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Chief Justice Sandile Ngcobo's Separation of Powers Jurisprudence

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ABSTRACT

This article examines Justice Ngcobo's profound contribution to the development of the foundational jurisprudence on the separation of powers in South Africa; it is premised on the fact that Ngcobo J can be better understood in the context of his contribution to the foundational jurisprudence. In this way, we will better comprehend how Ngcobo J's jurisprudence fits into our contemporary understanding of the Constitution. The key question I seek to investigate is to what extent Ngcobo's jurisprudence on the separation of powers has influenced or shaped South African constitutional law. In doing so, I specifically investigate whether Ngcobo J developed a political question doctrine theory for South Africa. I find that he did, and that while the learned Judge's political question jurisprudence was not clearly articulated or endorsed by the majority of the justices while he was on the Bench, the Constitutional Court has recently unanimously endorsed some of his political question doctrine theories and arguments. In doing so, they have served to crystallise the political question theory in South Africa. The article examines Ngcobo's contribution through both the lens of the judgments that he penned and his academic commentaries.

Keywords: separation of powers; judicial review; political question; doctrine theory; constitutional jurisprudence

Background and Introduction

The Constitution of the Republic of South Africa, 1996 ('the Constitution') establishes three branches of the State, namely the Legislature, the Executive and the Judiciary.[1] Chapter four of the Constitution establishes parliament, which consists of two houses: the National Assembly and the National Council of Provinces (NCOP). The main

1 See chs 4, 5 and 8 of the Constitution.

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functions of parliament are to pass legislation, to scrutinise and oversee Executive action, including the implementation of legislation, and to provide a national forum for public consideration of issues.[2] The allocation of these functions to parliament is based on the constitutional theory that parliament is a branch that is representative of the many different interests of South African society, so that what emerges from parliament will respect and reflect the nation's varied interests.[3]

The Constitution vests executive authority in the president:[4] Chapter five confers on the Executive the authority and function to implement the laws, develop and implement national policy and initiate legislation.[5] The allocation of these functions to a single president is based on the constitutional theory that the president can act swiftly without the need to harmonise conflicting interests.[6] This is why in some areas, such as foreign relations or defence, the president is either constitutionally permitted to act without the need to obtain prior legislative approval or is solely responsible to act.[7] To illustrate, sections 201 and 203 of the Constitution, respectively, permit the president as head of

2 See ss 42(3) and 55(2) of the Constitution.

3 See *Democratic Alliance v Masondo* 2002 (2) SA 413 (CC) paras 42–43. Sachs J's concurring opinion held that 'the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. The dialogic nature of deliberative democracy has its roots both in international democratic practice and indigenous African tradition … The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not to exercising … of power for its own sake, but at achieving a just society … At the same time, the Constitution does not envisage endless debate with a view to satisfying the needs and interests of all. Majority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding.' See also Burt Neuborne, 'The Last Walls' (Paper presented in the Great Hall at The Cooper Union, 13 December 2012) <https://www.youtube.com/watch?v=ATK7FftBiF4>. See also Burt Neuborne, 'Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges' (2011) 35 NYU Review of Law and Social Change 602.

4 Section 85 of the Constitution. See Mtendeweka Mhango, 'Constitutional Eighteenth Amendment Bill: An Unnecessary Amendment to the South Africa Constitution' (2014) 35 Statute Law Review 19–34 (arguing that s 85 means that under the South African Constitution a single president possesses the entirety of the executive authority, which he or she exercises together with the Cabinet).

5 See s 85(1) and (2) of the Constitution.

6 Neuborne (n 3).

7 See *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 244, where it was held that 'it is clear from the existing jurisprudence of this Court that all exercise of public power is to *some extent justiciable* under our Constitution, but the precise scope of the justiciability will depend on a range of factors including the nature of the power being exercised. Given that the duty to provide diplomatic protection can only be fulfilled by government in the conduct of foreign relations, the executive must be afforded considerable latitude to determine how best the duty should be carried out' [author's emphasis].

the national Executive to authorise the employment of the defence force in defence of the Republic or the fulfilment of an international obligation, or to declare a state of national defence without obtaining prior approval from parliament. In addition, section 231 of the Constitution entrusts the national Executive with the responsibility for negotiating and signing all international agreements.[8] Section 231(3) provides that

> an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

There are several other areas where the president, when acting as a Head of State, is constitutionally permitted to act without prior approval, such as in pardoning convicted offenders,[9] appointing commissions of inquiry[10] and conferring honours.[11]

8 See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 89, where it is explained that 'the constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature … it assigns to the national executive the authority to negotiate and sign international agreements… requires approval by resolution of Parliament.' But see Law Society of South Africa, reporting that the Law Society of South Africa had launched an application in the Gauteng High Court on 19 March 2015 to declare the actions of the president as well as the ministers of Justice and International Relations and Cooperation in voting for, signing and planning to ratify the SADC Summit Protocol in 2014 as it relates to the SADC Tribunal, to be unconstitutional <http://www.lssa.org.za/our-initiatives/advocacy/sadc-tribunal-matter>; News24 Reporter, 'DA Takes ICC Withdrawal Decision to the High Court' *Huffington Post* (5 December 2016) <http://www.huffingtonpost.co.za/2016/12/05/da/> accessed 17 November 2017, reporting that the Democratic Alliance was to challenge the decision by the government to withdraw from the International Criminal Court as unconstitutional.

9 See s 84 of the Constitution. See also *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1; *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC).

10 *South African Rugby Football Union* (n 9) para 146, where it was held that 'section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of inquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no further action by the government: the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats, for example … In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. The President is bound neither to accept the commissions factual findings nor is he or she bound to follow its recommendations.'

11 See *Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC); *General Council of the Bar v Mansingh* 2013 (3) SA 294 (SCA); *Mansingh v President of the Republic of South Africa* 2012 (3) SA 192 (GNP).

Lastly, the Judiciary's function under the Constitution is to interpret and apply the laws to a specific set of circumstances or disagreements involving individuals.[12] The allocation of these tasks to the Judiciary is consistent with the constitutional theory that the Judiciary is specially trained to carry out these functions and is insulated from the other branches that are democratically accountable.

Based on the fact that these functions and powers are allocated to the three branches in three distinct chapters of the Constitution, the courts have found that this structural design implies the principle of separation of powers. The theory is that by conferring these functions and their parameters in three entirely separate chapters, the framers intended there to be a separation of powers between the branches in relation to these functions and responsibilities. Apart from the text itself apportioning these various powers and functions among the three branches of government into separate isolated chapters, there is no constitutional text defining or codifying the principle of separation

12 See s 165 of the Constitution. Since the courts are designed to resolve existing disputes, they have consistently rejected engagement in an academic exercise. See *Legal Aid South Africa v Mzoxolo Magidiwana* 2015 (6) SA 494 (CC); *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21 fn 8, where it was explained that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law; *The Kenmont School & Another v DM* [2013] ZASCA 79; *Radio Pretoria v Chairman, Independent Communications Authority of SA* 2005 (1) SA 47 (SCA), where the Court expressed concern about the proliferation of appeals that had no prospect of being heard on the merits as the order sought would have no practical effect; *Legal-Aid South Africa v Magidiwana* 2015 (2) SA 568 (SCA) para 2, where the Court held that courts should and ought not to decide issues of academic interest only (that much is trite); *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26, where the Court explained that 'the present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle … that Courts will not make determinations that will have no practical effect'; *JT Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others* 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC) para 17, where it was held that there 'can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become'; and *Ferreira v Levin* 1996 (1) SA 984 (CC) para 199, where Kriegler J explained that the essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally, the Canadians call it, ripeness. That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered. But see ss 79(4) and 80 of the Constitution, which make provision for the Constitutional Court to provide an advisory opinion on the constitutionality of a Bill submitted to it by the president or the National Assembly respectively.

of powers.[13] Nor is there an explicit provision in the Constitution that prevents one branch of government from seeking to usurp the constitutional functions of another branch. Effectively, the principle of separation of powers is implied in the Constitution based on the structural design of the Constitution.[14]

This article examines Justice Ngcobo's profound contribution to the development of the foundational jurisprudence on the separation of powers in South Africa. It is premised on the fact that Ngcobo J can be better understood in the context of his contribution to the foundational jurisprudence. In this way, we will fully comprehend how Ngcobo's jurisprudence fits into our contemporary understanding of the Constitution. The key question this article seeks to investigate is to what extent Ngcobo J's jurisprudence on the separation of powers has influenced or shaped South African constitutional law. The article specifically investigates whether, in his contribution to the constitutional jurisprudence on the separation of powers, the learned Judge developed a political question doctrine theory for South Africa. I find that he did, and that while Justice Ngcobo's political question jurisprudence was not clearly articulated or endorsed by the majority of the Justices while he was on the Bench, the Constitutional Court has recently unanimously endorsed some of his political question theories and arguments, thereby crystallising the political question theory in South Africa. The article examines Ngcobo's contribution through the lens of the judgments he penned and through the academic commentaries he wrote.

