ABSTRACT
This article concerns remedial design by courts in cases where constitutional rights are jeopardised by a recalcitrant administration. We focus on the recent judgment of the South African Constitutional Court in *Bhekindlela Mwelase v Director-General for the Department of Rural Development and Land Reform* – in particular its doctrinal innovation in appointing a Special Master to oversee the processing of labour tenant claims by the Department of Rural Affairs and Land Reform. We argue that the case raises both conceptual and practical questions about the relationship between rights and remedies, substantive law, and the separation of powers. We approach these questions after considering the judgment in its socio-political context through a consideration of the factors underlying the granting of the remedy, from both a theoretical and comparative perspective. The paper identifies a set factors that underpinned the Court’s decision that will be likely to influence the granting of invasive remedies in future cases. We then apply these factors to the judgment of the Supreme Court of India in the Right to Food Case to better understand the ways they play out in a different jurisdictional context. These factors can provide doctrinal and normative guidance for courts – especially in the so-called Global South – that often operate under conditions of chronic recalcitrance, inattentiveness, inaction, or incompetence of the coordinate branches of government.

The longstanding jurisprudence of the Constitutional Court of South Africa requires that constitutional remedies be ‘effective’. A recent line of cases has forced the Court to consider what this means in the context of a constitutional system that is beset by a range of failures to institutionally deliver on its constitutional obligations. The latest of these decisions was handed down on 19 August 2019 by the Constitutional Court of South Africa in *Bhekindlela Mwelase v Director-General for the Department of Rural Development and Land Reform*. The case was brought by a group of petitioners who claimed that the Department had violated their constitutional rights by failing to...
process their claims as labour tenants to certain property rights under the provisions of the Land Reform (Labour Tenants) Act 3 of 1996. These actions came in the backdrop of the long-running failure by successive ANC-led governments to restore land to those who were deprived of it during apartheid and the increasing public anger and political mobilisation in response to that anger.\(^2\)

The majority judgment was authored by Justice Edwin Cameron on his last day in office and was hailed as ‘poetry in social justice’.\(^3\) The case is of significant import not only for the process of land reform in South Africa, but also for providing nuance to a distinctly South African understanding of the separation of powers and the principles that govern appropriate relief in constitutional litigation. In the case, three courts, the Land Claims Court (LCC), the Supreme Court of Appeal (SCA), and the Constitutional Court split on whether the adoption of a novel remedy – the appointment of a Special Master – overstepped the powers accorded to courts. With the majority of the Constitutional Court ultimately upholding the decision of the LCC to appoint a Special Master, the case raises both conceptual as well as practical questions about (1) the relationship between rights and remedies, (2) substantive law and (3) separation of powers.

In this article we put some of these questions into context and ask how we are to understand the outcome in *Mwelase*: We start by contemplating neglected questions about where remedies fit in the general framework on the separation of powers in the Constitution of the Republic of South Africa, 1996. Moving on, we consider whether the case provides a sufficient account of the conditions under which courts will be willing to forge innovative remedies. Does it provide judicially manageable thresholds that, if triggered, would estop an appellate court from interfering with a remedy granted by a lower court that potentially impinges upon the constitutional separation of powers? We situate the case in the current political climate surrounding land reform and constitutionalism in South Africa and ask: Was the outcome in the case so heavily contingent on a set of extra-textual factors, which can be gleaned by a close reading of the judgment, and as a consequence, unlikely to be replicated in the near future? The answer is a tentative yes. We test our hypothesis by applying the conditions identified to the invasive remedies developed by a similarly powerful apex court with a proclivity towards strong judicial interventions: the appointment of external commissioners to oversee its orders by the Supreme Court of India (SC) in the Right to Food (RTF) litigation in 2001.

The article proceeds in five sections. Part 2 discusses the *Mwelase* Constitutional Court judgment in detail, including its factual and procedural background, and the evolution of the case and order from the LCC, its overturning in the SCA, and its eventual reinstatement in the Constitutional Court. Part 3 answers the central questions identified in the second paragraph of this introduction by considering nine factors that guided the remedy granted in the *Mwelase* Constitutional Court judgment, including the thresholds for each. Part 4 applies the factors in the previous section to the case of

\(^2\) T Roux ‘Constitutional populism in South Africa’ in M Krygier, W Sadurski & A Czarnota (eds) *Constitutional Populism* (forthcoming 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583270>.

\(^3\) M Heywood ‘Poetry in the air during Judge Edwin Cameron’s send-off’ (22 August 2019) Daily Maverick <https://www.dailymaverick.co.za/article/2019-08-22-poetry-in-the-air-during-judge-edwin-cameron-s-send-off/>. 
the RTF litigation in India, which was relied on by Cameron J and Ncube J in the Mwelase Constitutional Court and LCC judgments respectively in order to derive authority for the judicial appointment of a Special Master to devise, oversee and implement a plan for solving a polycentric problem pursuant to a court order. Part 5 concludes by discussing the convergences and divergences between the RTF case and Mwelase, while also considering the possible institutional and interpretive risks of the path chosen by the Constitutional Court in the case.

1. Mwelase: the judgment

The 2019 judgment of the Constitutional Court in Mwelase concerned a matter that originated in a set of labour tenants’ (the named claimant being already deceased) claims to acquire property rights that had not been processed by the Department of Land Reform, an issue that dovetailed with a nationwide discussion on the issue of land reform and captured the public imagination.

1.1 The Land Claims Court

The case originated in the LCC, which had delivered a judgment appointing a Special Master of labour tenants to help the Department of Rural Development and Land Reform (DLR) process labour tenants’ land claims. The judgment in this case is one in a very long line of litigation between the applicant and the Department in an effort by a set of claimants to acquire ownership rights over a parcel of land known as the Hilton College in KwaZulu-Natal. According to the terms of the Land Reform Act, labour tenants’ right to acquire certain ownership rights over the land can be realised only through the detailed mechanisms set out in the Act, all of which are critically contingent on timely departmental action and processes.

The applicants had lodged their claim in June 2000; however, the claim was never referred to the LCC in order to resolve the dispute between the applicants and the Hiltonian Society, the trust in charge of administering the land. In July 2013 the applicants approached the LCC to settle their dispute while arguing that their case was emblematic of the wider problems in the department and asking for structural relief. The LCC noted that the processing of claims had been neglected and the related statistics were not properly maintained or incapable of being furnished. In some cases, applicants had died or moved away due to the inordinate delay, and files had been lost, requiring the claims process to commence anew, and subjecting the applicants to needless hardship.

The applicants approached the LCC a number of times, each time acceding to an agreement with the DLR that included supervision by the LCC but did not include the

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4 Mwelase v Director-General for the Department of Rural Development and Land Reform 2017 (4) SA 422 (LCC) (per Ncube AJ) (Mwelase LCC).
5 Mwelase Con Court (note 1 above) para 3 (per Cameron J).
6 Ibid para 10.
7 The facts appear at paras 14–36 of the Constitutional Court’s judgment (note 1 above).
8 Mwelase LCC (note 4 above) paras 5–7.
institutions of a Special Master. These measures did not yield results and the parties found themselves in the LCC again. Only this time, the applicants persisted in their claim for a Special Master. The LCC, considering the nature and scale of the problem, and noting its ‘ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts’ (derived from s 29 of the Land Reform (Labour Tenants) Act), validated the appointment of a Special Master of Labour Tenants. Ncube AJ reasoned that the mandate of the Special Master would be circumscribed, and the Special Master would act as an agent of the court to aid the Department in processing and adjudication of land claims brought under the Act. The Special Master would be tasked with devising an implementation plan that would have a number of clearly demarcated elements.

The rationale behind appointing a Special Master would be to ensure effectiveness, continuity, and the provision of expertise - all while being independent of the Department to a certain extent.

### 1.2 Overturning by the SCA

On appeal, the SCA promptly overturned the decision on seven grounds: first, it held that the appointment of the Special Master was a ‘textbook case of judicial overreach’ and that it was a violation of the doctrine of separation of powers. Second, it stated that it would require a massive increase in the Department’s budget and drastic reallocations between budget items.

