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AUTHORITARIAN CONSTITUTIONALISM: THE SOUTH AFRICAN EXPERIENCE*

1. INTRODUCTION

Over the past century, law was a central mechanism in the governance of the authoritarian regimes that preceded democratic South Africa.¹ At the same time, the dialectical quality of law created a space for litigation strategies, which, at the very least, tempered the excesses of racist rule.² Hence, an ambiguous legal history preceded the introduction of the 1996 *Constitution*,³ which, in turn, influenced the democratic model that was opted for by the constitutional negotiators at the Convention for a Democratic South Africa (CODESA) in the early 1990s.⁴

A number of factors played a role in the decision to adopt the model of constitutional democracy in 1993 when the interim *Constitution*⁵ was adopted. But, in the drafting of the 1996 text (the so-called “final *Constitution*”),⁶ the drafters thereof were swayed in the choices they made in crafting a constitutional as opposed to majoritarian model of democracy by two key considerations. First, the history of egregious arbitrary rule and a society saturated by racism over some three centuries. Secondly, the prevailing constitutional climate in the 1990s where, globally, transformative constitutionalism was viewed as a coherent mechanism to propel substantive social change, to the extent that it had become the hegemonic mode for transitions from autocracy to democracy.

Capturing this mood, Fukayama claimed that liberal constitutionalism was the “end point of mankind’s ideological evolution while the universalization of Western

- 1 See, for example, Chanock 2001.
- 2 The history of progressive litigation is wonderfully documented by Abel 1995.
- 3 *The Constitution of the Republic of South Africa*, 1996 (hereafter “the *Constitution*”).
- 4 See, generally, Davis 2003:181-195.
- 5 *Act 200/1993* came into operation on 27 April 1994.
- 6 See fn. 3.

liberal democracy was its final form".⁷ The influence of litigation that asserted the rule of law over the excesses of authoritarian rule was reinforced by the presence at CODESA of a number of lawyers who had led these litigation strategies – particularly in the 1970s and 1980s – to curb the excesses of apartheid.

The claim for the hegemony of constitutionalism as the legal mechanism to protect and, indeed, promote democratic politics is now, some 30 years on, under serious question both here and abroad. Transitional societies such as Hungary and Brazil can no longer claim that the model of constitutional democracy is the indicated form of governance. Victor Orbán and Jair Bolsonaro have shattered these earlier hopes. In Turkey, Recep Tayyip Erdoğan has adopted a similar authoritarian line. Even governance in the United States of America under Donald Trump and the politics of Boris Johnson in the United Kingdom reinforce this gloomy picture for the future of the model that South Africa chose in its first democratic election in 1994.

The picture painted of Narendra Modi's India – the largest democracy in the world – is reflected in the following passage from an analysis of the problem by Khaitan:

The tools for inflicting the thousand cuts differed. Measures that sought to undermine electoral accountability chiefly sought legislative or constitutional change. On the other hand, while some assaults on the institutional accountability mechanisms were indeed sought through legal and constitutional change, many of them pushed against established precedents, practices, and ways of doing things that were not necessarily illegal, but certainly a breach of constitutional civility or comity. Many of these acts were not so much unconstitutional (although some clearly were), but constitutionally shameless. By claiming to be the sole repository of legitimate state power, the political executive refused to respect any autonomous zone of operation.⁸

For this reason, extreme caution must be exercised against the liberal claim that constitutionalism can be equated invariably with democracy. As the new authoritarians – elected, it must be emphasised, in free elections – have shown, the authority of the *Constitution* can reduce the potential for democratic forms of politics. It does so by allowing the democratically elected leader to assume a position of hegemonic authority, thereby preventing critical debate aimed at the construction of a society that might differ from the normative framework as set out in the constitutional text. Far more perniciously, it can justify the democratic pedigree of the populist leader; after all s/he can claim to be chosen by a democratic election, and thus represent the will of the people far more accurately than recourse to a text passed many years previously and of which unelected judges are the guardians.