Existing Separation of Powers Jurisprudence

The South African Constitution was born out of the negotiations at the Convention for a Democratic South Africa (CODESA), where it was agreed that the Constitution would be drafted based on thirty-four preapproved constitutional principles, and that the final draft of the Constitution would be certified by the Constitutional Court to ensure compliance with those thirty-four principles. This agreement was encapsulated in section 71 of the Interim Constitution and it provided as follows:

> **71 Constitutional Principles and Certification**
>
> (1) A new constitutional text shall –
>
> (*a*) comply with the Constitutional Principles contained in *Schedule 4; and*

13 See Chuks Okpaluba and Mtendeweka Mhango, 'Between Separation of Powers and Justiciability: Rationalising the Constitutional Court's Judgment in the Gauteng E-tolling Litigation in South Africa' (2017) 21 Law Democracy and Development 1; Kevin Hopkins, 'Some Thoughts on the Constitutionality of Independent Tribunals Established by the State' (2006) 27(1) Obiter 150.

14 See *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

> (*b*) be passed by the Constitutional Assembly in accordance with this Chapter.
>
> (2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in subsection (1)(*a*).
>
> (3) A decision of the Court in terms of subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.

Out of the thirty-four constitutional principles agreed upon at CODESA, one constitutional principle is the most relevant for our purposes, and it reads as follows:

> VI. There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

In *De Lange v Smuts*, Justice Ackerman confirmed the source and status of the principle of separation of powers in South Africa, and said:

> in our first certification judgment dealing with the 1996 Constitution … we stated that although it is clear that pursuant to Constitutional Principle VI the Constitution provides for a system of separation of powers among the three co-equal branches of government, there is no universal model of separation of powers … I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that … reflects a delicate balancing … between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.[15]

It is now clear that the lack of a textual language in the Constitution has not prevented the Constitutional Court from developing jurisprudence enforcing the implied principle of separation of powers to prevent each branch from acquiring undue power by evading the domain set aside either expressly or implicitly for another branch. [16]

A few notable cases illustrate this emerging jurisprudence on the separation of powers. One of the most notable is *Western Cape Legislature v President of South Africa.* At issue in *Western Cape Legislature* was section 16A of Local Government Transition Act 209 of 1993, which provided that the 'President may amend this Act and any schedule thereto by proclamation in the *Gazette.*' The president was challenged when, pursuant to these powers, he promulgated Proclamation R 58 of 7 June 1995, which amended the Local Government Transition Act by transferring the power to appoint and dismiss the

15 *De Lange v Smuts* 1998 (7) BCLR 779 (CC) paras 60–61.

16 See *Heath* (n 14), holding that he could not accept that an implicit provision of the Constitution has any less force than an express provision.

interim provincial committee members from the provincial to the national government. The Constitutional Court ruled that the impugned provision of the Local Government Transition Act, under which the president had acted in promulgating the proclamation, was inconsistent with the separation of powers principle and therefore invalid.[17]

Secondly, in *South African Association of Personal Injury Lawyers v Heath*, the Constitutional Court had to consider whether it was constitutionally appropriate for a judge of the High Court to head a Special Investigative Unit (SIU), an investigative agency established in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996 and located within the Executive branch. In terms of the legislative framework, the powers of the SIU involved investigation and litigation on behalf of the State to recover monies lost to the State through corruption and maladministration.[18] The Constitutional Court held that in keeping with separation of powers imperatives, the functions of the SIU were inappropriate for a judge to perform. As justification for this holding, Justice Chaskalson, who wrote for the majority, reasoned that:

> The functions that the head of the SIU is required to perform are far removed from the central mission of the judiciary. They are determined by the President who formulates and can amend the allegations to be investigated. If regard is had to all the circumstances, including the intrusive quality of the investigations that are carried out by the SIU, the inextricable link between the SIU as investigator and the SIU as litigator on behalf of the State, and the indefinite nature of the appointment which precludes the head of the unit from performing his judicial functions, the first respondent's position as head of the SIU is … incompatible with his judicial office and contrary to the separation of powers required by the Constitution.[19]

Thirdly, *S v Dodo*[20]is another significant separation of powers case. There, the Constitutional Court had to consider whether the minimum sentence legislation enacted by parliament was consistent with the Constitution. Section 51 of the Criminal Law Amendment Act 105 of 1997 introduced minimum sentencing guidelines in relation

17 *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC).

18 See s 4, which provides that the functions of a SIU are: (*a*) to investigate all allegations regarding the matter concerned; (*b*) to collect evidence regarding acts or omissions which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned; (*c*) to present evidence in proceedings brought before a Special Tribunal; (*d*) to refer evidence regarding or which points to the commission of an offence to the relevant prosecuting authority; (*e*) to perform such functions which are not in conflict with the provisions of this Act, as the President may from time to time request; (*f*) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned; (*g*) upon the conclusion of the investigation, to submit a final report to the President; and (*h*) to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit.

19 *Heath* (n 14) para 45.

20 *S v Dodo* 2001 (5) BCLR 423 (CC). See also *Bernstein v Bester* 1996 (4) BCLR 449 (CC), where the Constitutional Court suggested that an Act of Parliament that sought to bring the Judiciary under the control of the political branches could be struck down under the principle of separation of powers.

to certain crimes and required the High Court to sentence an accused person to imprisonment for life unless the Court was satisfied that substantial reasons existed for the imposition of a lesser sentence. The Constitutional Court held that section 51(1) of the Criminal Law Amendment Act was an affront to the principle of separation of powers because both parliament and the Judiciary had obligations in relation to the sentencing of convicted offenders. Justice Ackerman, who wrote for the majority, reasoned that:

> There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished … Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment. The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation thereof.[21]

More recently, in *National Treasury v Opposition to Urban Tolling Alliance*,[22] the Constitutional Court was seized to determine whether the High Court had taken sufficient consideration of the separation of powers when it granted the temporary restraining order against several government departments to prevent them from implementing the Gauteng Freeway Improvement Project (GFIP). A major component of this project involved the implementation of a policy decision taken by the Executive branch that the expenditure related to the GFIP would be funded by tolling certain provincial roads on a user pay principle. The Court ruled that the High Court had not taken sufficient consideration of separation of powers concerns when it had granted the restraining order. It reasoned that the duty of determining how public resources are to be used is committed to the executive and legislative arms of government, and that the courts must

21 *Dodo* (n 20) paras 22–23.