Third, it stated that there were no rules governing the appointment of a Special Master or its equivalent in South African law. Fourth, it stated that s 32(3)(b) of the Restitution of Land Rights Act 22 of 1994 (the law under which the LCC was set up) only permitted the LCC to ‘conduct any part of any proceedings on an informal or inquisitorial basis’, and did not constitute adequate authority for the appointment of a Special Master. Fifth, it stated that the LCC had not

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9 The LCC also found violations of various provisions of the Constitution, including s 195 on certain principles of public administration, s 33 on the right to administrative action that is lawful, reasonable and procedurally fair, as well as s 237, which requires that all constitutional obligations must be performed diligently and without delay.

10 The elements of the plan, which would then be approved by the LCC, were (Mwelase LCC (note 4 above) para 38, emphasis added):

(a) an assessment of total number of claims lodged to date, and the number which have not yet been processed and finalized,
(b) an assessment of the skill pool and other infrastructure required for processing labour tenant claims, and to what extent such skill pool and infrastructure is available within the Department of Rural Development and Land Reform,
(c) devising of targets, on a year-to-year basis, for the resolution of pending labour tenant claims, either by agreement or by referring the claim to the Court,
(d) a determination of the budget necessary during each financial year for carrying out the Implementation Plan, including both the Department’s operating costs for processing claims and the amounts required to fund awards made pursuant to applications in terms of s 16 of the LTA,
(e) plans for co-ordination with the Land Claims Court to ensure the rapid adjudication or arbitration of unresolved claims referred to the Court in terms of s 18(7) read with s 19 to s 25 of the [Labour Tenants Act]; and
(f) any other matters which the Special Master may consider relevant.

11 Mwelase v Director-General for the Department of Rural Development and Land Reform 2019 (2) SA 81 (SCA) (Schippers JA; Leach JA, Seriti JA and Willis JA concurring; Mocumie JA dissenting) (Mwelase SCA).

12 Ibid para 51, borrowing the phrase from Mogoeng CJ in Economic Freedom Fighters v Speaker of the National Assembly 2018 (2) SA 571 (CC) para 223.

13 Ibid para 6.
enquired as to why the Senior Manager (who had been appointed by way of a Negotiation Order in the interim stages of the case) could not adequately deal with the inefficiencies and how the Special Master would accelerate or improve the settlement of claims. Sixth, it held that the Special Master would take over existing functions of the Department, which would incur an extra cost incurred as well as an uncertainty about what would happen in cases of disagreement on budgetary priorities. Seventh, it sought to distinguish the legal position of referee (which the applicants had contended was a position analogous to the Special Master) from that of the Special Master, since the referees’ powers under South African law is strictly circumscribed and consented to by both parties. The Court also distinguished the Special Master’s mandate from that of the independent panel of experts appointed to oversee remedy implementation in Black Sash Trust v Minister of Social Development (Black Sash I), where the Constitutional Court had set up independent oversight of SASSA, the government agency responsible for social grant payments.

Importantly, however, there was a dissent from Justice Mocumie, who stated that the considerations that were taken into account by the majority did not: ‘tilt favourably on the scales to justice and equity’ and that ‘the social circumstances, historical reality of labour tenants, scope of powers of the LCC, specificity of our judicial methods to interpret transforming legislations and our courts’ ever available oversight powers would shape the institution of a Special Master in a way that makes it compatible, specific and appropriate (in) this context.

The judge also cautioned against interference with orders of the LCC, which is granted special powers and has expertise and experience.

1.3 Constitutional Court overturns the SCA judgment

In a judgment delivered by Justice Edwin Cameron, who had once written that ‘litigation is not the solution to all problems of social justice’, the Constitutional Court reinstated the order of the LCC, placing great emphasis on the specialist nature of the Court, its broad remedial powers, and the fact that there was clear systemic failure on the part of the Department to engage in processing of land claims in any meaningful way. It also stated that the LCC had at all times set the scope of the Special Master’s mandate itself and retained control over its role in formulating the remedy. At all times, the Court took pains to establish the culpability of the Department in precipitating the kind of action the LCC took. The salience of the issue in the national

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14 Ibid paras 44–45.
15 Ibid paras 48–49.
16 See s 38 of the Superior Courts Act 10 of 2013, and ss 21 and 28C of the Restitution of Land Rights Act.
17 Black Sash Trust v Minister of Social Development 2017 (3) SA 335 (CC) (Black Sash I).
18 Mwelase SCA (note 11 above) para 74.
19 Ibid para 79.
20 E Cameron ‘A South African perspective on the judicial development of socio-economic rights’ in L Lazarus, C McCrudden & N Bowles (eds) Reasoning Rights: Comparative Judicial Engagement (2014) 319, 338.
21 The judgment in Mwelase Con Court (note 1 above) para 69 noted that the Department ‘showed failing institutional functionality of an extensive and sustained degree. That cried out for remedy’.
22 Ibid para 59.
23 Ibid para 40: ‘The Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties.’
imagination also played a key role in the reasoning of the Court.\(^\text{24}\) Given the care with which the Court has in the past treated the question of remedy, the brevity of the majority’s reasoning is quite striking. The emphasis on the LCC’s discretion is especially curious, given how frequently the Constitutional Court has overturned lower court orders that were much less intrusive than the appointment of the Special Master.

Justice Jafta seised upon these points in his dissent. In a detailed discussion of the powers of the Special Master, Jafta pointed to the budgetary powers granted to the Special Master – which were notably absent from the powers of the independent committee of experts constituted in *Black Sash I*.\(^\text{25}\) Drawing on the classic case law on the limits of judicial power in budgetary decisions – *Doctors for Life, Soobramoney, Treatment Action Campaign* – Jafta J stated that he would have rejected the appeal.\(^\text{26}\)

There is much to note in these brief judgments by the majority and minority that makes the reasoning in *Mwelase* susceptible to criticism. In particular, the cursory manner in which the majority addressed the question of remedy and its strong emphasis on lower court discretion are worthy of critique. The minority’s reasoning is more substantive, but also raises questions about the structure of the judgment. Heretofore, the appropriateness of the intervention has been dealt with at the stage of interpreting the right. Indeed, all the quotations from Jafta J’s judgments that are included here were made in the course of interpreting rights, rather than determining the appropriate relief.

In some sense, then, the Constitutional Court’s judgment failed to clarify the relationship between right and remedy and to offer an account of how these two should co-exist in the structure of constitutional argument.

### 2. Does *Mwelase* provide judicially manageable standards for the grant of an invasive remedy?

Having discussed the grounds for reinstatement of the LCC order by the Constitutional Court in its majority judgment, in this section we assess the factors that can be distilled from the judgment to illustrate when remedial innovations like the appointment of a Special Master might be ordered in subsequent cases by the judiciary. We also recount the Court’s previous holdings on invasive remedies, since *Mwelase* builds on these existing criteria. Such a reconstruction of the existing case law crucially lays the groundwork for the development of factors and conditions that help overcome traditional separation of powers issues in the grant of remedies.

- Likelihood of government non-compliance with order – Invasive remedies are likely to be granted in cases where there is a likelihood of non-compliance with the court’s order. This is seen in the early cases of the Constitutional Court. In

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\(^\text{24}\) Ibid para 41: ‘South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before.’ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (TAC).

\(^\text{25}\) Ibid para 97.

\(^\text{26}\) *Mwelase* Con Court (note 1 above) paras 99–104.
Sibiya v Director of Public Prosecutions: Johannesburg High Court, the Court exercised a supervisory role in ensuring that the government’s non-compliance with its judgment in Makwanyane was remedied. The likelihood (or lack thereof) of governmental non-compliance was also a key factor behind the choice not to impose supervisory jurisdiction in TAC. Therefore, the conduct of government authorities is determinative for this criterion to kick into operation. In constitutions that have a textual judicial remedial mandate that is as broad as that in South Africa, and guided by the principles of creativity, innovation and effective vindication of constitutional rights, it may be useful to consider whether the principle of institutional comity can provide a benchmark. Certain principles of institutional morality flow from the separation of powers and frame and shape the interaction between the branches of government. Where there are departures from adherence to the principle, courts would be likely to intervene in a more concerted way. While Froneman J repeatedly invoked SASSA’s extraordinary intransigence in justifying the invasive remedy in Black Sash I, Cameron J in the majority judgment in Mwelase notes the repeated failure of the Department to comply in good faith with previous negotiation orders from the LCC, which assumes greater significance in the backdrop of the salience of land reform in the project of transformative constitutionalism.