There is now a burgeoning literature on this topic.⁹ But my gaze is somewhat more myopic. In this paper, I am concerned with the long-term

7 Fukuyana 1992:1.

8 Khaitan 2020:35-36.

9 See, for example, Scheppele 2018(a):545-583; Graber *et al* 2018.

prospects for constitutional democracy in South Africa. My central argument is that a decade of sustained state capture during the presidency of Jacob Zuma has ensured that a parallel state was created and operated under the veneer of constitutionalism. Had the Zuma presidency continued, it was well on the way to producing a South African version of authoritarian constitutionalism. Hence, it is important to examine the causes for this shift worldwide and then apply these to South Africa as it enters a post-Zuma period.

2. WHY IS CONSTITUTIONAL DEMOCRACY UNDER SUCH PRESSURE?

In an incisive analysis of the constitutional demise of countries such as Hungary, Scheppele¹⁰ provided a helpful list of reasons for the significant global shift away from a model of democracy that was claimed merely two decades previously to be a historical end point. First, she argues that the traditional structure of political parties that emerged as democracy spread across the world has recently been torn apart. Over the past two centuries, mainly but not exclusively in the developed world, a class-based political spectrum from left to right dominated national politics. Left-orientated parties were grounded in their support for the working class. These parties campaigned in favour of a strong capable state that would be responsible for significant redistribution and the achievement of relative equality. By contrast, those parties that tilted to the right relied on the enthusiastic support of managerial and upper classes. They favoured limited government and critically insisted on strongly entrenched property rights.

As the twentieth century drew to a close, economic globalisation resulted in the erosion of social democratic models favoured by left-orientated parties. A variety of different forms of neo-liberalism dominated the economic and political discourse. Although an exposition of the variegated forms of neo-liberalism falls outside the scope of this paper, it will suffice to say that neo-liberalism placed the market mechanism at the centre of economic policy. This was accompanied by the deregulation of the economy, the internationalisation of capital and capital markets, global value chains as central to the production of goods and services, and precarious as opposed to legislatively protected labour. As Slobodian has argued in his history of neo-liberalism,¹¹ at the root of the project was the central idea that the global system should be ordered in a manner that would render capitalism safe from various national forms of political interference.

The pace of the growth of these forms of global economic arrangements exacerbated global patterns of inequality. Recently, Piketty¹² noted that, in Western countries, in particular, the concentration of wealth, which had diminished sharply after World War I and remained low until 1970, began to increase rapidly in the 1980s. Wealth and income inequality rose more in the

10 See in general Scheppele 2018(b).

11 See in general chapter 1 in Slobodian 2018.

12 Piketty 2020:762.

United States of America and India than in France or the United Kingdom. An increase in the concentration of wealth was particularly large in both China and Russia in the wake of privatisation policies having been implemented. For the majority of the world's population, it appears that globalisation has sustained a tiny globalised elite on the back of a large locally bound population who are economically in the most precarious of positions. Furthermore, Scheppele notes that

[p]eople with international passports and liberal education, with global horizons and universal values are in one political camp while those who stay close to home, speak one language and see both their neighbours and their nations as the horizon of politics are in another.¹³

A combination of the distance between political parties and their erstwhile supporters together with growing levels of inequality becomes far more conducive to the election of leaders who promise radical change for the masses, but then create a regime of autocratic rule by steadily dismantling the guardrails that have held the essential framework for constitutional democracy intact.

It is, therefore, understandable that populist politics would now be on the rise. What do we mean by "populism"? Mudde and Kaltwasser¹⁴ provide a useful definition of this concept as

a thin-centred ideology that considers society to be ultimately separated into two homogenous and antagonistic camps, 'the pure people' versus the 'corrupt elite' and which argues that politics should be an expression of the *volonté générale* (general will) of the people.