22 *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC). In an earlier case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 95 the Constitutional Court set aside a High Court decision that had restrained the Executive branch from imposing certain anti-dumping duties on the steel industry. The Constitutional Court found that the High Court had not taken sufficient consideration of separations of powers imperatives. It found that the administration of economic policy is a matter which the Constitution bestows on the national Executive and that the courts may not usurp that function by making a decision of their preference because that would frustrate the balance of power implied in the principle of separation of powers.

refrain from entering the exclusive terrain of the other arms of government.[23] Justice Moseneke, who wrote for the majority, reasoned as follows:

> Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.[24]

23 *Urban Tolling Alliance* (n 22) paras 44, 67. For a series of cases supporting the proposition that the political branches are better placed to make decisions in the public interest, see *Nyambirai v National Social Security Authority* 1996 (1) SA636 (ZS) where Gubbay CJ, writing for a unanimous Supreme Court at 644, explained it convincingly when he upheld a legislative policy to compel employees and employers to save for their retirement: 'I do not doubt that because of their superior knowledge and experience of society and its needs, and a familiarity with local conditions, national authorities are, in principle, better placed than the Judiciary to appreciate what is to the public benefit. In implementing social and economic policies, a government's assessment as to whether a particular service or programme it intends to establish will promote the interests of the public is to be respected by the courts. They will not intrude but will allow a wide margin of appreciation, unless convinced that the assessment is manifestly without reasonable foundation. The Minister has proclaimed that the Pensions and Other Benefits Scheme provides a service in the public interest. That is an assessment which this Court should respect.' See also *Apostolou v The Republic of Cyprus* (1985) LRC (Const) 851, where the Court rejected the argument that the government had no authority to compel a self-employed individual to pay contributions to the social insurance fund established under the Social Insurance Law of 1980; *Steward Machine Company v Davis* 301 US 548 (1937), where the Court upheld the social security policies in the United States Social Security Act of 1935; *Schweiker v Wilson* 450 US 221 (1981), where the Court reasoned that unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, the Supreme Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems.

24 *Urban Tolling Alliance* (n 22) para 63. South African courts have refrained from intervening in cases that are deemed to involve policy-laden or polycentric issues. The problem is that the courts have not defined these issues or developed an intelligible principle of law by which to justify their refusal to intervene. See *SCAW South Africa* (n 22) para 104, where the Constitution held that courts may not without justification encroach upon the polycentric policy terrain of international trade and its concomitant foreign relations or diplomatic considerations reserved by the Constitution for the national executive; *MEC for Social Development, WC v Justice Alliance of SA* [2016] ZASCA 88 (SCA), where the SCA held that the establishment of child and youth care centres in terms of s 195 of the Children's Act 38 of 2005 involves decisions that are polycentric and policy-laden in nature. See also Ntombizozuko V Dyani-Mhango and Mtendeweka Mhango, 'Deputy Chief Justice Moseneke's Approach to Separation of Powers in South Africa' (2017) 17 Acta Juridica 75. For a classical discussion of the concept of polycentric decisions and judicial review, see Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard LR 394–406, whose central thesis is that 'some polycentric decisions may not be suited to resolution through the courts, in other words, should not be regarded as justiciable. Polycentric decisions may involve taking into account a complex of relevant considerations that are beyond the cognisance of the court because of the limited way in which courts operate.'

The above rationale acknowledges that the Constitution commits certain provisions or functions to the exclusive competence of the other arms of government. In the light of the principle of separation of powers this should not be surprising. The Constitutional Court had endorsed the proposition that the Constitution delegates certain matters to specific branches and, as a result, other branches of government are expected to abstain from interfering in those matters.[25] In his concurring opinion in *National Treasury v Opposition to Urban Tolling Alliance*, Justice Froneman views the constitutional design in the same way. He ruled that

25 In this regard, see *Kaunda* (n 7) para 243, where Justice O'Regan held that the 'obligation to provide citizens with diplomatic protection conferred by our Constitution is one that must be construed within the terrain in which it is operative. That terrain is the conduct of foreign relations by the South African government. It is clear, though perhaps not explicit, that under our Constitution the conduct of foreign affairs is primarily the responsibility of the executive. That this is so, is signified by a variety of constitutional provisions including those that state that the President is responsible for receiving and recognising foreign diplomatic and consular representatives, appointing ambassadors, plenipotentiaries and diplomatic and consular representatives, and that the national executive is responsible for negotiating and signing international agreements. The conduct of foreign relations is therefore typically an executive power under our Constitution. This is hardly surprising. Under most, if not all constitutional democracies, the power to conduct foreign affairs is one that is appropriately and ordinarily conferred upon the executive, for the executive is the arm of government best placed to conduct foreign affairs'; *United Democratic Movement v Speaker of the National Assembly & Others* 2017 (8) BCLR 1061 (CC) para 64, where the CC held that 'how best and in terms of which voting procedure to hold the President accountable in the particular instance is the responsibility constitutionally allocated to the National Assembly.' See also *Harksen v President of the South Africa* 2000 (5) BCLR 478 (CC), confirming that matters of foreign affairs are committed to the legislative and executive branches; *Glenister* (n 8) paras 89–90, where it was held that 'the constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament. The approval of an agreement by Parliament does not, however, make it law in the Republic unless it is a self-executing agreement that has been approved by Parliament, which becomes law in the Republic upon such approval unless it is inconsistent with the Constitution or an Act of Parliament.'

See also Ziyad Motala and Cyril Ramaphosa, *Constitutional Law: Analysis and Cases* (Oxford 2002) 123–124, where in arguing in favour of the application of the political question doctrine, they observed that 'even though the German Constitution, like the South African Constitution, requires the Constitutional Court to adjudicate cases rightly brought before it, the German Constitutional Court in *Pershing 2 and Cruise Missile 1 case* (1983) 66 BVerfGe 39 held that foreign affairs is an area where it lacks manageable judicial standards and should be treated as a political question better left to be decided by the other branches of government.'

it is a breach of separation of powers for a court to intrude, by granting an interdict against government, upon the formulation and implementation of policy, a matter that resides in the heartland of national executive function.[26]

Furthermore, Froneman declared that

> courts should not determine what kind of funding should be employed for infrastructure project and who should bear the brunt for that cost because the remedy against such policy or political decisions lies in the political process.[27]

> In my view, the above authorities confirm that the Constitution envisages political accountability when it comes to certain political or policy questions. The task of the Judiciary is to determine which cases fall within this category and to abstain from adjudicating them. In articulating a similar view, Justice Ngcobo recently commented that 'it is important, as the decisions of the Constitutional Court indicate, to understand that there are matters that, for good reasons, are reserved for political branches of government' to resolve at their discretion.[28]

Lastly, in *Magidiwana v President of the Republic of South Africa,*[29] the applicants sought an order to compel the State and the Minister of Justice to pay the legal bills arising from their participation in the Marikana Commission of Inquiry. The inquiry had been set up by the president to investigate the killings of mineworkers by police in August 2012 following failed and protracted negotiations between the Lonmin corporation and the mineworkers' unions. The Constitutional Court rejected the application to grant the interim relief sought based on separation of powers considerations. Also based on separation of powers necessities, the Constitutional Court threw out the appeal, citing the nature and subject-matter of the disputes, namely executive decision-making on

26 *Urban Tolling Alliance* (n 22) para 84. There are other matters in the Constitution that are committed to the elected branches of government. See *Hugo* 1997 (n 9), where the Court recognised that the exercise of pardon powers is committed to the Executive branch. In addition, ss 206(1) and 207(2) of the Constitution commit policing matters to the Executive branch such that it is free to structure the South African Police without judicial scrutiny. See *Glenister* (n 8) 696, where it was held that the elected branches of government are free to decide where to locate a specialised corruption-fighting unit. In this case the elected branches had decided to locate such unit within and not outside of the South African Police Service, as had previously been the case.

27 *Urban Tolling Alliance* (n 22) para 95. See also *Chief Enyi Abaribe v The Speaker Abia State House of Assembly* (2003) 14 NWLR (pt 788) 466, where the Court explained that 'in cases involving political questions appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society such as ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives'; and *Schneider v Kissinger* 412 F 3d 190 (2005), where, in addressing concern about the effects of leaving political questions to the political process, the Court reasoned that the lack of judicial authority to oversee the conduct of the Executive branch in political matters did not leave Executive power unchecked because political branches effectively exercise checks and balances on each other in the area of political questions.

