps, the best we can hope to garner from our political representatives.[2])

Severally centuries on, the Republic of Rome developed a fascinating and complex, democratic and federalist, mode of rule. Citizens elected officials. The most powerful officials – two Consuls, not one – could be removed after a year if deemed incompetent. The Consuls were advised by a Senate of Rome's 600 most powerful men. As with most governments, these engagements covered the efficacy of extant laws, current finances and foreign affairs. The interpretation of laws in disputes fell to magistrates.[3] However, the Senate and Consuls occasionally served as appellate bodies. More intriguing still, however, is that as the empire grew, so did the complexity of its legal system. While governors and

[1] For an elegant transformation of Aristotle's reflective equilibrium into the more nuanced form of perceptive equilibrium, see M Nussbaum '"Finely Aware and Richly Responsible": Moral Attention and the Moral Task of Literature' (1985) 87 *Journal of Philosophy* 516.
[2] See, eg, J Waldron *The Dignity of Legislation* (1999).
[3] G Mousourakis *Roman Law and the Origins of the Civil Law Tradition* (2015) 27.

the military held the far flung empire together, Rome itself allowed significant degrees of self-rule and legal pluralism in its territories. Local laws and customs could largely remain in place. Such autonomy rested largely on one condition: taxes (determined partially by census) were paid timeously. This practice of devolution of power played an important role in ensuring that the centre held. Such was the power, flexibility and longevity of the Roman Empire that its civil law remains alive – through concretization in such early compilations as the Codex Gregorianus and the Codex Hermogenianus[4] -- as well as in South Africa's more modern Roman-Dutch legal tradition.[5]

Lest I be accused of an entirely Western bias, China, some two millennia ago, developed a multifaceted state.[6] Perhaps of greatest interest is how China managed to manage such far flung terrain. It did so through a well-trained, loyal, dispersed bureaucracy – administrators known as legalists. Through these legalists, China both maintained its territorial and political coherence for long stretches of time and developed a body of well-publicized laws that provided the framework for the closest thing to a just and fair social order in a patrimonial system.

England -- from the Magna Carta to the Empire to the partition of Ireland -- rules much of our (western) imagination. As imagination goes, Shakespeare provides useful insight into the Empire's governance during its rise to power. The Bard found himself confronted by the problem of populism. *Coriolanus* constitutes one of his answers. His successful general, elevated to King by the unwashed masses, becomes the brutal dictator. Mindful, as well, of the sectarian violence that had racked England for a century, Shakespeare seems content with a benign monarch, a Parliament designed to represent primarily the aristocracy and a body of jurisprudence built up by judges in courts of law and courts of equity over time.[7] Yet his histories are littered with warring aristocrats, benighted kings and neurotic pretenders to the throne – so no besotted fan of pure consolidation of power is the Bard. The man whose genius shaped the modern psyche hedged his bets. Hal and Falstaff in *Henry IV* are his working class heroes, even as he transforms Hal into the much admired and benign Henry V. Shakespeare offers no clear answers to the very modern and complicated psychological desire to be led by (benevolent) dictators, even as we lurch unevenly backwards and forwards, and seemingly backwards again, toward progressively more democratic governments elected by unruly citizens who prefer dancing halls and mead.

In our own time in South Africa, we all dreamed of the coming of Mandela. Many of us would have gladly turned the keys to the kingdom over to him. Whether a golden age of Mandela could have avoided the patrimonial arrangements of the current dispensation is not worthy of speculation. Mandela turned down a second term to prove a point. South Africa was a multi-party, constitutional democracy and not a state run by tin-pot dictators.

Pity then, poor Moldova. The Constitution of Moldova (which strangely – to a South African mind -- came into effect on 27 April 1994) trumpets itself as the highest law in the land. Chapter 2, like our own, enshrines a Bill of Rights and Freedoms. Moldova's Parliament, a unicameral assembly of 101 members (from 5 distinct parties), elects a President, who, in turn, 'appoints' a prime minister, who puts the final gloss on the upper regions of the Executive Branch by selecting a cabinet. A Constitutional Court vouchsafes the supremacy of the Constitution (and its fundamental rights), ensures that the state's powers are appropriately wielded by three branches of government (the legislature, the executive and the judiciary), retains powers of judicial review over the laws passed by Parliament and decisions taken by