The authors proceed to note that some form of populism invariably combines with authoritarianism and nativism:

[W]hereas the former refers to the belief in a strictly ordered society, and is expressed in an emphasis on "law and order" issues, the latter alludes to the notion that states should be inhabited exclusively by members of the native group ("the nation") and that non-native ("alien") elements are fundamentally threatening to the homogenous nation state.¹⁵

A distinction must, however, be drawn between left-wing and right-wing populism. Right-wing populists consider the enemy of the people to be minorities; recourse to nationalism is at the centre of its projects. By contrast, left-wing populists classify financial elites as the enemy; some form of socialism lies at the centre of their discourse. For this reason, some left-wing forms of populism merge into a kind of egalitarianism and the promotion of campaigns to reduce poverty and inequality. A further caveat: left-wing populism is not always opposed to democracy. In this instance, the ideology can be used to mobilise and give voice to groups that are excluded from the traditional political system, which has consistently preferred the interests of

13 Scheppele 2018(b):496.

14 Mudde & Kaltwasser 2017:7.

15 Mudde & Kaltwasser 2017:34.

an elite. But demands for popular sovereignty can lead to the evisceration of institutions designed to protect minorities or “the Other” and their replacement with calls for majoritarian rule, which then rides roughshod over a range of individual liberties. This is exemplified, for example, in the politics of Chávez in Venezuela, where the focus was on the leader as the encapsulation of the will of the Venezuelan people.¹⁶

3. THE TURN TO “LAWFARE” AND ITS IMPLICATIONS FOR THE SUSTAINABILITY OF CONSTITUTIONAL DEMOCRACY

The failure of a politics that was congruent with constitutional democracy has given rise to a government that disregards the interests of vast sections of the population. In turn, this has given rise to the increasing use of law, both by governments that seek to constrain opposition and by the latter, including historically disadvantaged communities, which remain presently disadvantaged. Thus, the failure of politics has seen the rise of “lawfare”; that is, recourse to courts to solve what hitherto would have been regarded as the subject matter of political contestation.

Something more needs to be said about lawfare. The concept of lawfare, employed in this paper, has been borrowed from the work of the eminent anthropologists Jean and John Comaroff,¹⁷ who contend that there has been an increasing use and deployment of the instruments of law for political ends. It is, however, a complex phenomenon. It is generally used by the powerful, whether government or large corporations, against the weak. It also has an insurgent character, in that legal strategies have been employed in attempts to curb the arbitrary rule of the powerful, as reflected in South African lawyering during the apartheid regime.

John Comaroff¹⁸ has amplified on the idea of lawfare by referring to the parallel between lawfare and warfare, which in turn can best be illustrated by way of a three-dimensional analysis, in which the framework for waging warfare is employed.

- First, the issue of *geography* is important in a decision to wage war; that is, armies seek favourable sites such as the sea or mountainous regions, in order to attack their opponents. Similarly, lawfare places considerable emphasis on the question of jurisdiction; that is, the

16 Hugo Chávez was an exceptionally gifted politician who surfed an oil boom, which he then employed, in part, to halve the unemployment rate, improving education and reducing infant mortality in Venezuela. But he packed the courts with his toadies, and drastically restricted press freedom, although, significantly, he was careful to maintain electoral legitimacy, even as he exponentially expanded executive power. See, for example, Ellner & Hellinger 2003.

17 See in general Comaroff & Comaroff 2006: chapter 1; Comaroff & Comaroff 2007: 144 - 148.

18 John Comaroff explains “lawfare” at <http://artepolitica.com/videos/john-comaroff-explica-lawfare/>. In his presentation he relies on Von Clausewitz’s classic work *On War* (1832).

location for the initiation of litigation is vital. The tendency will be to launch strategic litigation in countries that have a more favourable legal terrain to support the indicated legal argument or, more specifically, a particular court that might be more sympathetic to the proposed cause of action.

- The second component of warfare is the *nature of weaponry* employed. In the case of lawfare, weaponry equates to the available jurisprudence; that is, what law can be used to implement the chosen campaign of lawfare. For example, in South Africa, it is possible to employ the Bill of Rights, as set out in Chapter 2 of the *Constitution*, as a weapon to pursue a proposed legal campaign. By contrast, in Donald Trump's United States of America, recourse to human rights – particularly in the context of the composition of the current Supreme Court – is far less likely to constitute a helpful terrain for legal struggle. Different forms of jurisprudential weaponry may, therefore, have to be employed.
- Finally, there are a range of *externalities*. Warfare is often preceded by intense ideological campaigns designed to classify the enemy as “the other”, alternatively the depiction of the “barbarians at the gates” who need to be destroyed. In the case of lawfare, the media has increasingly become a critical site of struggle (whether it be the traditional media or increasingly social media platforms such as Twitter, Facebook and other internet forms), whereby legal opponents suffer similar forms of denigration and ideological isolation to that which precedes a campaign of warfare against the designated enemy. The inextricable link between media coverage and the use of courts has taken on similar forms to the role of the media in the pursuit of warfare against an enemy. Thus, various forms of both traditional and “new” internet-based media are used to appeal to emotions in such a way that rational debate is stifled. This is achieved, in particular, by promoting an insider/outsider dynamic that pollutes a broader conversation with negative stereotypes of targeted individuals or groups, and by eroding community standards of reasonableness that depend on norms of mutual respect and accountability.¹⁹