28 Sandile Ngcobo, 'Why Does the Constitution Matter?' (Public Lecture, Gallagher Estate, 30 June 2016) 24.

29 *Magidiwana v President of the Republic of South Africa* 2013 11 BCLR 1251 (CC).

matters involving budgetary issues and the allocation of resources. In my view, the Constitutional Court refused to hear the case based on its understanding that the issues were non-justiciable.[30]

Despite this emerging separation of powers jurisprudence and the promise by Justice Ackerman mentioned above (about the development of a distinct separation of powers principle), the Constitutional Court has yet to develop a distinct separation of powers approach underpinned by a coherent political question theory for South Africa. Although the Constitutional Court has correctly said 'no separation of powers is absolute',[31] it has emphasised that

> pursuant to constitutional principle VI the Constitution provides for a system of separation of powers among the three co-equal branches of government, in which checks and balances result in the imposition of restraints by one branch of government upon another.[32]

The Constitutional Court has also imposed an obligation on itself to respect the vital limits of its judicial power when it ruled, in a judgment penned by Justice Ngcobo in *Doctors for Life International v Speaker of National Assembly*, that[33]

> courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.[34]

While the Constitutional Court has consistently held that 'courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government', no rule has been developed to give effect to this statement of the law. How does the Judiciary exercise such restraint without developing a rule of law that governs how to determine those non-justiciable questions that courts must refrain from adjudicating? In my view, implicit in the Constitution and the jurisprudence of the Constitutional Court, including the above pronouncement in *Doctors for Life International v Speaker of National Assembly*, is an obligation on the Judiciary to develop a legal mechanism or rule to assist it in identifying those non-justiciable political questions that the courts must leave to the other branches to resolve. The problem facing South Africa is that the Constitutional Court has been unsuccessful in its efforts to develop a clearly articulated rule of law that would be applied to dealing with cases raising non-justiciable political questions and at the same time guide lower

30 See Okpaluba and Mhango (n 13).

31 *Certification of the Constitution of the Republic of South Africa*, *1996* 1996 (10) BCLR 1253 (CC) 1298–1300 ('*Certification*'). See also *De Lange v Smuts* (n 15) 804.

32 ibid paras 106–113. See also *Heath* (n 14) paras 85–86, confirming the separation of powers concept in the South African Constitution.

33 See *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

34 ibid para 37.

courts on how to dispose of such cases by abstaining from adjudicating them. This failure to develop a rule has on occasion inhibited the State from taking timely measures to transform society,[35] and has also enhanced the risk of courts' issuing ineffective court orders.[36] Nevertheless, no judge in South Africa other than former Chief Justice Ngcobo has contributed to the development of a separation of powers jurisprudence. I turn now to highlighting some facets of his contribution.

Ngcobo's Contribution to Separation of Powers on the Bench

In a recent speech, Justice Ngcobo described the notion of foundational jurisprudence and remarked that

35 See *SARIPA v Minister of Justice and Constitutional Development* 2015 (2) SA 430 (WCC), overturning an affirmative action measure involving insolvency practitioners; *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2012] ZAGPPHC 323 (CC), where an interdict was issued against the implementation of the e-tolling in the province of Gauteng; *National Treasury v Opposition to Urban Tolling Alliance* (note 22), a judgement overturning the interdict of the High Court; *Glenister* (n 8); *Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19 (CC); Kate O'Regan, 'Helen Suzman Memorial Lecture: A Forum for Reason: Reflections on the Role and Work of the Constitutional Court' (2012) 28 SA J on Human Rights 116 at 129, where the Justice argued that the 'role of the Constitutional Court is not to thwart or frustrate the democratic arms of government, but is rather to hold them accountable for the manner in which they exercise public power'; and *Glenister* (n 8), where the Court invalidated an Act of Parliament that frustrated the crime-fighting efforts of government.

36 For a discussion of some of the considerations courts must make when granting court orders, see *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 45; here the judge reasoned that the determination of appropriate relief therefore calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, *to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief.* Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, we must carefully analyse the nature of the constitutional infringement and strike effectively at its source. See also *New Patriotic Party v Attorney-General* 1993-94 2 GLR 35 SC at 51, where Archer CJ held: 'I have always held the view that this court like equity must not act in vain. In other words, it should not make orders that could be lawfully and legitimately circumvented so as to make the court a laughing stock. Under the Constitution, 1992, the President is the commander-in-chief of the Ghana Armed Forces. Suppose he accepts the declaration sought and confers with his commanders and service chiefs not to hold any route marches on 31 December 1993, yet the non-commissioned officers who were instrumental in staging the 31 December 1981 coup d'état choose to parade through the streets of Accra, who can stop them? Is this court going to send judges, magistrates, registrars, court bailiffs and ushers to erect barricades in the paths of the marchers? Again suppose, notwithstanding the orders of this court, the members of the governing party and their allies choose to celebrate 31 December with picnics, processions and dances, who can stop them? I must confess that the more I ponder over the reliefs sought, the more I become convinced of the futility of the orders being sought. I think this is a case which requires realism, pragmatism and foresight on the part of this court.'

> I was privileged enough to have been afforded the opportunity to apply the Constitution during my tenure as a member of the Constitutional Court and to participate in constructing our foundational jurisprudence on constitutional law. It was both a formidable and a complex task. It was complex partly because when I joined the Court, the Constitution was about three years old and partly because there was little or no precedent to guide the process. We were virtually writing on a clean slate. It was a formidable task because we were constructing the foundational jurisprudence that would guide the future development of our constitutional law. We had to construct a sound and solid foundational jurisprudence that would withstand the test of time.[37]

During Justice Ngcobo's tenure, it is fair to say the Constitutional Court handed down more landmark decisions in more areas of law than in any other period, and, as Justice Ngcobo points out, this was a difficult task because of a lack of precedent to guide the Judiciary. Justice Ngcobo authored the opinion of the Constitutional Court in several of the most celebrated of these cases: *Hoffmann v South African Airways,*[38] which upheld the right of an individual not to be discriminated against directly or indirectly on the basis of being HIV positive; *Daniels v Campbell & Others,*[39] which held that a Muslim spouse in a monogamous Muslim marriage had the right to inherit and to claim maintenance from their deceased spouse in terms of the Intestate Succession Act 81 of 1987 and also in terms of the Maintenance of Surviving Spouses Act 27 of 1990;[40] *State v Jordan,*[41] which held that the provisions of the Sexual Offences Act 1957 which criminalised sex work did not unfairly discriminate against women; and *Doctors for Life International v Speaker of the National Assembly*, which held that the obligation to facilitate public involvement is a material part of the law-making process and a requirement of manner and form, and that the failure to comply with this obligation renders any resulting legislation invalid.[42] *Doctors for Life International v Speaker of the National Assembly* is one of the foundational contributions to our jurisprudence that Ngcobo speaks about in the speech cited above. I am more concerned with this case because it is in it that Ngcobo began to sow the seeds of a political question theory in South Africa.

37 Ngcobo (n 28) 2.

38 *Hoffmann* (n 36).

39 *Daniels v Campbell* 2004 (5) SA 331 (CC), where at para 62 Ngcobo J is critical of the Court for going too far.

40 In this case, the Court maintained that for the purposes of the Intestate Succession Act and the Maintenance of Surviving Spouses Act the ordinary and commonly understood meaning of the word 'spouse' was broad enough to include a marriage formalised under Islamic Law.

41 *S v Jordan* 2002 (6) SA 642 (CC).

42 ibid para 209

Doctors for Life International v Speaker of the National Assembly

The case of *Doctors for Life International v Speaker of the National Assembly* arose after four pieces of healthcare legislation had been passed by parliament.[43] The applicant, Doctors for Life International, complained that during the legislative process leading to the enactment of these health laws, the NCOP and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement in their legislative processes as required by the provisions of sections 72(1)(*a*) and 118(1)(*a*) of the Constitution, respectively. Pursuant to section 72(1)(*a)*, the NCOP 'must facilitate public involvement in its legislative and other processes ... and those of its committees.' Section 118(1)(*a*) contains a similar provision relating to a provincial legislature. Doctors for Life International approached the Constitutional Court directly. It argued that the Constitutional Court was the only forum that had jurisdiction over the dispute because it concerned the question whether parliament has fulfilled its constitutional obligations. The jurisdiction of the Constitutional Court to consider such disputes is conferred by section 167(4)(*e*) of the Constitution. That section provides that 'only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation.' While there was no dispute between the parties as to whether the Constitutional Court had exclusive jurisdiction in the matter, Justice Ngcobo held that the question whether the Constitutional Court has exclusive jurisdiction is too important to be resolved through concession by the parties. Therefore, he opted to address this question before getting to the merits of the case.