• Degree of harm by non-grant/consequentialism – It is almost trite to state that the graver the likelihood of harm, the likelier the Court will be to impose an invasive remedy. This does have some more concrete elements, such as the importance of the right at issue as well as practical concerns such as ‘how many people will be affected by the order and whether the result of delay will be discomfort or death or something in between.’ It is also important whether a delay will result in irreparable harm, as was the case with death row inmates in Sibiya. Take for example, the supervisory order issued by the Court in Black Sash I where the Court was concerned with the consequences of non-compliance with its orders relating to the redoing of the tender process for appointing an external agency to handle social grant payments. The Court had reasoned that this was not only important for maintaining the rule of law and legality in the tender procurement processes, but also key to ensuring the uninterrupted payment of social grants on which millions depended. This line of reasoning also undergirded its decision, in

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27 Sibiya v Director of Public Prosecutions: Johannesburg High Court [2005] ZACC 6. The release of supervisory jurisdiction was done in Sibiya v Director of Public Prosecutions [2006] ZACC 22 after the Constitutional Court was satisfied that adequate steps were taken to comply with its orders in S v Makwanyane 1995 (3) SA 391.
28 Ibid.
29 TAC (note 24 above) paras 116–118.
30 See the Constitution s 38, 172.
31 Fose v Minister of Safety and Security 1997 (3) SA 786 para 69.
32 See for example Black Sash I (note 17 above) para 13: ‘Until the forced reply to this Court’s directions there has certainly been no reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government’.
33 Ibid para 10.
34 K Roach & G Budlender ‘Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable’ (2005) 122 South African Law Journal 325, 333.
35 Black Sash I (note 17 above).
AllPay I, to suspend its order of invalidity conditional upon the successful reconduct of the tender process in which certain procedural flaws were alleged by the unsuccessful bidder. In Mwelase, the Court is concerned about the abject and varied failures of the Department, as well as the centrality of the process of granting ownership rights to labour tenants to the ‘project of land reform and restitution that our country promised to fulfil when first the interim Constitution came into effect, in 1994, and after it the Constitution, in 1997’. Therefore, a line of consequentialist reasoning that considers the consequences of not granting an invasive remedy appears to guide the Court. This may not necessarily be a bad thing. It is our view that in disputes that have an impact on the fulfilment of a socioeconomic right, courts should be guided by the effect that a refusal of remedy grant would have upon the most vulnerable constituencies.

- Clarity of remedial steps – The clarity of steps to be taken to remedy the problem is a relevant factor while granting a remedy that possibly impinges on the separation of powers. Here it is important to restate that since the purpose of complex remedies like that of the Special Master are 1) to determine future steps to be taken to remedy a problem, and 2) to ensure compliance, it would depend on the specific context to see how these two factors play out. With respect to its early cases, the South African canon of social rights case law indicates that this was the reason for the reporting requirement (and an unstated retention of supervisory jurisdiction) in the High Court order in Grootboom. In the more recent cases, the need for greater clarity on possible remedial steps (which can be achieved by greater stakeholder consultation) led the Court to order meaningful engagement in eviction cases. In contrast, while the steps needed to remedy the problem in Black Sash were clear; at each stage, newer considerations (a classic polycentric problem) could be introduced. In addition, there was also the spectre of non-compliance, and so the Court opted for the retention of supervisory jurisdiction. In Mwelase, the Court is largely agnostic about the exact line of action that the Department should pursue in order to remedy its failure to process the labour tenants’ claims, and opts to defer to the expertise of the LCC in the appointment of an external agent as the best way forward. Courts adjudicating issues arising out of complex polycentric social problems routinely face issues of democratic legitimacy and a lack of information and expertise. The appointment of external experts helps alleviate some of these problems. Therefore, depending on the clarity of the way forward to address the underlying problem, as well as the likelihood of governmental compliance identified above, the Court is likely to fashion an invasive remedy of the kind seen in Mwelase.

- Underlying issue salience and systemicity – The salience of the underlying issue in the public imagination appears to be a motivating factor in the degree of

36 See AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (1) SA 604 (CC) (AllPay I) para 56: ‘Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role (in the approach to the remedy.’

37 Mwelase Con Court (note 1 above) para 2.

38 Grootboom v Oostenberg Municipality 2001 (1) SA 46 (Grootboom).

39 Black Sash I (note 17 above).
invasiveness of the remedy, and consequently whether the court will retain supervisory jurisdiction. While it is true that the Constitutional Court has retained supervisory jurisdiction even in cases where an issue as ‘everyday’ as evictions are concerned, when supervisory orders are combined with more invasive steps such as the appointment of external agents, the salience of the underlying is very relevant. The Court takes great pains in Mwelase, Black Sash and AllPay to establish, in addition to the endemic government ineptitude and insensitivity on display in both the cases, the systemicity of these cases, as well as their importance to the public. Here, we use systemicity in a very particular sense – as the characteristic of an individual case to be representative of an underlying systemic problem of governmental incompetence, inattentiveness, insensitivity, or persistent non-compliance with a judicial order, which has a knock-on effect on the realisation of a socioeconomic right. In these cases, the problem was not with the usual quandaries courts face while adjudicating socioeconomic rights issues – those of democratic legitimacy in giving content to a right, or of lack of institutional fit in determining steps to realise it. Rather, they were issues of (mis)governance. In Mwelase, the Court could point to the inertia of the DLR and its responsible Minister (against whom contempt proceedings were brought), and order an invasive remedy to attempt to engage with the problem of land reform – an issue that has immense currency in public discourses around the Constitution today. Similarly, with the invasive remedy in Black Sash, it is critical to appreciate that over 15 million people rely on social assistance in South Africa, a number that has only increased following the global Covid-19 pandemic. What remains constant is SASSA’s incompetence in handling payments and the kinds of deleterious effects such ineptitude has had. This shows how salience is a factor in determining if courts are willing to expend their institutional capital on invasive remedies.

40 The reality of everyday violence experienced by South Africa’s public at the hands of state authorities, especially in respect of evictions and demolition of homes, has also been noted by supranational organisations. See for example, the United Nations Committee on Economic, Social and Cultural Rights ‘Concluding Observations on the Initial Report of South Africa’ (2018) UN doc. E/C.12/ZAF/CO/1 11: ‘The Committee is also concerned at reports of illegal evictions and the excessive use of force during evictions, as well as evictions taking place without municipalities providing suitable alternative accommodation.’

41 Take for example its orders in Pheko v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (Pheko).

42 Mwelase Con Court (note 1 above) para 3 per Cameron J: ‘At issue is the extent of the Land Claims Court’s power to fashion and implement remedies to secure practical justice for claimants who, 25 years into our democracy, still have no secure tenure – even though a statute promised them this more than 20 years ago.’

43 Note 17 above para 1 per Froneman J: ‘One of the signature achievements of our constitutional democracy is the establishment of an inclusive and effective programme of social assistance. It has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment. In so doing it has given some content to the core constitutional values of dignity, equality and freedom. This judgment is, however, not an occasion to celebrate this achievement. To the contrary, it is necessitated by the extraordinary conduct of the Minister of Social Development (Minister) and of the South African Social Security Agency (SASSA) that have placed that achievement in jeopardy.’

44 Note 36 above.

45 See H Klug ‘Book review: Land Reform and the Future of Land Ownership in South Africa’ (1992) 109 South African Law Journal 373 and H Klug ‘Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa’ (2018) 34 South African Journal of Human Rights 469.

46 See J Maromo ‘DA to report SASSA to Human Rights Commission over social grants payment “ineptitude”’ 5 June 2020 IOL <https://www.iol.co.za/news/politics/da-to-report-sassa-to-human-rights-commission-over-social-grants-payment-ineptitude-48966076?fbclid=IwAR0yMjHXwznJGMy1SY4hXUTpycGd16da-tdB8HxTaK2Fdx2KRDpAIGnY>
• Political and electoral salience of issue – Land reform has posed a particularly difficult and multifaceted challenge to constitutionalism in South Africa. The sharp question in *Mwelase* related to the failure to process claims from labour tenants by the Department of Land Reform. This in itself is a crucial question affecting the lives of millions of South Africans, many of whom live in precarious conditions. However, as Justice Cameron’s opening paragraph reminds us, land reform provides both a ‘promise for structural change’ and also a possibility for the improvement to the lives of labour tenants, one of the most pressing and explosive political issues facing the country. It is probably not an understatement that the survival of the constitutional project in South Africa will depend to a great extent on the success of land reform and restitution. In this sense it is also important to note that the government has had a weak record in other areas of land reform apart from labour tenants’ rights. While the government has made some strides in the redistribution of land, the ownership of arable land still rests with in the hands of the few, land invasions and attendant evictions run rampant, and the pace of government land reform is not nearly adequate to quell public anger and resentment. The Economic Freedom Fighters (EFF) have also taken up the cause of land reform, reframing the shortcomings in this area as a direct challenge to the moral legitimacy of the mandate of the African National Congress (ANC) and the broader constitutional project – all the while increasing the party’s electoral support. As such the subject matter of the case could not be more pressing and as the political and administrative branches have failed to perform their duties, judicial intervention seems warranted in this particularly crucial domain for the future of the South African constitutional project.