Lawfare places the courts at the centre of political struggle. This, in turn, focuses attention on both the composition and the role of courts. A few remarks about these issues and, hence, the consequences of lawfare in other jurisdictions provide illumination. Not for nothing is it suggested, particularly under the Trump presidency, that arguably the most important decision taken by a President of the United States of America is the appointment of judges to the Supreme Court. After the appointments of Trump nominees Neil Gorsuch and Brett Kavanaugh, the Supreme Court is now set to reverse more than 75 years of jurisprudence, which had asserted the importance of rights claimed by African-Americans, women, the LGBT community (more recently) and labour.

Courts in the United Kingdom have also faced the consequences of lawfare, as highlighted by the controversy surrounding the Supreme Court of

¹⁹ See in general Stanley 2015: 1 – 26.

the United Kingdom's decision to strike down Prime Minister Boris Johnson's suspension of Parliament in 2019.²⁰ Illustrative of the contested role of courts in this context of lawfare, red in tooth and claw, is the observation of retired United Kingdom Supreme Court Justice Jonathan Sumption:

it is a great pity that it should have been necessary for the court to intervene ... but if the government takes an axe to the political convention and there are no rules, then there is a complete void in which the executive can act however it likes.²¹

Some criticism was even more strident. According to journalists Mark Landler and Benjamin Mueller, Professor Stephen Tierney of Edinburgh University suggested

that it was "astonishing" that the court had ruled decisively that it "[could] review something as fundamental as that, done by Her Majesty, as unlawful. The court is involved in what was largely seen as the internal workings of Parliament and its supreme power. ... That in itself is unprecedented in the UK system".²²

It was, therefore, unsurprising that, after his overwhelming electoral success, British Prime Minister Boris Johnson proposed far-reaching changes to the role of courts in the United Kingdom. In particular, one of his proposals was that Ministers of State be given a significant say in judicial appointments. In addition, Johnson proposed that parts of the Royal Prerogative be placed beyond the scope of judicial review. This followed the Conservative Party manifesto in the election, in which it was stated, *inter alia*, that

[w]e will ensure that judicial review is available to protect the rights of the individuals against an overbearing state while ensuring that it is not abused to conduct politics by another means so to create needless delays.²³

20 See *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent); Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41 (24 September 2019).

21 Landler & Mueller "How the U.K. Supreme Court's rebuke to Boris Johnson remakes British law", *The New York Times* <https://www.nytimes.com/2019/09/24/world/europe/uk-constitution-supreme-court-boris-johnson.html> (accessed on 24 July 2020).

22 See Landler & Mueller "How the U.K. Supreme Court's rebuke to Boris Johnson remakes British law", *The New York Times* <https://www.nytimes.com/2019/09/24/world/europe/uk-constitution-supreme-court-boris-johnson.html> (accessed on 24 July 2020).

23 Merrick "Boris Johnson 'to curb legal challenges over Brexit' in extraordinary attack on the courts", *The Independent* <https://www.independent.co.uk/news/uk/politics/general-election-brexite-latest-boris-johnson-article-50-second-referendum-a9217656.html> (accessed on 24 July 2020).

4. THE SOUTH AFRICAN EXPERIENCE

So much for the underlying pressures that have been placed on long-established models of constitutional democracy. I turn to examine the lessons for contemporary South Africa.