[4] Ibid at 193.
[5] E Fagan 'Roman Dutch Law in its South African Historical Context' in R Zmmerman & D Visser (eds)*Southern Cross: Civil Law and Commercial Law in South Africa* 32.
[6] Q Zhang *An Introduction to Chinese History and Culture* (2015).
[7] Of course, the House of Commons had existed since the 14th century. Though it made regular noise about taxation and public expenditure – and even had the chutzpah to indict ministers – its threat to the Crown lay mainly in the instability that it occasioned. Shakespeare might look rather prescient with the beheading of Charles I by an armed insurrection in 1648 and Cromwell's dissolution of Parliament in 1653. Although the monarchy and Parliament were restored in 1660, another deposition in 1688 gradually led to an on-going diffusion and separation of powers within the realm.

the President and other members of the state. Yet, at the time of writing, Moldova has turned its back on the European Union and has made load noises about returning to the embrace of mother Russia. History marches on, and the road to democracy is never straight.

The purpose of this eclectic introduction should be clear. The concerns that animate the separation of powers doctrine writ large are certainly not new. The nature of these concerns has varied from time to time, and it's content from place to place. More to the point, the disaggregation of power that gives the doctrine its force cannot prevent a democratic order with well-designed institutions from returning to the authoritarian regime from whence it came.

The news from the front is not all bad. During this current period of political decay and political disorder, the good news is that the doctrine still exists in roughly half of the 193 nations on the planet in which something akin to democracy obtains. The first question that drives this article is 'what, if anything, does the doctrine actually mean in practice?' Its practice varies widely and wildly from jurisdiction to jurisdiction. The second question, which follows from the first, is how the doctrine of the separation of powers should be understood in South Africa in terms of the problem of pluralism, the pathologies of helicopter constitutions and the promises that a resolute Constitutional Court continues to hold out.

II. Is There Really "A" Separation of Powers Doctrine?

The sample chosen – not entirely at random -- reflects seven democratic nations meant to represent seven continents.[8] It would seem obvious – with even a cursory glance at the qualitative data -- that the separation of powers means very, very dissimilar things in different democratic dispensations.

Australia, for example, lacks a justiciable bill of rights. Constitutional concerns tend to turn on issues of federalism.[9] That's no small thing, as the devolution of power to smaller constituent states can serve as a significant break on the power wielded by a federal government. The federal government itself possesses the classic three branches associated with the separation of powers doctrine: a legislature, an executive and a judiciary (plus a monarch – the Queen of England.) The legislature is something of a hybrid – a bicameral entity. Parliament reflects, on the one hand, the fusion of legislature and executive associated with the English Westminster arrangement and, on the other hand, a powerful federal senate modelled upon the body found in the US Congress. In practice, power tends to tilt toward the House of Representatives and its 150 members. The members represent districts based on a propositional basis – although two territories are each granted 5 representatives (more than their actual population would allow.) The party (or coalition) that commands the majority of representatives in the House forms the government (the Executive) and determines both the Prime Minister and the members of the Cabinet (who must be representatives in the House.) The 76 member Senate – compromised of 12 senators from each state, and 2 from each of the two territories – retains the power to block legislation initiated by the House. No small thing. The High Court – with both appellate and original jurisdiction – possesses the power of judicial review of Acts of Parliament. Although that sounds not unlike the US Supreme Court or the South African Constitutional Court, the Australian High Court lacks their wide-ranging powers in the absence of a justiciable bill of rights. The country's largely two-party structure is quite robust, and reflects both ideological and regional differences.

Singapore possesses three separate branches of government.[10] But looks can be deceiving. It has been governed by a single party – the People's Action Party – since 1959. Many observers take a dim view of Singapore's commitment to civil liberties, human rights and open political processes. But

[8] Okay, Antarctica goes unrepresented. For purposes of contrast, I gave Europe two slots -- France and the United Kingdom.
[9] C Saunders *The Constitution of Australia: A Contextual Analysis* (2011).
[10] K Tan *The Constitution of Singapore: A Contextual Analysis* (2015).

what if most people adapt to life without gum? That sepia-toned picture of gum chewing masses must be contrasted with Transparency International's current ratings.[11] They consistently place the government amongst the 'top ten' cleanest in the world. Likewise, World Bank assessments grade Singapore highly with respect to the rule of law, administrative efficiency and an absence of discernible corruption.[12] Moreover, this small country's appreciation for (or obsession with) law and order must be understood in terms of an ethnic Chinese majority embedded (physically and traditionally) in a broader Malay and Islamic world.