Four questions were presented to the Constitutional Court for resolution. For the purposes of this article, the first question—Does this Court have exclusive jurisdiction over the present dispute under section 167(4)(*e*) of the Constitution?—is the most relevant. In resolving this question, Justice Ngcobo observed that whether Doctors for Life International is entitled to approach the Constitutional Court directly in regard to its complaint against the NCOP depends on whether that complaint falls under section 167(4)(*e*) of the Constitution. Justice Ngcobo further observed that whether or not the Constitutional Court should have had exclusive jurisdiction under section 167(4)(*e*) to decide a dispute rests on two principal propositions: the first was that section 72(1)(*a*) imposes an obligation on the NCOP to facilitate public involvement in its legislative processes and those of its committees; and the second was that the obligation imposed by section 72(1)(*a*) is of a kind contemplated in section 167(4)(*e*). If both of these propositions are sound in law, Justice Ngcobo noted, Doctors for Life International is entitled to approach the Constitutional Court directly.

43 These were the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004 and the Dental Technicians Amendment Act 24 of 2004.

At the outset, Justice Ngcobo held that the phrase 'a constitutional obligation' in section 167(4)(*e*) should be given a narrow meaning for two important reasons.[44] He provided two justifications for this holding. First, he noted that a narrow meaning of the term would prevent any conflicts between the powers of the Constitutional Court and the powers of the Supreme Court of Appeal and the High Courts to make orders concerning the validity of Acts of Parliament. Secondly, he highlighted that the principle underlying the exclusive jurisdiction of the Constitutional Court under section 167(4) is to ensure which disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by the Constitutional Court only. Hence, he reasoned that the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4). To elaborate, Justice Ngcobo pronounced a rule that requires the Judiciary to distinguish between the areas in which it has to intervene because the Constitution mandates it to do so, on the one hand, and, on the other, those areas it has to abstain from intervening in out of respect for the separation of powers principle. He noted:

> a distinction should be drawn between constitutional provisions that impose obligations that are readily ascertainable … on the one hand, and those provisions which impose the primary obligation … to determine what is required of it, on the other. In the case of the former, a determination whether those obligations have been fulfilled does not call upon a court to pronounce upon a sensitive aspect of the separation of powers. An example of such a provision that comes to mind is a provision that requires statutes to be passed by a specified majority ... When a court decides whether these obligations have been complied with, it does not infringe upon the principle of the separation of powers. It simply decides the formal question whether there was, for example, the two-thirds majority required to pass the legislation. By contrast, where the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled, trenches on the autonomy of Parliament … and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(*a*) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard.[45]

44 In *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) paras 16–24, the CC failed to adhere to this pronouncement by giving s 176 a wider meaning. The Constitutional Court granted direct access on an issue concerning one of the houses of parliament, namely the National Assembly. The Constitutional Court failed to acknowledge that s 167 is concerned with the obligations of parliament (namely the National Assembly and the NCOP) and not one house of parliament alone. By construing the National Assembly as a mere extension of parliament for the purposes of s 167, the CC gave a wide meaning to s 167, which is contrary to what the Court said in *Doctors for Life International v Speaker of the National Assembly*. The Constitutional Court could have simply granted leave to appeal on the basis that the matter raises an arguable point of law of general public importance, which ought to be considered by that Court.

45 *Doctors for Life* (n 33) paras 25–26.

What is clear from this jurisprudence is that Justice Ngcobo understood that the power of judicial review is not absolute; that the separation of powers may, in appropriate circumstances, operate as a mechanism to limit the institution of judicial review, particularly in those areas where the political branches are constitutionally conferred with discretion to make decisions.[46] More than three hundred years ago, Chief Justice Marshall (while formulating the political question doctrine in the United States) explained that when 'the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.'[47] In the course of developing the institution of judicial review in *Leyds v Brown*[48] the Supreme Court of the Republic of South Africa, like courts in other jurisdictions, recognised that the power of judicial review is not absolute. In that case, the Supreme Court had to consider whether the court had the power to test the validity of acts of the Legislature. The Court relied heavily on American authorities and found that it had the power of judicial review or testing rights, but recognised that such power was not absolute.[49] In other words, while accepting the power of judicial review, the Court rejected the proposition that the judiciary was capable of deciding every question brought before it, noting that 'if any proposition may be considered as a political axiom, this we think, may be so considered.'[50] Chief Justice Ngcobo agreed with these sentiments when he recently remarked:

> It is important also to understand that having regard to their proper role on judicial review, courts cannot provide solutions to all political, economic and social problems that afflict societies in modern times … the appropriate solution to most political, economic or social problems can only be found through the political process. These problems are usually complex and they involve many conflicting interests and may involve the use and allocation of limited resources … It is to the political process that the citizen must look for an appropriate resolution of these problems. The responsibility for the proper and effective functioning of the political process in the interests of the community rests of course with the executive and the legislature. Judicial review ensures

46 See *Economic Freedom Fighters* (n 44); *Glenister* (n 8); Mtendeweka Mhango, 'Is It Time for a Coherent Political Question Doctrine in South Africa? Lessons from the United States' (2014) 7 African J of Legal Studies 457 at 490, arguing that 'when a Constitution is silent concerning the need for legislation in a particular area, a Constitution should be understood as granting the political branches discretion to formulate new policies in those areas without judicial interference'; *Marbury v Madison* 5 US 137 (1803); and *Economic Freedom Fighters & Others v Speaker of the National Assembly & Another* 2018 (3) BCLR 259 (CC), Zondo DCJ (dissenting) and Mogoeng CJ (dissenting).

47 *Marbury v Madison* (n 46) 166.

48 *Leyds v Brown* 4 Off Rep 17 (1897). See also *McCorkindale's Executors v Bok* (1884) 1 SAR 202; *Doms' Trustees v Bok* (1887) 2 SAR 189; *Hess v The State* (1895) 2 Off Rep 112.

49 ibid 29–31. For further discussion of *Leyds v Brown* and its effects, including how American authorities influenced that judgment, see George N Barrie, 'Impeachment on the Highveld: The Dismissal of Chief Justice Kotze by President Kruger on 16 February 1898' (2014) 4 Tydskrif vir die Suid-Afrikaanse Reg 817.

50 ibid paras 29–30.

> that the political branches of government perform their constitutional obligations and do so in accordance with and within the limits of their constitutional authority and obligations.[51]

Justice Ngcobo is not the only judge to hold these views. His Nigerian brother, Justice Fatai-Williams, articulated similar views in *Attorney General Bendel v Attorney General Federal.*[52] This case involved the interpretation of the Authentication Act. Section 2 of that Act had ousted the jurisdiction of the courts by providing that the Bill shall become conclusive for all purposes once passed by the two Houses of the National Assembly and upon the signature of the Clerk of the National Assembly. The effect of this wording in the Bill was that the signature of the Clerk was all that was needed to determine whether the Bill had been properly passed in line with the Constitution. In interpreting the impugned Act, Justice Fatai-Williams held that the Court has the power to examine the validity of a Bill despite the signature of the Clerk. In the course of his judgment, Fatai-Williams explained that one of the requirements of the separation of powers under Nigerian law is that the courts should respect the independence of the Legislature in the employment of its law-making powers.[53] This, he explained further, required the courts to abstain from pontificating on the validity of the domestic affairs of the Legislature, including the method used to employ its law-making powers.[54] On the contrary, Justice Fatai-Williams explained:

> if the Constitution makes provision as to how the legislature should conduct its internal affairs or as to the mode of exercising its legislative powers the Court is duty bound to exercise its jurisdiction to ensure that the legislature complies with the constitutional requirements. Sections 52, 54, 55 and 58 of our Constitution clearly state how the National Assembly should conduct its internal affairs in exercise of its legislative powers. That being the case the Court is bound to exercise its jurisdiction under section 4(8) of the Constitution to ensure that the National Assembly comply with the provisions of the Constitution.[55]