4.1 Jacob Zuma's presidency (2009–2018)

Unquestionably, the decade in which Jacob Zuma was President of the country was accompanied by a significant degradation of most of the constitutional guardrails designed to protect the South African constitutional democracy. The extent of the corruption of our constitutional model has been documented, for example, by the Nugent Commission, which investigated the collapse of the South African Revenue Service under Zuma appointee as Commissioner of the South African Revenue Service, Tom Moyane. The Zondo Commission of Enquiry into Allegations of State Capture has also shone a light on broader areas of egregious corruption. In turn, this evidence has confirmed the state of degradation of the National Prosecuting Authority (NPA), particularly under the leadership of Shaun Abrahams (another Zuma appointee), the disbandment of the Scorpions as a key institution designed to investigate and curb corruption and its replacement by the executive-controlled unit (the Hawks), as well as the general ineptitude of the investigation capacity of the South African Police Service.²⁴

At the same time as the state capture project was at its zenith, the legislature played an entirely passive role and failed to hold the executive accountable for any of the arbitrary decisions taken by the Zuma administration. Mr Zuma was particularly concerned to loosen the control exercised by the judiciary over his rent-seeking project. He thus argued strongly in favour of majoritarian democracy, claiming that (his ruling) ANC party²⁵ preferred the model of parliamentary democracy, where the legislature would have the last word. Unfortunately, in his view, the ANC was compelled to accept constitutional democracy at the negotiating table where

[t]he majority does not have the last word. You take a decision, and an NGO [Non-Governmental Organisation] takes you to the Constitutional Court and the Constitutional Court says your decision is unconstitutional. So you don't have the majority rule.²⁶

The total deference that the legislature exhibited as a result of the control that the ruling party exercised over this arm of the state left the courts as the sole effective buttress against this tsunami of corruption and the construction of the parallel state designed to implement increasing levels of rent-capture.

24 For a comprehensive account, see Swilling *et al* 2018.

25 The African National Congress (ANC) has been the ruling party in South Africa ever since the first democratic elections were held on 27 April 1994.

26 Msomi "Populist Zuma rubbishes constitutional democracy he and ANC signed up for" *The Sowetan* <https://www.sowetanlive.co.za/opinion/columnists/2018-09-14-populist-zuma-rubbishes-constitutional-democracy-he-and-anc-signed-up-for/> (accessed on 10 July 2020).

Unsurprisingly, ANC spokespeople spent much time criticising decisions of the courts that were unfavourable to Jacob Zuma. An example thereof is the following statement attributed to Sihle Zikalala, the ANC KwaZulu-Natal provincial chairperson:

There's a growing observable trend by the courts to act and play big brother role, where in some cases courts find themselves increasingly encroaching in the terrain of other state organs ... Courts use their powers like they are above Parliament. They interfere in executive decisions and Parliament.²⁷

In summary, by the end of 2017, a number of pillars central to constitutional democracy had been dismantled. Lawfare remained the only viable strategy to curb these developments. A range of legal challenges designed to retard and restrain state capture were launched, arguably the most famous being that which culminated in a judgment that held Jacob Zuma accountable for payment of private expenditure at his Nkandla homestead.²⁸ In keeping with the contradictory nature of lawfare, Zuma acolytes who were leading the law enforcement agencies employed lawfare against the political opponents of the President. Most prominent was the case where charges were brought against the then Finance Minister Mr Pravin Gordhan on counts of theft and fraud. There was no legal basis for these charges, but the NPA in this case was less concerned with the merits of the law and more with the pursuit of a clear political agenda.²⁹

The question as to whether South African constitutional democracy could be sustained was now anxiously considered, as indicated by the following extract from Sipho Pityana's Bram Fischer Memorial Lecture delivered at Oxford University in 2017:

Then we come to the plot to muzzle Parliament, whose oversight role is the lifeblood of our democracy. It's important to acknowledge, at the outset, the structural flaw that comes with our party-list, proportional representation electoral system. The ANC has effectively abused this system to its own ends, consistently endorsing blatantly unethical conduct at odds with the constitution, and its own policies. ... A President assured of the protection afforded him by co-opted institutions, embarked on a looting spree that runs parallel to the activities intended to undermine state institutions. Clearly, like termites determinedly gnawing at the base of a tree, this project has destabilised the country, its economy and our very sovereignty. Our search for sustainable answers to reverse racially skewed ownership patterns and

27 Mngadi "We are disgusted by court's overreach" *News 24* <https://www.news24.com/news24/southafrica/news/we-are-disgusted-by-courts-overreach-kzn-anc-20170515> (accessed on 10 July 2020).