France, on its own account, is an 'indivisible, secular, democratic and social republic' with a constitution that provides for both the separation of powers and an 'attachment to the Rights of Man'.[13] While it possesses a bicameral Parliament – a National Assembly and a Senate – the two bodies possess rather limited powers, save to say that a majority of the National Assembly determines the Prime Minister. The courts are genuinely independent and have divided competencies. The judicial branch has responsibility for civil and criminal matters. The administrative branch hears appeals of executive decisions. Each branch of the courts has its own supreme court. While France is often described as a unitary state, its various regions, departments and communes exercise a significant degree of autonomy. Moreover, France's constitution cedes some of its sovereignty to the European Union and must therefore abide by the EU's treaties, directives and regulations.

Across the channel lies the United Kingdom. No Constitution -- and it's still ruled (notionally) by a monarch. Yet the United Kingdom can also lay claim to being one of the oldest of modern democracies.[14] It too has two houses: a House of Lords and a House of Commons. A majority of members in the House of Commons (elected from first past the post constituencies) determines the selection of the Prime Minister, who, in turn with members of the ruling party (or coalition) determines the members of a powerful Cabinet. But the House of Commons, with its constituency based system, is no mere rubber stamp. In addition, the devolution of legislative and executive powers to Scotland and Wales has been sufficiently substantial to allow Scotland to recently decide, by referendum, whether to remain a part of the United Kingdom. They did, by a rather narrow margin. (But the Scottish Nationalist Party has only grown stronger and now own virtually all seats in Parliament.) The 'troubled' Northern Ireland, with its own legislature and executive, is subject to greater constraints on its devolution. Over some matters, the United Kingdom and Ireland share responsibility for its governance. The United Kingdom's judiciary is staunchly independent. Indeed, the members of the bench often bristle at suggestions that the United Kingdom requires an enumerated bill of rights or that it must subordinate a deeply embedded tradition of judicially developed freedoms and rights to the relatively recent Human Rights Act, and, on occasion, to the rulings of the European Court of Human Rights.

South Africa -- despite its textual commitment to cooperative government between different spheres (national, provincial and municipal) -- remains largely a unitary state under the control of a single party: the African National Congress.[15] Other parties have, intermittently, controlled the provinces of the Western Cape and Kwa-Zulu Natal, as well as various metropoles. Parliament is, technically, comprised of two houses: the National Assembly and the National Council of Provinces. However, it's the National Assembly – whose membership is determined by proportional election – that determines the President, who, in turn, determines the Cabinet. The African National Congress (ANC) has ruled largely uncontested since liberation from white minority rule in 1994. As a result, the power over most national, provincial and municipal matters has been wielded by internal ANC party structures such as the NEC. However, the basic law -- committed to constitutional supremacy, the rule of law and

[11] Transparency International *Corruption Perception Index* (2014).
[12] World Bank *Doing Business in Singapore* (2014).
[13] S Boyron *The Constitution of France: A Contextual Analysis* (2015).
[14] A King *The British Constitution* (2009).
[15] S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Edition, 2008).

a court system with powers of judicial review over a justiciable bill of rights and other provisions of the Constitution -- has operated as a meaningful brake on what remains a one party dominant democracy.

Across the pond is Brazil. The 1998 Constitution replaced rule by a military junta with a complex federal democracy.[16] Brazil possesses an independently elected President. Its federal legislature has a bicameral structure: a Senate of 81 members in which each of the 26 states plus the federal district elect 3 deputies (each by majority vote for 8 year terms) and a Chamber of Deputies of 513 members determined by proportional representation subject to the qualification that each state is entitled to at least 8 representatives. Although the legislature can override a Presidential veto, such occasions rarely arise. Brazil possesses a constitutional court, the Supreme Federal Court, with the power to declare federal and state law invalid and the capacity to declare the judgments of second instance courts constitutionally infirm. More interesting still are the 26 semi-autonomous states. Each possesses their own unicameral legislatures of deputies who promulgate laws, governors who act as executives and courts of first and second instance. That sounds very much like the arrangement in the United States – save for the fact that Brazil possesses quite a large number of active political parties that reflect a variety of ideological views and significant regional differences.

Lastly big brother. The United States, the oldest constitutional democracy, has, at the federal level, a President elected every four years, a legislature that consists of 2 senators from each of the 50 states elected for six year terms and 454 representatives allocated to the states on a proportional basis (though the requirement that each state must have a least one representative and two senators often flips the nature of tis power sharing arrangement.)[17] Its Supreme Court possesses general jurisdiction and judicial review, in terms of the federal Constitution, of the laws enacted by federal, state and local governments (and is assisted in this task by federal district and circuit courts). The 50 states replicate this formula with governors operating as executives, legislatures (and municipalities) passing laws, and a state judiciary (sometimes elected) that may review laws in light of a state Constitution. Not every state is exactly like the other. Vive la difference.