Essentially, in the above pronouncement, Justice Fatai-Williams, like Justice Ngcobo, clarifies that the rule of law requires the courts to interfere (when called upon to do so) and give effect to the law where the Constitution stipulates what the National Assembly or any other branch of government ought to do, and how. In Fatai-Williams's view, the political question theory does not prevent the courts from enforcing what the law expressly requires the National Assembly to do. However, when the Constitution is silent about how the Legislature should conduct or manage its domestic affairs, the separation of powers and indeed the political question theory require the courts to abstain from interfering because the Legislature has a discretion in this regard and its

51 Ngcobo (n 28).
52 *Attorney General Bendel v Attorney General of the Federation* 1982 10 SC 1.
53 ibid.
54 ibid paras 50–52.
55 ibid para 52.

actions are only politically examinable.[56] It is settled law, and has been so announced very often, that the courts will not, and should not, interfere with the discretionary duties of the political branches.[57]

Justice Ngcobo's proclamation in *Doctors for Life International v Speaker of the National Assembly* is important because it goes to the heart of the principle that the courts should abstain from deciding cases that raise political questions. By political questions I mean those questions that the Constitution grants discretion to the political branches to resolve or decide or those questions where there is no judicial standard for a court to resolve the question without overstepping the domain of the other branches.[58]

Elsewhere I have criticised the South African courts for recognising, in a number of cases, the limits of the power of judicial review in general and in relation to the adjudication of political questions, and for having failed to explain this in the context of a South African political question theory, founded as it is upon the principle of separation of powers. [59]

56 See *Marbury v Madison* (n 46); *Urban Tolling Alliance* (n 22); *Glenister* (n 8*);* Maurice Finkelstein, 'Judicial Self-limitation' (1924) 37 Harvard LR 344–345, discussing the Court's application of prudential considerations and advocating the use of the political question doctrine in those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction; MF Weston, 'Political Questions' (1925) 38 Harvard LR 298–299, 331, advocating the use of the political question doctrine in the Lochner-era social legislation; Rachel Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' 102 Columbia LR 237; Martin Redish, 'Judicial Review and the Political Question' (1984) 79 Northwestern LR 1031; *Economic Freedom Fighters* (n 46) para 93.

57 *Marbury v Madison* (n 46) 166–168. See also *Luther v Borden* 48 US 1 (1849); *Economic Freedom Fighters* (n 44*);* Herbert Wechsler, *Principles, Politics, and Fundamental Law* (Harvard 1961); Redish (n 56).

58 For South African authorities for the proposition that the lack of a judicial standard to resolve a dispute is a proper basis for declining jurisdiction see *Kolbatchenko v King NO & Another* [2001] 4 All SA 107 (C); *Inter-Science Research and Development Services* (*Pty*) *Ltd v Republica Popular de Moçambique* 1980 (2) SA 111 (T). See also *Swissbourgh Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T), 1998 JOL 4144 (T) 108–109, where the Court held that 'the judicial branch of government ought to be astute in not venturing into areas where it would be in a judicial no-man's land. It would appear that in an appropriate case, as an exercise of the court's inherent jurisdiction to regulate its own procedure, the court could determine to exercise judicial restraint and refuse to entertain a matter, notwithstanding it having jurisdiction to do so, in view of the involvement of foreign States therein. In the present matter it is apparent that decisions have to be made in regard to the alleged unlawful conduct of [government of Lesotho] in Lesotho and the control of [government of Lesotho] and its relationship with the South Africa. As far as the latter is concerned there can be little doubt that this is not an area for the judicial branch of government. It belongs to international law … The Court would be in judicial no-man's land. It would have no judicial or manageable standards by which to judge the issue. It clearly is a matter in respect of which this Court should exercise judicial restraint.' Held further that 'the act of state doctrine is just as applicable to South Africa as it is to the USA and England.'
See also *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) para 5, where the judgment in *Swissbourgh Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* is discussed with approval.

59 Mhango (n 46) 481; Mhango and Dyani-Mhango (n 24) 8–89. See *Tshwane Metropolitan Municipality*

However, I noted that although the political question theory was not the substance of the case, Justice Ngcobo in *Doctors for Life International v Speaker of the National Assembly* identified an important characteristic of the political question theory that is missing in South Africa, one that can be used to develop a coherent theory. He stated that

> courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.[60]

My concern is that over the years the Constitutional Court has failed to link separation of powers concerns, similar to the ones identified by Ngcobo above, with the limits on judicial powers, particularly in relation to political questions delegated to other branches of government.[61] Consequently, this has led to the Constitutional Court's failure to develop a clear political question theory that would be used to dispose of such questions in the future. In other words, while the Constitutional Court has frequently cited Justice Ngcobo's legal proposition in *Doctors for Life International v Speaker of the National Assembly*, no rule has been developed to give effect to that proposition. Justice Ngcobo's views about the political question theory in *Doctors for Life International v Speaker of*

v Afriforum & Another [2016] ZACC 19 (street naming); *MEC v Justice Alliance* (n 24) paras 38–39, where it was held that establishing child and youth care centres in terms of s 195 of the Children's Act 38 of 2005 involves decisions that are polycentric and policy-laden in nature; and that the separation of powers doctrine requires a court to refrain from intervening in decisions of this nature, particularly since they are polycentric and policy-laden in nature. See also *Urban Tolling Alliance* (n 22); *Ferreira v Levin* (n 12); *UDM v President of South Africa* 2002 (11) BCLR 1179 (CC), where the Court observed that 'this case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional'; *Mazibuko, v Sisulu* [2012] ZAWCHC 189 (CC), where it was held that 'an overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state to deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model'; Okpaluba and Mhango (n 13); Mhango (n 46) 476–477, who advocates a coherent political question doctrine for South Africa; *Swartbooi v Brink (2)* 2003 (5) BCLR 502 (CC); *Mazibuko v Sisulu* 2013 (6) SA 249 (CC) para 83, where Jafta J's minority opinion noted that 'political issues must be resolved at a political level; that our court should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution'; *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA) paras 19 and 38, where it was held that determining which streets should be renamed and what the new names should be was deemed to be inherently political and, accordingly, it was not for a court to interfere in the politically motivated decisions taken by a deliberative assembly of the council politically accountable to the electorate.

60 *Doctors for Life* (n 33) para 37.

61 Mhango (n 46) 481.

the National Assembly did not command the majority opinion on the Constitutional Court. However, as I will explain below, his views on the subject have recently been endorsed by a unanimous Court, which has added impetus to the proponents of the political question theory of law.

Glenister v President of the Republic of South Africa

One of the most fiercely litigated constitutional questions in South Africa has been the independence of the institutions entrusted with investigating corruption and organised crime.[62] For our purposes, the most relevant of this trilogy of cases is *Glenister v President of the Republic of South Africa*, where Justice Ngcobo penned the minority judgment. In this case, the Judge refined the proposition he articulated in *Doctors for Life International v Speaker of the National Assembly*, which, in my view, is an integral building block of the political question theory to the extent that it recognises constitutional discretion on the part of the political branches in certain matters and the courts' abstention from intervention.

In *Glenister v President of the Republic of South Africa* the Constitutional Court had to consider the constitutionality of the decision by the political branches, through the South African Police Service Amendment Act 2008, to establish the Directorate for Priority Crime Investigation and locate it within the South African Police Service as opposed to the National Prosecuting Authority, as had been the case before in terms of section 7(1) of the National Prosecuting Authority Act 1998. Both the majority and the dissenting judgments held that

> section 179 of the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit within the [National Prosecuting Authority] and nowhere else. The creation of a separate corruption-fighting unit within the [South African Police Service] was not in itself unconstitutional and thus the [Directorate for Priority Crime Investigation] legislation cannot be invalidated on that ground alone. Similarly, the legislative choice to abolish the [Directorate of Special Operations] and to create the [Directorate for Priority Crime Investigation] did not in itself offend the Constitution.[63]

In his dissenting judgment, Justice Ngcobo put forward the following reasons in support of the above holding:

> The decision to disband the [Directorate of Special Operations] and establish the [Directorate for Priority Crime Investigation] and locate it within the South African Police Service must be

62 *Glenister v President of the Republic of South Africa* 2013 (11) BCLR 1246 (CC); *Glenister* (n 8); *Glenister v President of South Africa* 2009 (1) SA 143 (ZAGPHC); *Glenister v President of South Africa* 2009 (1) SA 287 (CC) (commonly referred to as *Glenister I*); *Glenister v President of South Africa* 2010 (1) SA 92 (ZAWCHC); and *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC).