28 *Economic Freedom Fighters v the Speaker of the National Assembly and Jacob Zuma* 2016 3 SA 580 (CC).

29 See Letsoalo "The Plot against Pravin Gordhan has backfired" *Mail and Guardian* <https://mg.co.za/article/2016-10-14-00-the-plot-against-gordhan-has-backfired/> (accessed on 10 July 2020). The use of law against Mr Gordhan was accompanied by a relentless campaign of denigration, which fits into the analysis of Stanley, as referred to above.

income inequality has been discredited as these policies have been repeatedly exploited to pursue corrupt ends.³⁰

4.2 The post-Zuma period: Is there still a threat to the constitutional project?

The elevation of Cyril Ramaphosa to the Presidency requires its own examination, in that he is a committed constitutionalist. He was central to the negotiations that gave rise to both the interim *Constitution* (at CODESA) and the 1996 “final” *Constitution*. In 2008, Mr Ramaphosa, although not directly involved in party politics at that stage, wrote:

political leaders, likewise need to respect the spirit of the *Constitution* and to abide by the culture of justification it seeks to promote. Leadership in a constitutional order must rest on persuasion and justified action and not upon the bald compulsion of state or party power.³¹

Thus, to return to the key question addressed in this paper: Has the danger to the constitutional project passed so that the turn towards authoritarian constitutionalism – as is evident in many countries and which was threatening to become dominant in South Africa – can now be discounted? To answer this question, we need to return to the causes of the drift away from the constitutional democratic model as explained earlier.

4.2.1 Political parties

Over the past 25 years of democracy, there has been a marked weakening of the importance of the political party in South African politics. To recapitulate, in the 2019 national and provincial elections, if the total number of eligible voters is taken into account, the ANC received 28 per cent of the eligible national vote, the Democratic Alliance (DA) 10 per cent, and the Economic Freedom Fighters (EFF) 5.5 per cent.³² It is clear from this statistical picture that, for the proverbial person in the street, party politics has declined radically in importance since the first democratically held elections in 1994.

While party politics may not play the traditional role of representing left and right visions of how society should be structured, the party has become the transmission belt for rent-capture. According to Gumede,³³ rent-seeking (and capture) entails that

30 Pityana “Can our constitutional democracy be sustained?” *Politics Web* <https://www.politicsweb.co.za/opinion/can-our-constitutional-democracy-be-sustained> (accessed on 20 July 2020).

31 Davis & Le Roux 2009:page v.

32 These statistics are calculated from the registration certificates of the Independent Electoral Commission as at 1 November 2019.

33 Gumede “*Policy Brief 14: Combatting corruption in South Africa*” Democracy Works Foundation <https://democracyworks.org.za/policy-brief-12-combatting-corruption-in-south-africa/> (accessed on 20 July 2020).

[T]he politically connected make easy money, get government, private sector contracts and mining rights and favourable policies just because of their closeness to the governing party, political leaders and government, without any merit, or without them having the ability or competence to perform. [It] also involves lobbying for policies which enriches a particularly connected group, company or political faction, rather than the whole of society [and] includes appointing politically connected 'cadres' to both the public and private sectors.

In this instance, constitutional structures are undermined by the ease with which parallel rent-capturing structures are created. In this connection, Gumede further opined that

South Africa's electoral system allows party leaders to handpick who gets appointed as Members of Parliament, provincial legislatures and councillors. Pliant, incompetent and 'captured' appointees ultimately preside over panels that approve appointments to crucial public offices, contracts and policies.³⁴

Olver reinforces this disturbing conclusion.³⁵ As a senior government official at the time, he documents his experience of how local politics in the Nelson Mandela Bay area was dominated by rent-seekers, criminal syndicates, and compromised local politicians using both crime and sophisticated corporate structures (by way of shelf companies) to benefit a small coterie at the expense of the population of the city.