• Personal conduct of government officials – One of the central factors that guided the development of the Special Master remedy by the Court in *Mwelase* is the systemic, rather than personal failure, that lay at the heart of the Department’s failure to process labour tenants’ claims. Cameron J articulated what appears to be a coherent standard that has the capacity to guide future claimants in showing ‘failing institutional functionality of an extensive and sustained degree’ that ‘cried out for remedy’. He went on to state that the LCC’s exercise of its discretionary powers is tempered by the fundamental issue at hand being *institutional, not personal*. It is

47 JL Gibson *Overcoming Historical injustices: Land reconciliation in South Africa* (2009) 1; J Tuovinen ‘Land reform in the time of populism: The law and politics of land reform in South Africa’ in A Sajo & R Uitz (eds) *Critical Essays on Human Rights Criticism* (2020) 157. Land reform was already a challenging topic during the negotiation for the new Constitution: L Segal & S Cort *One Law, One Nation: The Making of the South African Constitution* (2012). On the drafting of the property clause, see: M Chaskalson, ‘The property clause: Section 28 of the Constitution’ (1994) 10 South African Journal of Human Rights 131. For two high-level government panels analysing the success of land reform, see: High Level Panel on the Assessment on Key Legislation and the Acceleration Of Fundamental Change Report of the High Level Panel on the Assessment on Key Legislation and the Acceleration Of Fundamental Change (25 November 2017) <https://www.parliament.gov.za/press-releases/download-report-high-level-panel-assessment-key-legislation-and-acceleration-fundamental-change>; Final report of the presidential panel on land reform and agrarian reform for his excellency the President of So">

48 A Akinola ‘Land reform in South Africa: An appraisal’ (2018) 10 Africa Review 108.

49 H Wissink ‘The struggle for land restitution and reform in post-apartheid South Africa’ in A Akinola & H Wissink (eds) *Trajectory of Land Reform in Post-Colonial African States: Advances in African Economic, Social and Political Development* (2019) 67.

50 *Mwelase* Con Court (note 1 above) para 69.

51 Ibid.
also important to note here that the SCA’s dismissal of the contempt of court claim against the Minister of DLR was upheld in appeal in *Mwelase*. *Mwelase* therefore departs from a recent development in case law of ordering personal costs against public officials, as seen in *Black Sash* against the Minister of Social Development and the attachment of state assets censure that is seen in *Linkside*. It remains to be seen how this standard will play out in future litigation, but it is quite likely that the impleading of public officials as parties to suits in cases of systemic failure will continue and will have to be determined on a case-by-case basis.

- Extent of diffusion of powers in cooperative government – One of the persistent challenges in diffused systems of cooperative government like that in South Africa is pinpointing the authority responsible for a particular act. While the government is constituted as national, provincial and local spheres that are ‘distinctive, interdependent and interrelated’, there is ‘a clear hierarchy which runs from national government down to provincial government down to local government.’

One of the many implications of such a structure is the allocation of responsibility for public service provisioning like housing or sanitation to be determined primarily at the local level with auxiliary inputs from the provincial and national governments. Conversely, areas like land reform as well as the provision of social grants are administered by a central authority. This results in a heightened allocation of responsibility, power and competence to a national authority, and lower levels of diffusion. We believe this to be a predictor of the Court’s willingness to use invasive remedies. In *Black Sash*, it was the inertia, incompetence and ‘extraordinary conduct’ of a single federal government agency, SASSA, which precipitated a ‘national crisis’, that led the Court to order its intrusive remedy. This was also the case in *Mwelase* and *Madzodzo*, where self-standing government departments and their ministers were called to task for their delicts. Therefore, the more clearly identifiable the government department or the source of a delict, the greater the likelihood of an order that is invasive in nature. A guiding principle of this nature may comport with our intuitions about higher courts’ deference to local institutions of governance. Yet it risks privileging certain categories as meriting strong judicial intervention into disputes whose origin can be traced back to federal, rather than provincial, government departments.

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52 In *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209 para 35, this is described as a ‘blunt instrument […] to address and resolve complex social problems […]’ and courts should look to orders that secure on-going oversight of the implementation of the order.

53 *Mwelase* Con Court (note 1 above) para 77.

54 *Linkside v Minister for Basic Education* [2015] ZAECGH C 36.

55 S Woolman & T Roux ‘Co-operative government & intergovernmental relations’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2013).

56 Section 40 of the Constitution.

57 *Cape Metropolitan Council v Minister for Provincial Affairs and Constitutional Development* 1999 (11) BCLR 1229 (T) para 2. Woolman & Roux (note 55 above) 14–10 note that the ‘apparent autonomy and independence’ of the local government sphere is ‘relative and limited by unequivocally expressed constitutional restraints. Its status is, to a large extent, that of a junior partner in the trilogy of spheres that make up the government of the country’.

58 *Grootboom* (note 38 above) paras 39–40, quoted in Woolman & Roux (note 55 above).

59 *Black Sash I* (note 17 above) para 1.

60 Ibid para 51.
Institutional fit and epistemic superiority – A persistent refrain about the adjudication of questions that involve an element of expertise is that of epistemic uncertainty that inheres in complex social problems. This manifests itself in two ways. The first is the usual practice of superior appellate judicial fora like the Constitutional Court not engaging in fact-finding and leaving such matters to lower courts. The second is the way in which epistemic uncertainty serves to constrain expansive judicial orders due to courts’ lack of expertise in technical matters.61 Both of these factors operate parallelly in the affirmation of the LCC’s holding in Mwelase. By locating the power granted to the LCC to ‘make any order that is just and equitable’ and analogising it with its power to strike down a statute on the ground of constitutional invalidity, Cameron J likely sought to limit future application of a remedy that is as invasive as that of the Special Master. The judge insisted that the power ‘is no invitation to judicial hubris’ but rather ‘an injunction to do practical justice, as best and humbly, as the circumstances demand, and that it would be wrong to understate the breadth of these remedial powers’. It is curious that the remedial power of the LCC is located by Cameron J in terms of the provision permitting it to ‘conduct any part of any proceedings on an informal or inquisitorial basis’,62 rather than relating it either s 172 of the Constitution, or to the alleged governmental delict of the failure to take a decision as contemplated in terms of s 6(2)(g) of the Promotion of Administrative Justice Act, 2000. We believe this nod to the epistemic superiority of the LCC should be seen as a diagonal separation of judicial competence, which serves to both respect the relative expertise of some specialist courts in remediying complex problems, as well as to limit the possible future application of an invasive remedy – unless it is specifically ordered by a specialist court that is set up to deal exclusively with a particular issue (whether or not arising from South Africa’s apartheid history).

Nature and functions of the invasive remedy – The LCC, while granting the remedy of the Special Master, granted it the power to draw up a plan. Such a plan would contain an assessment of claims lodged to date and how many were yet to be processed; available human resources to process such claims; the devising of labour tenant claim-resolution targets; a determination of the budget necessary during each financial year for carrying out the plan; coordination plans to ensure rapid adjudication or arbitration of unresolved claims; as well as a residual power to decide on any other matters that the Special Master may consider relevant.63 These powers are clearly extensive and fairly unprecedented in South African public law jurisprudence. What is important is that the Special Master would act as an agent of the LCC. Cameron J does not fully engage with the LCC’s perfunctory dismissal of the Senior Manager as a possible option for solving the problem of departmental inertia (as averred by the SCA), and it is clear that he believed that there was a breach of the obligation to negotiate in good faith that could have possibly made an internal candidate from within the Department a viable choice. All of this indicates a remedial power that is far greater, including the drawing of budgets, than what the Court was willing to do in Black Sash. The panel of experts

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61 J King Judging Social Rights (2012) 107.
62 See Restitution of Land Rights Act s 32(3)(b).
63 Mwelase Con Court (note 1 above) para 26.
in *Black Sash* included the Auditor General and suitably qualified independent legal practitioners and technical experts, who would jointly evaluate and report to the Court on SASSA’s compliance with the terms of its orders. Similarly, the auditors in *Madzodzo* would evaluate compliance with the terms of the court’s orders. The budgetary powers granted to the Special Master are wide-ranging and almost dispositive in nature. It remains to be seen whether future remedial jurisprudence will adhere to this position or whether the dissent by Jafta J in *Mwelase* will prove to be the controlling position.

