Introduction to special issue: separation of powers, the judiciary and the politics of constitutional adjudication

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This special issue of the *South African Journal on Human Rights* arises from a general call for papers that was issued in October 2019. The special issue has come to fruition in circumstances that none of us could ever have imagined at the time of its conceptualisation. No one imagined that within six months from that date a health pandemic would sweep across the world, plunging humanity into crisis and bringing life to a virtual standstill while simultaneously redefining the norms of human movement, interaction and exchange. Indeed the impact of Covid-19 and the regulations taken in order to protect public health were felt everywhere, including our editorial processes.

While the pandemic brought death, despair and upheaval and disrupted the order of social, political, cultural, economic and religious life as we know it, questions around the involvement of the courts and the judiciary in the nation's political contestations became more pronounced. Rather than abating, in line with the slowness induced by the pandemic, these political contestations gathered greater momentum and urgency. For example, as I write this introduction, the number of politically charged matters being litigated or headed towards litigation continued to accumulate, further heightening the inter- and intra-branch tensions between constitutional structures. At the time the special issue was being conceptualised, our collective frame of reference was informed by the Jacob Zuma presidency

and characterised by an increase in civil society and political actors involved in disputes turning to the courts to resolve what were clearly political controversies.

Little has changed in that the accumulation of politically charged cases involving former president Zuma, persons thought to be associated with him and more generally the governing African National Congress (ANC) continues. The pinnacle point in this respect, at the time of writing, is the Constitutional Court case emanating from the Zondo Commission on State Capture in which former president Zuma has been found guilty of the crime of contempt of court and sentenced to an effective 15-month term of imprisonment.[1]

There are, of course, other matters not involving the former president that have been equally mired in political controversy. Profound questions have been raised concerning the separation of powers doctrine and where the lines should be drawn under our system of constitutional supremacy, especially with respect to the court's remedial powers.[2] Whether one believes it was the Zuma presidency that fuelled the pace at which the judicialisation of politics occurred in South Africa or whether it is a natural consequence of a strong model of judicial review under a regime of constitutional supremacy, the arrival of this special issue makes an important contribution to the debate on the politics of constitutional adjudication in light of the doctrine of separation of powers.

Much literature in South African constitutional scholarship has considered the doctrine of separation of powers; it is accepted as axiomatic within our constitutional system.

[1] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18

[2] A small sample of the types of matters either recently decided by or before the courts are matters such as (1) the matter in which the Public Protector is challenging the impeachment procedure against her by the National Assembly, (2) the successful challenge of the findings and holdings of the Seriti Commission findings on the arms deal, and (3) a recently instituted challenge by the Council for the Advancement of the South African Constitution (CASAC) against recommendations for judicial appointment made by the Judicial Service Commission to the President; and (4)the finding of illegality with respect to the Ingonyama Trust in Kwa-Zulu-Natal) <https://www.groundup.org.za/media/uploads/documents/itb_judgment_11_june_2021.pdf>

Over the last 25 years, the South African courts have expounded on the doctrine on numerous occasions, making decisions and crafting remedies primarily in terms of its logics. Thus, much like the rule of law, the separation of powers has emerged as a constitutional doctrine, foundational value, and justiciable legal principle that is potentially implicated in every case where the courts interpret relations between constitutional structures and how they exercise their powers. Arguably, this reflects how many understand the nature of separation of powers within the South African constitutional system. However, this common understanding has not obviated the doctrine being subject to ever-increasing contestation. Its operation has placed the courts at the epicentre of settling political disputes and, naturally, having the last word on the meaning of the South African Constitution.

Jurisprudentially, the practicalities and contours of how, when and by whom the separation of powers should be determined have proven to be challenging. This has had profound implications for the judiciary: first, in terms of its relations with other constitutional structures, and second – and most important – how it determines the parameters of when and where courts *should* themselves intervene. In short, where and when it is appropriate and necessary for courts to assert their constitutional jurisdiction over a matter while being mindful of the fact that they themselves are subject to the Constitution is an important terrain of scholarly discussion, as Felix Dube reminds us in his contribution to this special issue.[3]

Dube's contribution sets the pace of the issue, as he boldly proposes that to make institutional sense of the nature of the Constitutional Court in terms of its positioning and powers under the Constitution, it is best to regard it not simply as a court, but as a *sui generis* constitutional structure occupying the apex position of both the 'legal and political order'. In

[3] F Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2020) 36 *South African Journal on Human Rights* XX.

short, Dube argues that South Africa's is a system of judicial supremacy.[4] On a cursory reading, Dube's proposition and argument are highly provocative, especially when considered against a background of separation of powers literature premised on an orthodox doctrinal conception of three co-equal branches theoretically derived from the period of the European Enlightenment. However, to merely focus on Dube's conclusion without closely considering his argument is to avoid an uncomfortable question. Dube asks how we are able to reconcile the Constitutional Court's powers and status with the ordinary/orthodox separation of powers doctrine when, in his view of the evidence, the prevailing doctrine fails to account for the Constitutional Court's elevated role in matters of law and politics, relative to the legislative and executive branches. Dube suggests that making this shift in how we imagine the Constitutional Court is critical for the purposes of formulating theory about the Court's powers, especially in light of what he argues are its clearly discernible democratic, political and law-making (legislative) mandates. Implicit in Dube's provocation is a question to other interlocutors: what would happen to our theory and understanding of separation of powers if it were premised on a more accurate description of the institutional positioning of the Court that takes into account its multiple mandates, rather than on the basis of an antiquated theoretical account of co-equality between the branches? Understood within the context of his contribution, Dube can be understood to be calling for better, more contextual and grounded theory of the South African separation of powers doctrine.