4.2.2 The economy and inequality

At the same time as rent-capture increased exponentially, economic policy has been a manifest failure, judged by its inability to respond adequately to the legitimate demands of the majority. The core vision of the *Constitution* that every South African should live a dignified life has not even closely been vindicated. Indeed, the stark levels of poverty and inequality inherited from the apartheid regime have only worsened. After nearly 20 years of decline, from a "low of 53,2% in 2011", by 2015 some 55.5 per cent of the population at that time (that is 30.4 million people) were living in poverty in South Africa. Official unemployment was almost 30 per cent.³⁶ A World Bank study focusing on the period between 2006 and 2015 found South Africa to be the most unequal country in the world in terms of the 149 countries it analysed. It found that the top 1 per cent of South Africans own 70.9 per cent of the country's wealth, while the bottom 60 per cent controlled only 7 per cent of the country's assets.³⁷

34 Gumede "Policy Brief 33: Impact of corruption on democracy and development. Democracy Works Foundation <https://democracyworks.org.za/policy-brief-33-impact-of-corruption-on-democracy-and-development/> (accessed on 20 July 2020).

35 See, in detail, Olver 2017.

36 Francis & Webster 2019:788.

37 World Bank "Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities" <https://openknowledge.worldbank.org/bitstream/handle/10986/29614/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINALWEB.pdf?sequence=1&isAllowed=y> (accessed on 20 July 2020).

None of the government's economic forecasts predicts any significant improvement. In his National Budget Speech of 26 February 2020, Minister of Finance Tito Mboweni forecast that the growth rates over the three years between 2020 and 2022 would be 0.9 per cent, 1.3 per cent and 1.6 per cent, respectively.³⁸ These growth projections painted a gloomy picture even prior to the Covid-19 pandemic's subsequent effect on the economy.

Nevertheless, the persistence of poverty, the increase in unemployment and escalating inequality requires an explanation that extends further back than the past few years. The failure of economic transformation is arguably less the result of *insufficient* growth and more the product of *the wrong kind* of growth. Between 1994 and 2012, the South African economy grew at 3.2 per cent per year on average. Indeed, between 2002 and 2006, annual growth on average exceeded 3.8 per cent.³⁹ True, the post-apartheid government inherited an economy that was dominated by large corporations, and thus highly concentrated and vertically integrated. As Bundy noted:

[F]ar from reigning in or regulating the dominant corporations, the ANC deregulated them and authorised capital flight on a massive scale. If it is the case that no country, to date, has made the transition out of a middle-income to higher-income status, "without the dynamism of a vibrant, labour-intensive manufacturing industry" ... then South Africa has made a grave mistake: manufacturing production has become more capital intensive. The ANC has failed to address the structural dimensions of poverty and unemployment – not least because the beneficiaries of BEE [Black Economic Empowerment] and boardroom deals have done very well under the existing growth path.⁴⁰

Over the past 25 years, hardly anything has been done to alter the spatial geography of the country. The cities and towns of the country remain almost the same as they were prior to the dawn of democracy. Even the government's housing policies introduced post-1994 took place on the periphery of the urban areas. This failure to embrace radical change was but a sad metaphor for the broader economic failure to effect significant structural change. As Friedman noted with regard to the 2017 ANC policy document,

it doesn't seek a new path which will include millions more. Instead it keeps alive the forlorn hope that the excluded can be absorbed into an economy built to exclude them ... it doesn't get to grips with the core reality that the formal economy is still an insider club ... dominated by too few players engaged in too many cosy networks.⁴¹

38 National Treasury "2020 Budget Review" <http://www.treasury.gov.za/documents/National%20Budget/2020/> (accessed on 20 July 2020). It should be reiterated that these forecasts were made before the Covid-19 pandemic, which subsequently engulfed the world while this lecture was being edited and updated.

39 Loubser "Economic growth in South Africa: A twenty year review" <https://www.moneyweb.co.za/archive/economic-growth-in-south-africa-a-20year-review/> (accessed on 24 July 2020).

40 Bundy 2019: 93.

41 Friedman "The ANC isn't ready to radically transform the South African economy" <https://businesstech.co.za/news/government/166115/the-anc-isnt-ready-to-radically-transform-the-south-african-economy/> (accessed on 20 July 2020).