3. The right to food litigation in India: an equilibrating approach

In the previous section, we identified certain factors that would attenuate the usual separation of powers concerns that accompany the provision of remedies in cases and thus provide nuance to our understanding of the kinds of remedies that the Constitutional Court can be expected to grant in future cases. In this section, we apply these factors to the instance of the *RTF* litigation in India – a case that pushed the envelope for the kinds of things that courts could or could not do. The primary motivation for this is to test the application of our factors, which can be normative in nature, to a case decided by a similar apex court, on an issue with similar underlying structural problems. A secondary motivation is to further extend the lively conversation about the judicial behaviour of apex courts relative to their respective positions in the constitutional scheme with respect to other political actors. This inquiry is methodologically justified to seek answers to the initial research question formulated at the outset of the article, as well as the lower hanging fruit of the *RTF* case having been used as a point of authority in the judgments of the LCC and the Constitutional Court.64

3.1 The Supreme Court of India and social rights: a primer

The social rights jurisprudence of the SC of India is somewhat puzzlingly celebrated in the academic literature.65 This of course might have much to do with an apex court that is not doctrinally bound to any known legal limits in terms of its remedial powers, its feted position in the Indian middle class public imagination, and its pious pronouncements that straddle an incompetent, corrupt bureaucracy on one hand, and a dysfunctional, often gridlocked political system of parliamentary decision-making on the other.

The SC’s interventions in the social rights arena have largely been on the basis of public interest litigation (PIL) by strategically placed NGOs,66 but have been

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64 *Mwelase* LCC (note 4 above) para 22; *Mwelase* Con Court (ibid) para 35.

65 For example, D Bonilla Maldonado ‘Introduction: Toward a constitutionalism of the global’ in D Bonilla Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (2013) 1.

66 The concept of public interest standing, well known to South African public law in s 38(d) of the Constitution, was relatively alien to Indian litigation practice. It was a judicially led relaxation of standing requirements in *S.P. Gupta v Union of India* that was key to the surge of cases that sought to engage with social and economic deprivation: ‘If public duties are to be enforced and social collective “diffused” rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights.’ See *S.P. Gupta v Union of India* AIR 1982 SC 149 para 19.
constrained (until recently) by the lack of judicially enforceable socio-economic rights constitutional provisions or rights-based social welfare legislation. The political environment within which the Court operates has been crucially relevant to its interventions. Previous generations of doctrinal scholars and more recent empirically grounded work have pointed to its early cases in the 1980s as being motivated by a need to 'bury its emergency past', as well as trying to win the support of the 'huge underclass of people for whom the Constitution’s promise of social and economic transformation had yet to be made real'. This phase ran between 1980 and 2000, with the court hearing cases involving the rights to work, shelter, health, education and food, while grappling with 'how much deference to grant to the executive and legislative authorities involved, especially on questions of budgetary allocation of funds for particular social rights.'

The RTF case, which was cited by the LCC in Mwelase to derive authority for the appointment of a Special Master, is part of the third phase, where the judiciary is characterised as being 'much more confident about its authority to rule on social rights issues' and being 'deeply immersed in politics'. This consolidation of a democratic instrumentalist understanding of the Court’s role has been facilitated through 'public and political acceptance of the Court’s interventionist role' and closer attention to 'questions of implementation and monitoring of its orders'.

### 3.2 The Right to Food case

The Right to Food was inaugurated through PIL brought by the People’s Union of Civil Liberties (PUCL) that had been built on the back of sustained grassroots activism by a number of organisations that had been working on the issue of rural hunger for a number of years. Due to a shortage in rainfall in the 2001–2002 monsoon, there were drought-like conditions in a number of states in the north west of India, despite

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67 The social rights judgments of the Indian Supreme Court have thus far relied on an interpretation of the right to life, combined with a reading of the directive principles of state policy, which are textually unenforceable.

68 In the period between 2004 and 2014, the Parliament enacted a number of rights-based legislation aimed at securing the rights to education, employment guarantee, food security and information. See generally, J Chiriyankandath, D Maiorano, J Manor & L Tillin (eds) The Politics of Poverty Reduction in India: The UPA Government, 2004 to 2014 (2020); S Rupareli ‘India’s new rights agenda: Genesis, promises, risks’ (2013) 86 Pacific Affairs 569; for an account of judicial treatment of cases brought on the basis of these laws, see G Mukherjee ‘The Supreme Court of India and the inter-institutional dynamics of legislated social rights’ (2021) 53 Verfassung und Recht in Übersee 411.

69 U Baxi The Indian Supreme Court and Politics (1980) 122–123, 233–245; generally, SP Sathe Judicial Activism in India (2002); J Cassels ‘Judicial activism and public interest litigation in India: Attempting the impossible’ (1989) 37 American Journal of Comparative Law 495.

70 T Roux The Politico-Legal Dynamics of Judicial Review – A Comparative Analysis (2018) 148–150.

71 The Emergency was a period of social and political turmoil in Indian politics, with a large number of civil-political rights violations, which was aided by a supine judiciary.

72 A Thiruvengadam ‘Characterising and evaluating Indian social rights jurisprudence into the 21st century’ unpublished paper based on a presentation at the Second APU Law and Development Conference held in August 2013 <https://azimpremjiuniversity.edu.in/SitePages/pdf/Characterising-and-evaluating-Indian-social-rights-jurisprudence-into-the-21st-century.pdf>.

73 Roux (note 70 above) 148.

74 Ibid 149.

75 Thiruvengadam (note 72 above) 17.

76 L Birchfield & J Corsi ‘Between starvation and globalization: Realizing the right to food in India’ (2010) 31 Michigan Journal of International Law 691; P Chitalkar & V Gauri ‘India: Compliance with Orders on the Right to Food’ in M Langford et al (eds) Social Rights Judgments and the Politics of Compliance: Making It Stick (2017) 288.
which the state governments had desisted from an official declaration to that effect.\textsuperscript{77}
The SC of India delivered a judgment in response to a series of petitions\textsuperscript{78} by the Peoples’ Union of Civil Liberties seeking ‘that the right to food should be recognised as a legal right of every person in the country, whether woman or man, girl or boy’.\textsuperscript{79} What followed was a series of orders, which were not intended to be completely dispositive of the original petition and the relief sought. Since the Constitution of India does not contain a justiciable right to food, the Court interpreted the right to life\textsuperscript{80} in light of the unenforceable, but morally and politically salient\textsuperscript{81} directive principles of state policy. The interpretive gymnastics by the SC of India, in respect of the gradual expansion of Article 21 to include a panoply of rights, has not been accompanied by a strong remedial approach that is focussed on the implementation of their judgments, resulting in declarations without a concomitant remedy.\textsuperscript{82}

The RTF case therefore marked a departure from this standard practice. These orders converted eight federal government-run schemes relating to food, livelihood and social security, into an entitlement. Moving beyond the scope of the original relief sought, one of the orders from the case in 2008 set up a commissionerate ‘to track side-by-side hunger and the implementation of interim orders relevant to the RTF case across the country’.\textsuperscript{83} A commentator, who had been appointed as one of the commissioners in the case, hails it as having ‘paved the way for an enforceable right to food for the first time, preventing governments from removing or diluting these schemes, under pressures to reduce fiscal burdens’.\textsuperscript{84} Additionally, the orders also set up a monitoring mechanism by appointing a commissioner to oversee the implementation and performance of a number of government schemes. This institutional form consisted of a separate commissionerate, which had its offices within the premises of the SC building, whose officers were tasked with reporting non-compliance with the court. They operated in close cooperation with allies – activists and civil society organisations through the right to food campaign.\textsuperscript{85}

\textsuperscript{77} The legal consequences of the declaration of drought are manifold, including the kicking-in of a special emergency legal regime which includes the possibility of greater financial outlays from the Central government as well as dedicated funds from states in the realms of social provisioning. See Ministry of Agriculture, Government of India \textit{Manual for Drought Management} (2009) <http://agricoop.nic.in/sites/default/files/DroughtManual.pdf>.