Ultimately, Dube's contribution suggests that we should embrace the Court's superior position within our constitutional system and accept that its part in the nation's politics is inevitable once parties to a dispute turn to it for a remedy. In this respect, Dube introduces a

[4] Ibid XX.

key factor in navigating the politics of constitutional adjudication, namely the Court's remedial powers, which he describes as 'far-reaching (if not nearly infinite)' and bordering on 'textually unlimited'.[5] This concern with the Court's remedial powers is a common theme across the contributions in this special issue, with remedies widely seen as representing that imaginary line that is argued to either have been respected or breached when determining whether a court has acted legitimately within its proper constitutional limits or engaged in judicial overreach.

If Dube's view suggests that we must, as a matter of theoretical integrity, accept judicial supremacy as real, and that we must embrace it as a product of design rather than happenstance, then Hoolo Nyane's contribution, which follows Dube's, cautions against the normalisation of the Constitutional Court as a 'super-branch'.[6] Read in conversation with Dube's contribution, Nyane's is the caution of a more orthodox or traditionalist doctrinal scholar who regards the judicialisation of politics as posing a serious danger to democracy.

Nyane's contribution encapsulates a deep-seated and widely-shared concern for the need to determine 'the proper place that must be occupied by the judiciary' in post-apartheid South Africa in the face of the judicialisation of politics, which he identifies as an emerging trend. According to Nyane, while still somewhat unsettled, the judicialisation of politics as a 'notion connotes "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversy"'.[7] In Nyane's view, these are ordinarily matters outside of the court's purview. Therefore, by assuming jurisdiction on plainly political matters and failing to apply what he calls 'time-honoured principle[s]' such as

[5] Ibid XX.
[6] H Nyane 'The judicialisation of politics in South Africa: A critique of the emerging trend' (2020) 36 *South African Journal on Human Rights* XX.
[7] Ibid XX.

the 'political question doctrine', courts have been 'over-enthusiastic' in interpreting their remedial powers. Such has been their enthusiasm, according to Nyane, that they have taken their powers to 'mean literally anything, including overreach into the functions of the political branches of government'.[8] Nyane provides a robust critical appraisal that usefully tracks the frequency and deepening nature of 'overreach'. In so doing, he argues that the impetus towards the judicialisation of politics can be associated with certain identifiable factors, including 'the realisation of transformative constitutionalism theory'.[9] Ultimately, Nyane's anxiety seems to stem from what he conceives of as an unmanageable blurring of the lines between law and politics that has (mis)placed law as being *the* central driver of social transformation to the exclusion of the two political branches, among other considerations. In spite of this evident anxiety, Nyane, like the rest of the contributors, accedes to the notion that courts have a role to play in politics under a supreme constitution. However, he differs from the others with respect to how expansive or intrusive that role should be, especially where certain remedies necessarily encroach on the domain of the other branches.

Less reticent about the important and decisive role played by the judiciary in resolving constitutional disputes that have 'macro-political' ramifications, Lauren Gildenhuys accepts as inevitable the notion that courts adjudicating within a constitutional law framework will make decisions, the political implication or consequences of which will in all likelihood have an impact on inter-branch relations.[10] For Gildenhuys, the question is manifestly not *whether* the judiciary can or should involve itself in matters that immerse the judiciary in politics, but rather *what* is the 'proper response' for the court when faced with such cases. Rather than

[8] Ibid XX.
[9] Ibid XX.
[10] L Gildenhuys 'Esoteric decision-making: Judicial responses to the judicialisation of politics, the Constitutional Court and *EFF II*' (2020) 36 *South African Journal on Human Rights* XX.

avoiding the political issues, Gildenhuys suggests that the proper response for courts is a strategic one that entails deciding matters in line with the imperatives of esoteric decision-making techniques. According to Gildenhuys, esoteric decision-making occurs when courts rely on 'apolitical, technical and legal justifications to substantiate a judicial outcome that is preferred for political reasons, which remain unexpressed'.[11] Through an examination of some politically contentious cases, she argues that there already exists a judicial repertoire of esoteric decision-making techniques primed to 'downplay' the role of politics in adjudication in order to safeguard the courts' legitimacy and institutional security.