III. Breaking Bad: Different Mechanisms for the Prevention of the Consolidation and Abuse of Power

What does this kaleidoscope of democracies – each with manifestly distinct takes on how executive, legislative and judicial power, as well as federal and state powers -- tell us, if anything? Textbooks tell us that the separation of powers doctrine is designed to prevent polities from 'breaking bad' – from being undermined by the aggregation of power that leads to tyranny. But the seven nations are so different in doctrine and in practice that one might want to ask whether the separation of powers is doing the heavy lifting, or whether something else is going on?

Singapore is a one party dominant democracy in which it's separation of powers is honoured primarily in the breach. Yet it manages – by international standards – to be largely free of corruption, governed by the rule of law and bureaucratically efficient. Australia is a two party democracy – with a few outliers – with a strong inclination toward federalism. Perhaps here size is destiny: seven states are separated by large distances from one another. According these states room to manoeuvre helps hold the centre together. France, although a unitary state, benefits from a different kind of separation of powers. The state's professional administration – set up some two centuries ago – keeps the train on the tracks, through several republics, emperors and military rulers. The United Kingdom remains relatively stable. But its devolution of powers to Scotland and Wales may have unanticipated consequences. The rise of the Scottish National Party might mean that the next referendum leads to a succession of Scotland. As to Northern Ireland: can it continue to limp along, neither entirely English, nor entirely Irish, nor entirely Northern Ireland? Brazil is fascinating – and too complex for a limited

[16] C Cole *Comparative Constitutional Law: Brazil and the United States* (2008).
[17] L Tribe *American Constitutional Law* (2nd Edition, 1988).

appraisal. But the 26 states (+ 1 federal district) and the multiple parties to which they have given rise creates a sustained dynamism in Brazilian politics. The differentiation between states – along with relatively progressive federal leadership in two major parties -- may partially explain how Brazil has overcome the ignominious distinction of having the world's highest gini-coefficient. But let's not overegg the pudding: Brazil remains predominantly poor and the issue of landlessness shows no sign of abating anytime soon. South Africa now owns the distinction of having the world's highest gini-coefficient. What can be said is that despite its manifold one party democracy problems, the judicial branch and other state actors have kept the promise of a vibrant multi-party democracy alive and nudged the state to deliver on more constitutional promises than it might otherwise be inclined to do. As to the United States: it's hard to imagine a country in which the 3 branches of the federal government operate in a more truly separate and divisive fashion. Could Madison, Hamilton and Jay have imagined that their system of checks and balances would be so out of balance. With the end of the current President's term, Congress will have gone some 6 years without the passage of important legislation. The President, without congressional cooperation, operates through executive orders and the power of federal agencies. The Supreme Court has lurched so far to the right that it has radically reversed course in a number of significant ways: perhaps none more damaging than through its decisions undermining campaign finance reform. This move that has not merely enabled the distortion of federal politics, it may also be said to have played a role in the increasing inequity between the poor and working classes, on the one hand, and the uppoer middle and absurdly wealthy classes, on the other. But. By the narrowest of margins, the US Supreme Court has twice left the most important piece of federal legislation in almost 50 years – the Patient Protection and Affordable Health Act – in place. Moreover, in statehouses across the country support for gay marriage has picked up speed oer the last 15 years: almost 30 of 50 states permit such unions. Again: the Court took note of this seismic shift, and has upheld the right to same-sex marriage. This state of affairs surely looks much better than the period in which *The Federalist Paper*'s authors penned their masterpiece – a necessity in order to provide an alternative to the failed experiment in national and state governance from folding entirely only a few years after winning the War of Independence. If demographics is destiny, then one party largely out of touch with reality may see the chickens come home to roost.

Again: What conclusions can we draw? Politics is local. A cliché, perhaps, but still true. The separation of powers doctrine mapped on to countries with radically different histories, traditions, cultures and demographics has produced dramatically different systems – and no separation of powers doctrine that looks like another save in the most rudimentary and skeletal form. But that's not to say it lacks meaning entirely. Different democratic dispensations have gone about trying to solve the problem posed by the doctrine: how do we create accountable forms of government that remain consciously aware of the dangers associated with the aggregation of power by a singular political authority?