\textsuperscript{78} People’s Union for Civil Liberties \textit{v} Union of India Writ Petition (Civil) No. 196 of 2001 (India).

\textsuperscript{79} H Mander ‘Food from the courts: The Indian experience’ (2012) 43 \textit{IDS Bulletin} 17.

\textsuperscript{80} The Constitution of India, 1949 art 21: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’

\textsuperscript{81} T Khaitan ‘Constitutional directives: Morally-committed political constitutionalism’ (2019) 82 \textit{Modern Law Review} 603, 605.

\textsuperscript{82} See generally M Tushnet \textit{Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law} (2008).

\textsuperscript{83} Chitalkar & Gauri (note 76 above) 288, 299: ‘The commissioners are empowered to enquire into any violation of the court’s orders and to demand compliance. They analyse central and state governments’ data to monitor the implementation of various food and employment schemes, receive complaints of non-compliance from grassroots organisations and set up enquiry committees for verification purposes. They also work with governments to address obstacles to implementation.’

\textsuperscript{84} Mander (note 79 above) 18.

\textsuperscript{85} S Hertel ‘Hungry for justice: Social mobilization on the right to food in India’ (2014) 46 \textit{Development and Change} 72.
Over time, the commissioners began to make a number of recommendations that the court sought to impose not only on the federal government, but also on a number of state governments who had been joined to the case. The SC ordered these states to identify ‘vulnerable groups under their respective jurisdiction and ensure that these groups are informed as to the way in which their right to food may be satisfied.’ Strategic litigation of this kind was only one limb of the organisational matrix of the social movements that coalesced around the case, along with the burgeoning use of a grammar of constitutional rights to articulate demands. The prevailing political climate helped advance the case, with members of opposition parties to the ruling Bharatiya Janata Party coalescing around civil society organisations in support of the cause of ending rural starvation deaths.

It has also been argued that the case ‘increased the visibility of civil society groups and their leverage over the state’, resulting in their presence becoming stronger and more organised in these sectors. This eventually led to their emergence as a more cohesive force in national political discourse that culminated in their involvement in the framing of the food security law. In this case the Court was able to galvanise both political and civil society around a publicly salient issue, but one which often suffered due to bureaucratic inertia and a legislative blind spot.

This blind spot was addressed by way of the enactment of the National Food Security Act, 2013, which sought to crystallise what had become legal entitlements due to the RTF litigation discussed in the previous paragraph. In this way, the set of orders in the RTF case show how courts can sometimes be receptive to a popular outcry about crises of maladministration, corruption, or political stasis, especially if the underlying issue has broad national salience.

The RTF case is now regarded as a high-water mark for social rights jurisprudence in India and has been a goldmine for the development of comparative law jurisprudence for courts across the world. It has been used as authority for at least three propositions: first, that courts can mould their role conception to that of a catalytic one in certain categories of cases; second, that the RTF case exemplifies judicial role that is dynamic in nature, which looks to ‘improve the performance of political institutions through time’, while remaining unconcerned with the ‘classic counter-majoritarian difficulty or the dilemma of courts imposing on democratic space and taking on legislative roles’, and third, that it is an example of the court engaged in an exercise

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86 D Landau ‘Courts and support structures: Beyond the classic narrative’ in EF Delaney & R Dixon (eds) Comparative Judicial Review (2018) 226.
87 RA Kagan, D Kapiszewski & G Silverstein ‘New judicial roles in governance’ in Delaney & Dixon (ibid) 142; Delaney & Dixon Research Handbooks in Comparative Constitutional Law (2018) 144.
88 See its use by Ncube J and Cameron J in the Mwelase judgments.
89 Role conception places an emphasis of the ‘understandings courts have of themselves’, where they ‘must contend with their own forms of legitimacy, in order to maintain the justification for their ongoing democratic role, adherence to their opinions, and execution of their orders.’ K Young Constituting Economic and Social Rights (2012) 171, (but also chapter 6, providing examples of courts functioning in a catalytic manner in South Africa, India, and Colombia).
90 Young (ibid) 173, conceptualises the role as one that tends to ‘lower the political energy that is required to change the protection of economic and social rights, or at least the way in which the government responds to the protection of economic and social rights’, by seeing itself as being ‘in productive interaction with other political and legal actors’.
91 D Landau ‘A dynamic theory of judicial role’ (2014) 55 British Columbia Law Review 1501.
of ‘bounded deliberative democracy’, which envisions a role for courts in human rights adjudication that ‘strengthens the deliberative potential of democracy, displacing interest bargaining in the context of human rights’.92

This is all well and good, until courts that are considered catalytic, dynamic or engaged in bounded deliberative democracy, stop acting the way that they have done in past cases. It is trite to state that courts are not monolithic, they rarely ever speak in one voice,93 and have almost distinct phases where their approaches to adjudication and the nature and volume of case-law on a given subject matter area vary widely.94 There is adequate evidence to suggest that the legally unbounded nature of the SC’s PIL has been overwhelmingly in favour of business interests over the rights of the poor for which it was originally envisaged,95 as well as the fact that a large majority of the Court’s interventions in the last ten years in the social rights domain had come from the bench of a single judge – Justice Madan Lokur, in a 31-member court.

Courts which look to cases like the RTF litigation in India for inspiration or authority for a certain remedial proposition on account of its effectiveness or similar social circumstances should exercise caution, since they often do not appreciate the background political circumstances and the critical mass of cross-class public salience that the issue held at the time when it is decided. This becomes crucial when asking why it is that the remedial innovation witnessed in the RTF case has never been replicated in subsequent cases at the Supreme Court of India, despite the persistence of the underlying issues it sought to address.

Therefore, we ask whether the structural and issue-specific factors we identified in the previous section can help us understand the conditions for the interventions of apex courts in a given case and assess convergences and divergences in Mwelase and the RTF cases. While all of the factors we identified were present in both of these cases, they vary widely. We find similarities or relative convergences in the likelihood of compliance, political and electoral salience of issue, the personal conduct of ministerial or government officials, and the systemicity of the problem, there are dissimilarities or relative divergences in the litigation history, the degree of harm by non-grant/consequentialism, the clarity of remedial steps, the extent of diffusion of powers/federalism that undergirded the problem, the approaches to the question of institutional fit or epistemic superiority of the courts, and the approaches to nature and functions of the invasive remedy.

3.3 Convergences between Mwelase and Right to Food

We have taken pains to establish how courts, beginning from the LCC, right up to the SCA, persistently invoked South Africa’s apartheid history and how extensive and effective land reform was key to reconciling with this past. In the RTF litigation, the
The court was entertaining a PIL filed by the PUCL invoking the SC’s jurisdiction under art 32 of the Constitution of India to pass orders to the Central and concerned State governments.

Hunger and malnutrition have always been a problem in India, but had rarely been used as a political tool in this way prior to this case. The extensive coverage by the national and local media ensured that the issue became difficult to ignore and non-compliance with court orders was costly for the government. At the time, the political economic landscape of media coverage was also changing, with increased attention to starvation deaths proving to be an uncomfortable truth juxtaposed against international media coverage of India as an emerging economic power. However, until the time when the Congress party (the political opposition) found that it could ally with members of civil society to press the issue of malnutrition deaths in a judicial forum, it was an issue that was relatively underutilised in political discourse. The Congress party, which was campaigning to be re-elected in the national elections in 2004, weaponised the rulings of the Court in the *RTF* case, and included a promise in its manifesto to enact a law on food security if elected. This showed that the SC intervention opened up discursive spaces that could be used by strategically placed civil society and political actors to convert policy issues into a grammar of rights.

The orders of the SC in the *RTF* case display a marked reluctance by the Court to accept that government *compliance* with its orders were likely without the existence of an external monitoring mechanism. This may be on account of systemic failures in the Indian system of public administration of the food distribution system, on account of which the bureaucratic heads of a number of states were joined to the litigation. There is also a marked culture of mistrust that exists between what is seen as an efficient court and a lackadaisical public administration. The likelihood of non-compliance however is not usually seen as being of a personal nature, much like what the Constitutional Court in *Mwelase* emphasises, but representative of a systemic malaise. This leads us to the final convergence between the *RTF* case and *Mwelase* – the question of systemicity, which was a factor in guiding the Court’s decision.