In this special issue, the *Economic Freedom Fighters (Democratic Alliance as Intervening Party) v Speaker of the National Assembly*[12] (*EFF II*, also known as the impeachment decision) case can be read as representing the high-water mark as far as cases reflecting the judicialisation of politics in South Africa is concerned. All five submissions constituting this special issue expressly referring to this case also suggest as much. It is, therefore, unsurprising that Gildenhuys subjects this case to close scrutiny, as she seeks to elaborate on the value of esoteric decision-making in shielding the courts from political controversy when deployed carefully, as compared to the dangers it poses when done ineptly. That said, Gildenhuys' focus on strategy and techniques begs a few questions about the normative measures or standards to be applied in determining the success or failure of a particular instance of esoteric decision-making. Therefore, while esoteric decision-making justifies the court's right to act in politically charged matters, less clear is whether, or even how this kind of decision-making informs the substance of decisions, in particular the types of remedies handed down.

[11] Ibid XX.
[12] *Economic Freedom Fighters (Democratic Alliance as Intervening Party) v Speaker of the National Assembly* 2018 (2) SA 571 (CC).

The issue of remedial powers and the types of remedies the courts hand down, in particular the level of their intrusiveness in what is usually understood as the 'pre-eminent domain' of the other branches, represents the sharpest line of tension between courts paying due deference to other branches and the courts straying into the thorny terrain of judicial overreach. Ropafadzo Maphosa's contribution most directly addresses the question of remedies, in particular structural interdicts.[13] Maphosa responds to commentary questioning the legitimacy of intrusive orders the courts make in socio-economic rights adjudication while focusing on a particular structural interdict, namely what she terms the 'expert remedial formulation model' as deployed in *The Black Sash Trust v Minister of Social Development*[14] and *Mwelase v Director-General for the Department of Rural Development and Land Reform*.[15] Clearly connecting the intrusiveness of the remedies in these cases with a choice the Constitutional Court made to embrace a strong – as opposed to weak – judicial review model, Maphosa argues that these decisions are not only in keeping with the Court's earlier jurisprudence, but are also, in essence, a natural progression of the Court legitimately exercising its supervisory authority over its orders. In other words, Maphosa suggests that the expert remedial formulation model is an extension of the Constitutional Court's jurisprudence and demonstrates this by providing a detailed taxonomical account of the different models of structural interdicts through the cases. Beyond providing a thoughtful account of how the courts' remedies jurisprudence has evolved, Maphosa's submission also provides useful

[13] R Maposa 'Are judicial monitoring institutions a legitimate remedy for addressing systemic socioeconomic rights violations?' (2020) 36 *South African Journal on Human Rights* XX.
[14] *The Black Sash Trust v Minister of Social Development* 2018 (12) BCLR 1472 (CC).
[15] *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC).

context for the last contribution in the special issue, which examines in greater depth with the question of intrusive remedies.

The final contribution special issue comes from Gaurav Mukherjee and Juha Tuovinen.[16] It is a thought-provoking article that reflects on the courts' powers to design intrusive remedies. Working from the premise that there is little or no room for courts to avoid the judicialisation of politics, the authors identify the specific factors that explain *why* in *Mwelase*,[17] which concerned a 'recalcitrant administration', it was justifiable for the Court to issue, under its supervisory jurisdiction, what is self-evidently an invasive order that gave a court-appointed 'Special Master' an executive function. The authors are critical of the thinly reasoned majority judgement, particularly its failure to clarify the logics and reasons underlying the choice of remedy; this fact is what leads to Mukherjee and Tuovinen to closely examine the case history, the role of government and the implications of a failure to act before settling on eight crucial factors that explain the choice of remedy. These factors, the authors suggest, may be useful points of reference for providing 'normative and doctrinal guidance' in identifying the types of cases where intrusive orders may be warranted in future.

As a means to test the utility of these factors against a different set of facts and in another setting, the authors apply them to the well-known Indian *Right to Food* case.[18] Whether *Right to Food* is an apt comparator is open to debate, yet it presents an opportunity to test Mukherjee and Tuovinen's factors against a well-known example where post-colonial administrative malaise has drawn the courts into the adjudication of politically charged disputes concerning socio-economic distribution. Mukherjee and Tuovinen's contribution is

[16] G Mukherjee & J Tuovinen 'Designing remedies for a recalcitrant administration' (2020) 36 *South African Journal on Human Rights* XX.
[17] Note 15 above.
[18] *People's Union for Civil Liberties v Union of India* Petition (Civil) No. 196/2001 (Indian Supreme Court case).

important, going beyond general questions of the legitimacy of courts to act in politicised matters to a consideration of specifics to be taken into account as courts design effective, if invasive, remedies while striving not to engage in judicial overreach.

In conclusion, there is as much within this special issue to give one cause for reflection as there is with which one can disagree. Either way, the contributors must be commended for producing a stimulating and engaged set of papers on the judicialisation of politics in South Africa from different perspectives. It is our hope at the *South African Journal on Human Rights* that this special issue serves to stimulate and enrich the debate on the important questions that it traverses. Furthermore, it is our hope that other researchers with strong views on the matters raised will take up the challenge to make their views known by further engaging what is clearly a phenomenon that we will be grappling with for the foreseeable future.