63 *Glenister* (n 8) para 162; See also *Helen Suzman Foundation* (n 62).

> understood in the context of the Constitution. Section 179 of the Constitution makes provision for a single national prosecuting authority ... On the other hand, section 205 makes provision for the national police service ... It is therefore within the power of Parliament to establish an anti-corruption unit and to locate it within the [South African Police Service]. The Constitution does not prescribe to Parliament where to locate the anti-corruption unit. It leaves it up to the executive, which initiates legislation under section 85(2)(*d*), and ultimately to Parliament to make a policy choice.[64]

Furthermore, Ngcobo correctly dismissed an argument by the plaintiff that the impugned legislation in the case was unconstitutional because it sought to implement a political resolution adopted by the ruling political party, the African National Congress, at its 52nd national conference in Polokwane in December 2007. The resolution read as follows:

> Single Police Service
>
> 1. The constitutional imperative that there be a Single Police Service should be implemented.
> 2. The municipal, metro and traffic police, be placed under the command and control of the National Commissioner of the South African Police Service, as a force multiplier.
> 3. The Directorate of Special Operations (Scorpions) be dissolved.
> 4. Members of the DSO performing policing functions must fall under the South African Police Services.
> 5. The relevant legislative changes be effected as a matter of urgency to give effect to the foregoing resolution.[65]

At the heart of this political resolution a policy emerged that called for the establishment of a single police service in South Africa and the dissolution of the Directorate of Special Operations, which, under the previous legislative framework, had been located outside the South African police Service. In dismissing the plaintiff's argument, Justice Ngcobo reasoned:

> Assume, for the moment, that the impugned laws were in fact motivated by the Polokwane Resolution. This does not render the scheme unconstitutional. Indeed, it may well be the central role of a political party to formulate policy recommendations with the intention that they be implemented, and there is nothing untoward in the Cabinet taking up such recommendations … these recommendations become law only if the executive embodies them into legislation which it initiates, Parliament passes the legislation, and the President signs the legislation.[66]

64 *Glenister* (n 8) paras 64–65.

65 See ANC, '52nd National Conference: Resolutions' (20 December 2007) <http://www.anc.org.za/content/52nd-national-conference-resolutions> accessed 17 November 2017.

66 *Glenister* (n 8) para 62.

Furthermore, Justice Ngcobo found that it was a government policy decision to transfer this investigative component of the National Prosecuting Authority to the South African Police Service, and his intimation is that such policy choices are within the political branches' discretion to make. He further reasoned:

> Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This *judgment is political* and may not always coincide with views of social scientists or other experts[67] (my emphasis).

Eventually Ngcobo J held:

> what must be stressed here is that it is not the judicial role to dictate to other branches what is the most appropriate way to secure the independence of an anti-corruption agency. The judicial role is limited to determining whether the agency under consideration complies with the Constitution. Indeed, the legislature here had to exercise a political judgment. That there is more than one permissible way of securing the structural and operational autonomy of the [Directorate for Priority Crime Investigation] does not make the choice of one rather than the other unconstitutional.[68]

The principle that emerged from Justice Ngcobo's jurisprudence in *Glenister v President of the Republic of South Africa* and *Doctors for Life International v Speaker of the National Assembly* is that where the Constitution grants a power to a functionary without prescribing or indicating the parameters of how such power ought to be exercised, such functionary must be regarded to have discretion in exercising that power.[69] This is a very important principle of constitutional law. If it had been properly understood and applied in *Glenister v President of the Republic of South Africa*, the impugned legislation in that case would probably have been upheld because at the heart of the debate was a political question that was constitutionally reserved for the political branches to make. The question is: Why didn't the Constitutional Court apply this textually based principle of law to the case? And: What accounts for this failure to apply a principle of law that is expressly sanctioned by the Constitution? After all, the Constitutional Court has suggested that when determining the meaning of a constitutional provision the language in the text must be respected.[70] What would prompt the highest court in the land to be

67 ibid para 67.

68 ibid para 146.

69 See Ngcobo (n 28) at 22–23 (discussing this principle of law).

70 *S v Zuma* 1995 (4) BCLR 401 (SA) at paras 17–18, where the Court held that 'while we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single objective meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever

less clear about the nature of its ruling when it uses political question terminology? Does this lack of clarity reflect uncertainty in our justices' own minds about the proper role of the Judiciary in our constitutional order? It has been argued elsewhere that 'judges are not expected simply to apply the law under a transformative Constitution but to justify their decisions with reference to the Constitution.'[71] This is important to ensure that decisions are respected not only because of the authority with which they are given but also because of the rational reasons on which they are predicated. Almost three decades ago, Justice Brennan echoed these same sentiments when he said the following:

> in our legal system judges have no power to declare law. That is to say, a court may not simply announce, without more, that it has adopted a rule to which all must adhere. That, of course, is the province of the legislature. Courts derive legal principles, and have a duty to explain why and how a given rule has come to be. This requirement serves a function within the judicial process similar to that served by the electoral process with regard to the political branches of government. It restrains judges and keeps them accountable to the law and to the principles that are the source of judicial authority. The integrity of the process through which a rule is forged and fashioned is as important as the result itself; if it were not, the legitimacy of the rule would be doubtful.[72]

Of course, Justice Brennan was writing in the context of the American legal system. However, I think what he said then is true in the South African context today.

Ngcobo's dissent in *Glenister v President of the Republic of South Africa* sowed the seeds for future harvesting because five years after it was written the Constitutional Court, in *Economic Freedom Fighters v Speaker of the National Assembly*,[73] endorsed, without expressly overruling the majority position in *Glenister v President of the Republic of South Africa,* the above principle of law put forward by Justice Ngcobo in relation to its determination of whether the National Assembly had breached its constitutional obligation to hold the president to account. In addressing this question, a unanimous Constitutional Court observed that the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the Executive to account nor outlines the mechanisms for doing so.[74] As a consequence, the Constitutional Court reasoned that the National Assembly must be construed as having 'been given the leeway to

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we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to values the result is not interpretation but divination.' See also Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta 2005) 147.

71 Mtendeweka Mhango, 'Transformation and the Judiciary' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 81, citing Pius Langa, 'Transformative Constitutionalism' (2006) 3 Stellenbosch LR 353.

72 William Brennan, 'In Defense of Dissents' (1985) 37 The Hastings LJ 435.

73 *Economic Freedom Fighters* (n 44).

74 ibid para 43.

determine how best to carry out its constitutional mandate.'[75] The Constitutional Court explained:

> It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role … these are some of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government.[76]

Therefore, the current state of the law in South Africa is that there are narrow instances where the text of the Constitution limits the power of judicial review, based on the theory that political branches are conferred with an absolute discretion to determine certain constitutional questions.

Ngcobo's Contribution to the Separation of Powers off the Bench

In his academic commentaries, Justice Ngcobo has been an open advocate of the political question theory even though he has not called it by that name. He stunned the academy with his seminal piece titled 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers'. In this piece, Justice Ngcobo introduced his readers to the notion of a 'constitutional dialogue', which he used to explain the notion that the South African constitutional design contemplates interaction between the three branches of government. Ngcobo dismisses the perceived notion that when courts 'strike down unconstitutional action or legislation … it is perceived as the end of the matter.'[77] On the contrary, he argues that a 'judicial finding of constitutional invalidity is … merely the beginning'[78] of a constitutional dialogue between the three branches of government. Ngcobo J views this dialogue as being 'rooted in the shared obligation among all branches of government to uphold the Constitution.'[79]

What is more, Justice Ngcobo's concept of a constitutional dialogue resembles Professor Bickel's notion of the passive virtue, which Bickel articulated more than five decades ago.[80] Professor Bickel defended the political question doctrine through his

75 ibid para 87.