### 3.4 Divergences between *Mwelase* and Right to Food

The consequentialist reasoning that the Constitutional Court in *Mwelase* uses was less on display in the reasoning of the SC of India in the *RTF* case. However, as already discussed, it needed a set of interpretive semantics in order to hold that the right to food was a part of the right to life, as well to convert existing government schemes aimed at alleviating food insecurity into justiciable entitlements. The Court was less clear about the way forward for the implementation of the remedy, after having designed it using a set of prayers advanced by the petitioners, who were themselves grassroots organisations with a sense of what would work. Therefore, unlike the Special Master in

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96 J Dreze ‘Democracy and the right to food’ (2004) 17 *Economic and Political Weekly* 1723–1731.
97 Chitalkar & Gauri (note 76 above) 307.
98 S Friedman & D Maiorano ‘The limits of prescription: courts and social policy in India and South Africa’ (2017) 55 *Commonwealth & Comparative Politics* 353, 357.
99 Ibid.
Mwelase, the SC commissioners were not in charge of designing remedies and devising budgetary plans, but rather simply in charge of coordinating across a range of civil society actors and government institutions at the horizontal level in order to ensure compliance with a set of predetermined plans. The question of diffused responsibility in federal systems also assumes importance, since the lack of institutionalised coordinative mechanisms between national, state, and local governments is a persistent problem for welfare delivery systems in India. The Commissioners in the RTF litigation were tasked with also being nodal agencies for better coordination. Finally, it is also important to stress that the Court was operating in uncharted waters, without the existence of a legislative framework to guide the question of food security, and was therefore playing a role that was more dialogic in nature and concerned primarily with the implementation of existing discretionary public distribution system entitlements parsed into the idiom of justiciable rights.

3.5 An emboldened court, a government on its back foot: contrasts and similarities

The interventions of an apex court in the remedial domain are heavily tempered by the surrounding social, political, economic circumstances, as well as the kinds of cases that are brought before it by parties, often depending upon their private interests. In the kinds of cases discussed, there is a classic dilemma on display: these individual cases being representative of a deeper underlying systemic problem that is capable of being engaged with through governmental action. In the Mwelase case, the occupants of the Hilton College Estate in KwaZulu-Natal sought to draw attention through their case to the larger problem of governmental intransigence in processing land restitution or property rights claims. In the RTF litigation, PUCL, which was the main petitioner, sought to draw attention to the feeble federal and state-wise response to the conditions of drought in parts of the country, with a combined focus on the dysfunctional public food distribution system and resultant starvation deaths. The administrative failures in the RTF case were addressed by not only an interpretation of the right to life to include a right to food, but also a remedial dimension that was facilitated by the sustained public discourse surrounding starvation deaths around the country.

The remedial oversight mechanism of the commissioners that the SC created as a response to state incapacity was greatly helped by its alliances with civil and political society. Therefore, the precise socio-political moment at which the RTF decision was delivered assumes monumental importance to understand why the Court felt comfortable in expending its institutional capital to engage with a cause that had broad public support, but could have opened it up to executive reprisals. At the time, the BJP government was in power as part of a coalition of a number of centre-right parties, and legislative attacks against the court would likely have found few cross-partisan takers.

100 Y Aiyar & A Kapur ‘The centralization vs decentralization tug of war and the emerging narrative of fiscal federalism for social policy in India’ (2019) 29 Regional & Federal Studies 187.
3.6 The risks of unbounded judicial intervention

The RTF case represented the zenith of judicial intervention in the field of social rights. Such bold interventions were characterised by remedial innovation that have since disappeared from Indian social rights jurisprudence, despite the continued existence of the kinds of social problems that precipitated them. The SC’s recent reticence in intervening into the massive social and economic displacement resulting from the strict lockdown due to the Covid-19 pandemic has been widely criticised.101 So has its inexplicable zeal in causing a humanitarian crisis of unprecedented proportions with the citizenship registry exercise in the North Eastern Indian state of Assam, where the Court, using the same PIL jurisdiction, passed a number of orders requiring the sub-national government to detain persons without identity papers.102 Both of these actions have drawn widespread criticism, but are a symptom of the SC’s telic jurisprudence that has often sacrificed process for outcome – outcomes that often disfavour the vulnerable, but usually prove to be popular among a large majority of Indians today. Perhaps it is best to view the Court’s interventions, then, as now, as motivated by a desire to minimise ‘confrontations with government, seeking instead to promote dialogues involving itself, government actors, and civil society organisations’, while employing a shrewd political strategy of ensuring institutional longevity.103

4. Assessing the precedential value of Mwelase

4.1 A note on extra-textual factors in constitutional adjudication

Mwelase follows closely on the heels of Black Sash II, another major evolution in the Court’s remedial jurisprudence. And while Mwelase represents no doubt the more intrusive remedy, the tone of the Court in Black Sash II was no doubt more cautious. Writing for a practically unanimous court (Madlanga J concurred in the order but reasoned in a somewhat dissenting manner), Froneman J stated that: ‘It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis.’104

Curiously in Mwelase, the majority downplayed the intrusiveness of its order, emphasising deference to the LCC’s expertise in the matter. Yet Mwelase is arguably one of the most intrusive orders handed down by the Court to date. Upon the violation of one or more constitutional rights, a court has a range of remedial options available to it to redress such a violation. A separationist – rather than holistic – view of rights categories holds powerful explanatory appeal for the kinds of decisions that the

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101 R Mukherji ‘Covid vs. democracy: India’s illiberal remedy’ (2020) 31 Journal of Democracy 91, 99–100.
102 AP Kumar ‘More executive-minded than the executive: The Supreme Court’s role in the implementation of the NRC’ (2019) 31 National Law School of India Review 203.
103 PB Mehta ‘The Indian Supreme Court and the art of democratic positioning’ in M Khosla & M Tushnet (eds) Unstable Constitutionalism: Law and Politics in South Asia (2016) 234.
104 Black Sash I (note 17 above) para 51.
Constitutional Court has taken to rights questions over the years. Such an approach focuses our attention on institutions (‘helpful in addressing the “regime” of governance, which ultimately works to realise the right’), the consideration of bureaucracy and law (‘usually detailed as a regime’), political leverage (‘the social support structures that buttress claim-making’), the existing support structures for rights-based claim-making (social movements, cross-class support) and judicial calculations in light of fiscal and other pressures. A separationist approach also helps locate the factors we identify in the grant of a remedy within a coherent framework that is attentive to factors that are beyond the scope of legal hermeneutics or constitutional text. These theoretical approaches to the right-remedy gap are largely compatible with a range of theories on the actions of the Constitutional Court, including Theunis Roux’s idea of the Court exploiting ‘discretionary gaps’ in its decisions. There is good reason to believe that the Court engages in a set of calculations about the kind of decision that it takes – avoiding heading in directions that could potentially jeopardise its institutional position in a de-facto single party democracy, or a dominant party democracy. It is also important to remember that the background political conditions within which Roux’s theory holds true have been rapidly changing. Between 2004 and 2014, the ANC has witnessed a steady decline in support in both local and national elections. The emergence of the EFF as well as the decline of the organised labour movements like the COSATU has facilitated this process. The behaviour of apex courts under conditions of endemic institutional failure in single party dominant regimes has been adequately, although not exhaustively, theorised. It is generally argued that concerns about the separation of powers, democratic accountability, institutional fit, and popular legitimacy will influence outcomes in particular cases. This would generally imply deference to the coordinate branches of government in cases with an explicitly political nature, with a corollary adoption of a dialogic, cooperative approach to cases that implicate social goods like housing, healthcare, and education. However, this

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105 KG Young ‘The right-remedy gap in economic and social rights adjudication: Holism versus separability’ (2019) 69 University of Toronto Law Journal 124.

106 T Roux ‘Legitimating transformation: Political resource allocation in the South African Constitutional Court’ (2003) 10 Democratization (2003) 92, 93, where discretionary gaps are defined as ‘fissures in the normative structure governing the decision that enabled the court to fashion an outcome in accordance with its sense of the degree of intrusion into politics appropriate to the case concerned’.