IV. Understanding Harbermas on Pluralism and its Pathologies and its Application to South Africa's Separation of Powers Doctrine

A. On Social Pluralism and Political Pathologies

Habermas' identification of the disjunction between the lofty norms articulated in our basic law and the panoply of South African traditions is especially picante for any discussion of our local separation of powers doctrine. (Of course, that does not mean that the Constitutional Court's own jurisprudence has little bearing on more mundane decisions regarding the doctrine.[18]) We are, after all, engaged in what Habermas believes to be the most challenging of projects – the unification of multiple traditions, in a highly stratified economy, with little history of trust between peoples from dramatically different communities (or subpublics) under the banner of a single state fashioned in terms of a basic law to which all other forms of laws in our radically heterogeneous society are, ostensibly, governed.

[18] S Seedorf & S Sibanda in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) Chapter 12.

That's a big ask. It seems worth acknowledging that (a) that 20 years constitutes a mere blip in time; (b) that the stitching together of multiple societies whose individual members operate on a daily basis according to radically heterogeneous visions of the good requires a significant amount of heavy lifting, and (c) that the basic law, even with a flexible separation of powers doctrine, cannot rectify all the wrongs of the past nor underlying structures of the economy and social power that prevent provide all the material and immaterial goods learners require in order pursue lives worth valuing. Even so, as I hope to show ever so briefly, how the Constitutional Court has achieved something rather remarkable in (a) its basic law as scaffolding approach and (b) its 'meaningful engagement' jurisprudence. In addressing concerns about what constitutions in non-North Atlantic modern democracies can do, it has crafted two bodies of law that recognizes the plurality of traditions to which the basic law must speak.

But before we move on to the two promising doctrines that serve South Africa's separation of powers' doctrine, let's consider again the hitches that Habermas identifies with many, though not all, of the post-1989 Helicopter Constitutions. What exactly does Habermas mean when he states that '[t]he development of constitutional democracy along the celebrated 'North Atlantic' democracies has certainly provided us with results worth preserving, but once those who do not have the good fortune to be the heirs of the Founding Fathers turn to their own traditions, they cannot find criteria and reasons that would allow them to distinguish what would be worth preserving from what should be rejected'? He means, first, that older, well-established democracies crafted constitutions (written and unwritten) grounded in traditions that readily identified the specific terms that ought to become part of the basic law and the normative content that would fill out those norms. Every reader knows that, as Habermas writes in 1996, the constitutional democracies of the celebrated 'North Atlantic' refers to no more than a fistful of nations. His worry and his focus then shifts to those nations that, after the fall of the Berlin Wall in 1989, felt themselves obliged to reconstruct themselves, at least formally, along the lines, and through documents, that parroted the language of celebrated 'North Atlantic' constitutions as well as covenants generated by the United Nations. In these new constitutional orders, the basic law came *not* from the ground up (as a reflection of shared political, social, cultural, religious and economic traditions) but from the top down, drawn up by elites (and foreign experts) whose immediate concerns were not an adequate reflection of the multiplicity of traditions and communities for whom the basic law was just another imposition – albeit something of an improvement upon the authoritarian, communist or racist regimes from which they were liberated. In this regard, Habermas was a full two decades ahead of the comparative constitutional law scholars cum political scientists who discovered that a large portion of the post-1989 constitutional democracies have become one party dominant democracies plagued by the three Cs of cronyism, clientalism and corruption.

B. Habermas and the Basic Law as Scaffolding

Habermas' prescience lay in two critical insights into the celebrated 'North Atlantic' constitutional democracies and the new constitutional democracies arriving on the scene as he began this seminal work. Why, following Habermas, should I describe constitutions or the basic law as scaffolding? First, constitutions are scaffolding to the extent they constitute the background conditions for novel and necessary social, cultural and economic arrangements to be worked out through the hurly-burly of politics – a process that must be satisfy the demands for meaningful collective action, and not decision-making by fiat of an apex court of 11 women and men. Second, the first staging post that constitutions as scaffolding much reach are (a) rule of law culture and a robust civil society which not only mediates vertical relationships between citizen and state, but also facilitates, negotiates and resolves horizontal relationships between citizens, and between the various associations that provide the setting for the lion-share of meaningful action undertaken by individuals within the polity itself; [19] (b) a deepening of the commitment to the rule of law that, at a minimum, ensures that the governed and the governors are