76 ibid para 93.

77 Sandile Ngcobo, 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 1 Stellenbosch LR 3–41, in which the learned Judge argues that the constitutional dialogue is the underpinning and defining feature of the separation of powers in South Africa.

78 ibid.

79 ibid 48.

80 See Ngcobo (n 28) 19, noting Bickel's argument against judicial review because 'it thwarts the will of

pronouncement on the notion of the passive virtue of the judiciary: he asserts that the doctrine permits courts to decline to adjudicate cases for prudential considerations.[81] Bickel's advocacy of the doctrine was motivated by his concerns that when courts declare legislation or executive action to be unconstitutional, they frustrate the will of the people, which has the potential to dent the Judiciary, whose power arises from the perceived legitimacy in adjudicating cases rather than from passing or enforcing laws.[82] In his submissions, Bickel pointed out that at some point, the continuing invalidation of the will of the people enhances the risks of losing that legitimacy.[83] Accordingly, instead of losing legitimacy by invalidating laws or enforcing poorly imagined policy decisions by upholding them, the judiciary may exercise the passive virtue by invoking the political question doctrine to decline to adjudicate a case.[84] Bickel maintained that when this happens, the courts facilitate a dialogue with the political branches and the public about the issues in dispute.[85] In his view, which ties in with Justice Ngcobo's thoughts, invoking the political question doctrine in these circumstances enables a constitutional dialogue between the people and the political branches about the issues in dispute. While Justice Ngcobo does not mention the term 'political question doctrine' in his articulation of the notion of a constitutional dialogue, his objectives in advocating such a dialogue are similar to Bickel's—which is to ensure that political questions are resolved in the political process without court interference.

Justice Ngcobo recently developed his views. In his examination of the arguments for and against judicial review, which implicates the political question doctrine, he argued that 'at the core of these arguments and counter-arguments is the doctrine of separation of

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the representatives of the actual people.'

81 See Anthony T Kronman, 'Alexander Bickel's Philosophy of Prudence' (1985) 94(7) Yale LJ 1567; Alexander Bickel, 'The Supreme Court 1960 Term Foreword: The Passive Virtues' (1961) 75 Harvard LR 74–80; Andrew Nolan, 'The Doctrine of Constitutional Avoidance: A Legal Overview' (2014) *CRS Report for Congress, R43706* <https://www.hsdl.org/?viewanddid=757829>.

82 Bickel (n 81) 16–17. For a discussion of judicial confidence, see Ismail Mahomed, 'The Role of the Judiciary in a Constitutional State' (1999) 115 SALJ 111, noting that 'unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation.' See also Sandile Ngcobo, 'Sustaining Public Confidence in the Judiciary: An Essential Condition for Realising the Judicial Role' (2011) 128(1) SALJ 10–11, where the Judge notes that 'without public confidence in the judiciary, its ability to do justice is lost. Where people do not trust courts, they will resort to other means to resolve matters that properly belong to the realm of the judiciary.'

83 Bickel (n 81) 74–80. See also Kronman (n 81).

84 Fritz W Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 Yale LJ 537–539.

85 ibid.

powers and the limits of the powers of judicial review'.[86] He remarked that the challenge facing South Africa arises from the need to develop a coherent theory of judicial review that is rooted in the principle of separation of powers for South Africa, which will guide the courts on whether to accept or reject disputes that often appear to have heavy political lifting brought before them.[87] I agree with Justice Ngcobo. As I have said elsewhere, I believe that the future of South Africa lies in the development of a separation of powers principle that is underpinned by a coherent political question theory as applied to the adjudication of purely policy or political disputes.[88] It is important to emphasise that the suggestion for the development of a coherent theory of judicial review is no different from the submission for a coherent political question theory. The two submissions are designed to address similar objectives.

Justice Ngcobo is emphatic in his suggestion that in the development of such a coherent theory of judicial review, the following propositions of law should be accepted:

> First, our Constitution contemplates three co-equal branches of government; an all too powerful judiciary is a threat to our constitutional democracy in which government is based on the will of the people just as an all too powerful executive or legislature is a threat to our democracy.
>
> Second, the very principle of separation of powers which forms part of our Constitution, presupposes that there are limitations on the exercise of the power of judicial review and requires the judiciary to observe the vital limits on the exercise of power of judicial review.
>
> Third, limitation on the power of judicial review must be sought in, and be derived from, the text of the Constitution; and
>
> Fourth, while concepts such as the principle of deference or margin of appreciation or political question doctrine provide a useful starting point in considering limits on the power of judicial review, it is important to bear in mind that the principle to be developed must be informed by our Constitution and be anchored in our constitutional democracy which gives courts the central role in upholding and protecting the Constitution.

86 Ngcobo (n 28) 19.

87 ibid 22.

88 Mhango (n 44) 457–493, arguing that the political question already exists in South African jurisprudence but it is not coherent. See also Nomthandazo Ntlama, 'The "Deference" of Judicial Authority to the State' (2012) 33 Obiter 135, arguing that the courts have developed a political question doctrine; Sebastian Seedorf and Sanele Sibanda, 'Separation of Powers' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta 2008) 12–50, discussing the political question doctrine in South Africa; Chuks Okpaluba, 'Justiciability, Constitutional Adjudication and the Political Question in a Nascent Democracy: South Africa' (in two parts) in (2003) 18 SAPL 331 and (2004) 19 SAPL 114, advocating the political question doctrine in South Africa.

> Fifth, as the Constitutional Court has recently emphasized, it must be informed by the need to allow space to the political branches of government to discharge their constitutional obligations unimpeded by the judiciary save where the Constitution mandates it.[89]

As should be evident from these submissions, Justice Ngcobo could not be any clearer about his call for a political question theory for South Africa. I agree with his suggestion that South Africa's version of the political question theory should be informed by the South African Constitution and give the Judiciary the central role of upholding the Constitution. The question remains, though: What impact has Ngcobo made to the constitutional jurisprudence of South Africa? In the light of the above analysis, his contribution is profound. What remains is for the Constitutional Court to build on this jurisprudence or overrule it in a transparent manner, with good reasons. If one were to look into the crystal ball on constitutional matters, one would probably see that Ngcobo's jurisprudence will continue to influence both the rulings of the Constitutional Court and society for decades to come.

Conclusion

In this article, I have argued that Chief Justice Ngcobo's writings were developing a political question theory for South Africa. I have demonstrated that *Doctors for Life International v Speaker of National Assembly* was the starting point of this development. In his many other cases, such as *State v Jordan*, Ngcobo always gave due regard to the distinction between matters that required judicial attention and those that required a solution by the people's representatives. In *State v Jordan*, he reasoned:

> Much of the argument in this case, and of the evidence placed before this Court, was directed to the question whether the interests of society would be better served by legalising prostitution than by prohibiting it. In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.[90]

Ngcobo's contribution and fidelity to the principle of separation of powers is profound. He recognised the gap in the institution of judicial review and, as explained in this

89 Ngcobo (n 28) 22–23.

90 Note 41 para 30. See also fn 11 in *State v Jordan* (n 41), where Ngcobo stated: 'the state has advanced several explanations for the suppression of commercialised sex. First, the business is said to breed crime which is not confined to the sale of sex but which extends into violent crimes. Second, the business results in the exploitation of women and children. Third, it leads to trafficking in children. Fourth, it leads to the spread of sexually transmitted diseases. The appellants and *amici* contended that these social ills can be eliminated by decriminalising and regulating commercial sex.' In my view, these arguments must be addressed to the legislature. For further discussion of *State v Jordan*, see the article by Dyani-Mhango in this volume.

article, he attempted to fill that gap by developing a political question theory, one that now forms an integral part of South African constitutional law. It is now the task of the Judiciary to cultivate this area of law.

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