107 See generally H Giliomee & C Simkins The Awkward Embrace: One-Party Domination and Democracy (1999).

108 M Paret ‘Beyond post-apartheid politics? Cleavages, protest and elections in South Africa’ (2018) 56 Journal of Modern African Studies 471, 473.

109 L Gentle ‘What about the workers? The demise of COSATU and the emergence of a new movement’ (2015) 42 Review of African Political Economy 666.

110 For a recent account of the influence of economic populism on politics inflected with the idiom of constitutional rights, see Roux (note 2 above).

111 S Choudhry ‘He had a mandate’: The South African Constitutional Court and the African National Congress in a dominant party democracy’ (2009) 2 Constitutional Court Review 1; R Dixon & S Issacharoff ‘Living to fight another day: Judicial deferral in defense of democracy’ (2016) Wisconsin Law Review 683; D Ma ‘Explaining judicial authority in dominant-party democracies: The case of the Constitutional Court of South Africa’ (2020) 52 Comparative Politics 1, 18.

112 D Landau ‘Institutional failure and intertemporal theories of judicial role in the global south’ in D Bilchitz & D Landau (eds) The Evolution of the Separation of Powers Between the Global North and the Global South (2018) 33; see also A Thiruvengadam ‘Revisiting the role of the judiciary in plural societies: A quarter-century retrospective on public interest litigation in India and the global south’ in S Khilnani, V Raghavan & AK Thiruvengadam (eds) Comparative Constitutionalism in South Asia (2009) 342, 363: ‘typically, courts are required to confront the problem of sick, failing, or recalcitrant institutions in PIL cases.’
account does not map neatly to the actions of the Constitutional Court. For one, disputes that have a political root have found their way into courts, replacing, as one commentator put it, ‘political warfare’ with ‘lawfare’. More recently, the Constitutional Court has ruled on the failure of the President to take action on the report of the Public Prosecutor. It is impossible to not note that these judgments have come in the wake of an ANC that is not only electorally weakened, but also dealing with exogenous and endogenous competition with the emergence of the EFF as well as the presence of the ‘radical economic transformation’ faction within the party. At the heart of these developments in the socio-political realm is the government’s perceived failure to address rising inequality, disparities in an already creaking public service provision, as well as youth unemployment and absolute poverty. The question of the slow pace of land reform has been one of the key reasons behind the deafening public discourse and political theatre on the issue of the expropriation without compensation.

How does the current social and political circumstance alter the way in which legal questions on land reform, which are directly linked to socioeconomic rights, are adjudicated? Does the change in circumstances signal a judicial willingness to consider and grant remedies to claimants who can secure their rights more effectively, but can also raise concerns about the separation of powers? We engage with these questions by assessing whether the Special Master remedy represents a natural culmination of the Court’s recent remedial jurisprudence as well as its jurisprudence on land reform.

4.2 Subject matter jurisprudential convergence

As hinted at in section 2.1 above, Mwelase represents yet another case in which the Court is dealing with the fallout from the wide-ranging failure to enact land reform in a timely manner. Most of these cases deal with unlawful evictions, an area of land law in which individuals enjoy strong judicial protections. Under the less stringent Grootboom approach the government enjoys significant leeway in the making of substantive policy choices and as such there has been relatively little litigation on these questions. However, with Mwelase we see a case in which the way in which the government implements policy is open to challenge. As such it opens a new chapter in land reform litigation, opening up avenues to enforce rights that were unprotected due to administrative incompetence.

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113 Illustratively, see Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC); Justice Alliance of South Africa v President of the Republic of South Africa; Freedom Under Law v President of the Republic of South Africa 2011 (5) SA 388 (CC); Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC); Mazibuko v Sisulu 2013 (6) SA 249 (CC).
114 DM Davis ‘Separation of Powers: Juristocracy or Democracy’ (2016) 133 South African Law Journal 258, 269.
115 Economic Freedom Fighters v Speaker, National Assembly 2016 (3) SA 580 (CC).
116 Roux (note 2 above) 6.
117 Tuovinen (note 47 above) 157.
118 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd (CC) 2012 (2) SA 104 (CC); Pheko (note 41 above).
4.3 Remedial jurisprudential convergence

The Constitutional Court has generally shied away from the use of external actors to oversee implementation of judgments. For instance, while the Court had initially indicated a role for the South African Human Rights Commission to oversee the compliance with its orders in Grootboom, it later demurred from entertaining a report by it on account of the doctrine of functus officio. More recently, the Court has not shied away from the use of a panel of experts that included the Auditor General and suitably qualified independent legal practitioners and technical experts to jointly evaluate and report to the Court on SASSA’s compliance with the terms of its orders to oversee implementation of its remedy in Black Sash. Authority for the constitution of such a panel was derived from the Madzodzo case, which involved a litigation in the Eastern Cape High Court brought by the LRC against the Department of Education on the severe furniture shortages in public schools across the Eastern Cape. It has been argued that this represents a cross-fertilisation of remedial development across different tiers of the judicial system. However, the remedy in Mwelase is markedly different – both in its nature and extent of powers, and should be seen as both a culmination of the Court’s willingness to flex its remedial muscles, but also as a departure from its previous position on the judiciary being reluctant to dictate budgetary priorities to an executive authority.

5. Conclusion

In this paper, we pursued three lines of inquiry in answering whether the Court in Mwelase provides adequate guidance for a future grant of remedies that are as invasive and that raise as serious questions about the separation of powers as that of the Special Master. The first was the factors and conditions, articulated in existing case law and Mwelase, about the conditions under which remedial innovations might occur in the future. Second, we located the decision in Mwelase in a very particular social and political moment. This is a moment in which an assertive court has shaken off some of its doctrinal trappings in the face of an electorally weakened ANC that continues to operate in a dominant party democracy, but may be dependent on popular support for its decision in order to secure greater public legitimacy and safeguard its institutional capital. Third, we used the example of the RTF litigation in India to compare and contrast the actions of the SC of India and the Constitutional Court of South Africa, both of which use remedial innovations – which border on overreach – in order to address a discursively salient social issue.

Ultimately, we find that the Court is faced with only bad choices. If it does not act boldly, the rights of a great number of persons may go unenforced. And while the Court certainly has the power to craft innovative remedies as we have sought to show, its argumentation in this case was rather lacking. This raises the fear that by being too

119 K Pillay ‘Implementation of Grootboom: Implications for the enforcement of socio-economic rights’ (2002) 6 Law, Democracy and Development 255.
120 Madzodzo v Minister of Basic Education [2014] ZAECMHC 5.
121 See H Taylor ‘Forcing the Court’s remedial hand: Non-compliance as a catalyst for remedial innovation’ (2019) 9 Constitutional Court Review 247.
bold the Court will undermine the proper functioning of the separation of powers in
the South African state for the foreseeable future. Here we find that the comparison
with the SC of India may be helpful. Like its South African counterpart, that court
faced difficult cases at a time when other branches of the government were failing their
duties. It also remains to be seen whether Mwelase might form the halting first steps in
inaugurating an era with judicial remedies that are much less tethered to the legalism
that has been the prevailing ideology behind judicial decision-making.122 A recent
supervisory order from the North Gauteng High Court123, imposing a supervisory
interdict to ensure the uninterrupted availability of a national school meal program
during the COVID-19 pandemic, allays some of the separation of powers concerns
associated with such a remedy by deriving authority from Mwelase. This could well be
evidence of what Roux terms a judicial willingness and capability to drive transform-
ation to new legitimating ideology124 – a post-liberal South African understanding of
separation of powers and the Court’s own role in the constitutional scheme. However,
this could also raise problems in the long term with judicial intervention compounding
the pathologies besetting the administration, while also atrophying bureaucratic will
and institutional capacity to be over-reliant on external prodding. In this article
we have tried to stake out the two sides of the coin and to explore whether a court
positioned like the South African Constitutional Court can walk the tightrope between
fulfilling its duties without overstepping its mandate, and without ceding discursive
space to those who seek to delegitimise the constitutional project from outside
and within.125

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122 T Roux ‘Losing faith in law’s autonomy: a comparative analysis’ in Delaney & Dixon (note 86 above) 204.
123 Equal Education v Minister of Basic Education (22588/2020) [2020] ZAGPHC 306.
124 Roux (note 122 above) 207.
125 F Venter ‘The limits of transformation in South Africa’s constitutional democracy’ (2018) 34 South African Journal
on Human Rights 143–166.