[19] M Krygier 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law' in A Sajó (ed) *Out of and into Authoritarian Law* (2002) 55.

subject to the same legal strictures, and, ultimately, a commitment to the rule of law that, maximally, enhances the mutual concern, respect and trust that individuals (and groups) have for one another; (c) political accountability that enables citizens to regularly kick the bums out, thereby breaking up patronage systems and moving us beyond a patrimonial state; and (d) an effective bureaucracy that provides basic goods and services that enables citizens to cooperate in a manner that does not require coercion by the state in order to produce public goods on scale.[20]

With respect to the first insight, the South African Constitutional Court was quick to recognize that its role was to provide and to protect that scaffolding. Such is the learning of the *First Certification Judgment*.[21] What the Constitutional Court could not do, and no apex court ever does do, was recast the socio-economic environment that it had inherited -- and within which it was situated -- in a manner that might generate the social democratic outcomes (or at least the liberal democratic outcomes) identified with its celebrated predecessors. One does not jump from an oppressive political order with the world's second highest gini-coefficient to a social democracy simply by having (what appeared to be at the time) one of the most cleverly designed constitutions in history. With respect to the second insight, the Court placed at the centre of its project the creation of a rule of law culture, the promotion of individual rights (especially equality and dignity) that quite often led to the reversal of apartheid-era rules of law, enhanced roles for public participation in the legislative process and, to a limited degree, provided greater insulation from political interference with the work of the Public Protector, the Auditor-General and whatever other investigatory unit is charged with rooting out corruption.[22]

C. Habermas on Radical Heterogeneity

The Constitutional Court also recognized something critical for this new constitutional democratic project. It shares Habermas' insight that the radical heterogeneity of the communities, subpublics, cultural networks and associations that fall with South Africa's sovereign borders (and reflect our ugly repressive history of separate development) leave the Court in a position where it cannot easily draw down on any one tradition to decide what aspects of our society we should preserve and what aspects of our society we should discard. Until such a time that we can adequately stitch together our component parts, a commitment to pluralism – political, legal, social, religious, cultural and linguistic – remains the most defensible justification available to the Court.

This commitment to radical heterogeneity circles back to its 'basic law as scaffolding' jurisprudence – beginning with the *First Certification Judgment* – the Court has largely restricted its role (a) to maintaining the autonomy of various political institutions (perhaps most importantly itself), (b) to promoting the rule of law and (c) to protecting fundamental rights. It eschews assiduously political engagement – even if its various roles invariably invite (unsolicited) contestation.[23] A second manner in which the Court dampens down political conflict can be found in its meaningful engagement jurisprudence. By delineating quite broadly framed normative construction of constitutional provisions, and inviting to the settlement table as many parties as possible (including coordinate branches of government), the Court diminishes its overtly political role and increases the informational impact and normative power of any settlement/order of court that follows.[24] I shall say more about this novel approach to the separation of powers doctrine in a moment.

D. South African Separation of Power Pathologies Comes in Threes

[20] M Olson *The Logic of Collective action: Public Goods and the Theory of Groups* (1965).
[21] *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), 1996 10 BCLR 1253 (CC)(*'First Certification Judgment'*).
[22] *Glenister v President of the Republic of South Africa.* 2011 ZACC 6, 2011 3 SA 347 (CC), 2011 7 BCLR 651 (CC).
[23] 'Humility, Michelman's Method and the Constitutional Court: Rereading *the First Certification Judgment* and Reaffirming a Distinction between Law and Politics' (2013) 24 *Stellenbosch Law Review* 284
[24] S Woolman *The Selfless Constitution; Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013).

As for South Africa, the jurisprudence around separation of powers has not, in fact been where the real action in separation of powers has taken place. As Theunis Roux carefully expatiates, the Constitutional Court has undertaken an arid approach to the doctrine, when an arid approach stands more likely both to secure its own institutional legitimacy and more readily dispatch of the dispute that has seized the Court.[25]

Is there still more good than bad? South Africa must be said to beset by three separations of powers tribulations.

First. As noted above, South Africa largely lacks a genuine separation of powers – at least in terms of where most power is wielded. The National Assembly has determined, since 1994, the executive of South Africa – the President. The President then enjoys the power to determine his Cabinet of Ministers. Over the past 20 years, the African National Congress has (save for a brief period of a government of national unity) determined through consistent 63% representation in the National Assembly (and equal control of the National Council of Provinces), the constitution of the Executive. Because a single party has been able to determine the identity and the constitution of the Executive, the National Executive Council of the African National Congress has largely had unfettered control of that decision-making process – and effectively all subsequent decision-making processes. The provinces, despite their characterization in the Constitution, are largely administrative branches of government. They lack: (a) a judiciary of their own, (b) the ability to tax without national legislative approval; and (c) the ability to pass money bills with the approval of national government. We have, as a result, what so many commentators have described as a one party dominant democracy.[26]

Second. While we have a notionally independent judiciary, it has grown weaker over time. That's hardly surprising. In most constitutional democracies, the executive is charged with selecting members of the bench. The initial Constitutional Court acted with a substantial (if self-imposed) degree of independence. But it was able to do so because the executive placed quite a great deal of faith in justices who had played a role in the liberation movement and who it believed would not engage 'in' overreach. The change in the ANC's trajectory from liberation movement to the dominant player in a one party democracy has led to choosing both supine and less reflective members to serve on our highest court. It has not, for rhetorical purposes, prevented the government from making rather ludicrous and wholly unfounded claims that the judiciary has undermined the state's attempt to transform South African society.

My colleague, Firoz Cachalia, has identified what he claims to be a third separation of powers problem. He views as illegitimate the use of the judiciary by minority political parties to press their complaints about Parliamentary procedure outside the halls of Parliament. By his lights, the judiciary has, in a number of cases, been asked to serve as an extra-legislative chamber.[27] That's an accurate but fundamentally incomplete account. In jurisdictions in which minority parties never really have an opportunity to control the legislature or the executive (and thereby determine both law and policy), and the judiciary possesses forms of judicial review capable of overturning legislative and executive edicts, it's eminently reasonable for out-groups to attempt to use the judicial branch to reach an alternative

[25] T Roux *The Politics of Principle: South Africa's First Constitutional Court, 1995 – 2005* (2013).

[26] S Choudhry '"He had a Mandate": Constitutionalism in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1; S Choudhry *Constitutional Design for Divided Societies: Integration or Accommodation* (2008); S Choudhry *The Migration of Constitutional Ideas* (2006); T Roux 'The South African Constitutional Court's democratic rights jurisprudence' (2014) 5 *Constitutional Court Review* 33; T Roux *The Politics of Principle: The First South African Constitutional Court, 1995 - 2005* (2013); T Roux 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106; S Issacharoff 'Constitutional Courts and Democratic Hedging' (2012) 99 *Georgetown LJ* 961; S Issacharoff 'Constitutionalizing Democracy in Fractured Societies' (2004) 82 *Texas LR* 1861; S Issacharoff 'The Democratic Risk To Democratic Transitions' (2014) 5 *Constitutional Court Review* 1; R Dixon & T Ginsburg 'The South African Constitutional Court and Socio-Economic Rights as Insurance Swaps' (2012) 4 *Constitutional Court Review* 1; H Klug 'Finding The Constitutional Court's Place in South Africa's Democracy: The Interaction of Principle and Institutional Pragmatism in The Court's Decision-Making' (2010) 3 *Constitutional Court Review* 1; H Klug *The Constitution of South Africa: A Contextual Analysis* (2010); M Krygier 'The Quality of Civility: Post-Anti-Communist thoughts on Civil Society and the Rule of Law' in A Sajó (ed) *Out of and into Authoritarian Law* (2002) 55.

[27] See, eg, *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC). See also K Govender 'The Risk of Taking Risky Decisions: *Democratic Alliance v President of the Republic of South Africa*' (2014) 5 *Constitutional Court Review* 451.

result. However, while I agree with my friend's characterization of minority party resort to court as a descriptive matter, I would question the degree of success that they have had in pressing an alternative political agenda. At best, the success of minority party claims has been consistent with the Court's own agenda: the creation (and simultaneous defence) of a rule of law culture.

This last observation suggests that the separation of powers doctrine is not yet dead in South Africa. In following section, I will suggest that the Constitutional Court has developed a mode of judicial review that carves out space (for a separation of powers doctrine) designed to enhance, rather than subvert, the policies and the decisions made by co-ordinate branches, constitutionally created independent institutions designed to support our constitutional democracy and various subpublics and communities within the realm.

V. Meaningful Engagement Orders as an Ingenious Answer to Separation of Powers Problems

The Constitutional Court itself has grown increasingly bold, in terms of its interventions in, and construction of, the space in which housing law, policy and reality take shape – and it willingness to adopt roles more commonly associated with the legislative and executive branches of government. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*, the Court was asked to determine whether the City of Johannesburg had acted constitutionally in attempting to evict residents from derelict – and dangerous – inner-city buildings.[28] In some instances, the eviction notice came without any plan to provide comparable housing. In other cases, the eviction notice contemplated the forced removal of a building's residents to the city's outskirts.

The *51 Olivia Road* Court, from the outset, distinguishes the matter from virtually all of its predecessors. Rather than impose a decision on the parties framed by *Grootboom*-based criteria, the Court ordered the residents and the City of Johannesburg to repair to the negotiating table in order to reach a settlement that would lead to a more optimal outcome for both sides. The parties did. Their settlement then became an order of the Court.

The fact of Court facilitated negotiation by all the relevant stakeholders – and more informed parties – constitutes a dramatic break with its previous rubric for rights analysis. The most fascinating part of the judgment – from the perspective of a novel separation of powers doctrine – is that the *51 Olivia Road* Court held that, in addition to any other duties s 26(2)'s right to access to adequate housing might impose, 'a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [its] constitutional obligations'.[29] What does this mean? First, it appears that the courts may not be the right branch of government to determine how some 63, 000 persons – living in dangerous conditions – are to be best accommodated when a municipality determines that their current housing constitutes a threat to their lives. Second, having decided that persons who live in dangerous conditions must be removed, the Court also resolved that a municipality must determine where they are to be otherwise accommodated: a right to housing cannot be reconciled with a decision of the state to make people 'homeless'. Third, in deciding on how to accommodate this endangered class of persons, the city or the state is obliged to engage the affected parties – in this case all 63,000 persons. As Yacoob J writes:

> Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a

[28] [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC).
[29] Ibid at para 16.

> city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.[30]

The *51 Olivia Road* Court held, in addition, that the city had an obligation to engage meaningfully all 63 000 evictees in a systemic fashion and that '[e]ngagement is a two-way process'[31] that 'will work only if both sides act reasonably and in good faith'.[32] Thus, consistent with the precepts of a novel separation of powers doctrine, the *51 Olivia Road* Court places a premium on or pooling information and on reaching accommodations that place all parties in a better position than they might find themselves if the Court were to act as the final arbiter in a zero-sum game.

The Court built upon its semi-experimentalist, non-arid separation of powers model for dispute resolution in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*.[33] The *Joe Slovo I* Court addressed the constitutionality of the state's controversial N2 Gateway project. The project, as planned, would have moved the residents of existing informal settlements along the N2 highway to Delft – a community some 15 km away. For our immediate purposes, the opinion that best connects shared constitutional interpretation, participatory bubbles and a less arid commitment to the separation of powers is penned by Justice Sachs:

> This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in ongoing constitutional relationships. It is to everyone's advantage that they be encouraged to get beyond the present impasse and work together once more.[34]

Even after the participatory bubble of a particular conflict has burst, and the various stakeholders have returned to their regular lives, the residue of active citizenship and responsive government remains: (1) the parties have learned more about the particular problems that forced the immediate litigation and engagement; (2) the state – all three branches!! -- has learned something more about the communities that they govern and the stakeholders have learned more about the political and social processes that govern their lives; and (3) politicians, bureaucrats and citizens throughout the country should take away lessons on housing and evictions that can be profitably applied to future conflicts. So, although Sachs J refers to a two-way street of engagement, the better metaphor is, perhaps, a piazza, where members of the public meet again and again, share new information, and reflect upon the community's collective wisdom – as active citizens and politicians in a republic do. *No longer are parties required to play the zero sum game required by an arid separation of powers doctrine.* Meaningful engagement – though not perfect – creates an opportunity for all boats to rise through (a) the increased access to essential decision-making information necessary to all parties to achieve a close to Pareto optimal outcome; (b) the enhanced normative legitimacy of a court order or settlement by allowing (almost) all parties with an interest to be heard, if not vindicated. Even losing parties have something to offer the polity – for the factual predicate and the legal regime the next time around may be similar, but dissimilar enough to warrant a different approach. Moreover, we should all have learned whether the prior experiment in polycentric decision-making worked, failed or could use a tweak or two. Now that's truly both a valuable and innovative approach to the separation of powers problems that looks beyond the horizon and the

[30] Ibid at para 15.
[31] Ibid at para 14.
[32] Ibid at para 20.
[33] [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC).
[34] Ibid at para 408.

problems of pluralism which Habermas presciently identified with new constitutional democracies looking for the resources and the mechanisms necessary to stich themselves together.