In summary, South African democracy has seen a combination of the absence of the transformation of the South African economic structure together with the rapidly increasing growth of a rent-seeking society, in which politically connected parties have made vast sums of money by way of procuring government and private sector contracts, as well as mining rights. The capture of key elements of public administration has ensured the implementation of policies that are favourable to the increase of the wealth of the politically connected.

Over the past decade, in particular, the South African economy has failed to expand its capacity, but has enabled a cohort of politically connected rent-seekers to exploit existing capacity. This has also served to prevent innovation and new entrepreneurs from expanding the economy. Simultaneously, the exploitation of BEE has elbowed out those who could genuinely increase the productive capacity of the economy. As amplification, the disclosures that have flowed from the Zondo Commission of Enquiry into Allegations of State Capture have illustrated luminously the creation of a parallel structure between the legal government and an illicit economy during the Zuma presidency, in which billions have flown into the pockets of a small politically connected elite at the expense of millions of historically disadvantaged who, owing in significant part to this parallel structure of governance, remain disadvantaged.

Even if these criticisms are rebuttable, it is surely incontestable that economic delivery to millions of South Africans over the past 25 years has significantly failed to vindicate the rights and legitimate expectations that were sourced in the 1996 *Constitution*.

This, in turn, holds significant implications for the core question about the future of constitutionalism in South Africa. Given the constitutional promise of a society based on freedom, equality and dignity for all who live in South Africa,⁴² it is not surprising that the legitimacy of the *Constitution* has been called into serious question. Illustrative of this line of critique, Modiri writes:

[T]he South African constitution cannot logically be categorised as “non-racial”, since it actively preserves interest and powers secured through racial oppression. In so doing, it closes off the possibility of substantively abolishing the hierarchically entwined social categories of conqueror and conquered, settler and native, white and black. In the result, notwithstanding the official completion of the TRC’s work, a new national anthem and national flag as well as a nominally non-racial constitution, white people would continue to carry the stigmatic markings of “oppressor” and thus remain unfree as well.⁴³

42 See sec. 1 of the *Constitution of the Republic of South Africa*: “The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

43 Modiri 2018:317.

Similarly, Ngang offers the following observations about the origins of the *Constitution*:

Because capitalist interest prevailed during the transitional arrangements, the free-market model greatly influenced the constitutional arrangement, with significant implications for human rights and the national development agenda. This is noticeable in the manner in which constitutional entitlements are formulated more as individual rights, aiming to empower single persons rather than seeking to redress the collective disadvantage highlighted in the preamble as the basis for radical transformation.⁴⁴

Viewed from the position of the overall transformation of a country shaped by decades of racist rule, the constitutional promises of both political and economic reconstruction of the society inherited from apartheid have not taken place. It is thus hardly surprising that a *Constitution*, which promised both political and economic transformation, is under threat. This, in turn, has undermined the central premises of the constitutional project, set out some years ago by the then Chief Justice Langa, when he suggested that transformative constitutionalism presented

[a] social and an economic revolution. South Africa at present has to contend with unequal and insufficient access to housing, food, water, healthcare and electricity. As former Chief Justice Chaskalson wrote in *Soobramoney v Minister of Health, KwaZulu-Natal*, “[f]or as long as these conditions continue to exist that aspiration [that is, of substantive equality] will have a hollow ring”. The provision of services to all and the levelling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism.⁴⁵

4.2.3 Populism as a counterpoint to constitutional democracy

Within the context of the failure of traditional politics, and an economic system that has failed to transcend its apartheid heritage and thus the continued presence of a stark incongruence between the ambitious constitutional promise and the degrading realities encountered on a daily basis by millions of South Africans, populism finds fertile ground for growth. Concepts such as “radical economic transformation”, “White monopoly capital”, and uncritical use of the generic concept of “decolonisation” have become keywords in contemporary South African political discourse.

This form of populist rhetoric is often coupled to an identity-based politics, which privileges distinct social groups, traditions, values and practices as part of an overall revisionist project to reconfigure national identity. Within the South African context, this form of politics targets any attempt at racial reconciliation or the construction of a non-racial and non-sexist South African identity, which lies at the heart of the constitutional project.

44 Ngang 2019:36.

45 Langa 2006:352.

Ramose exemplifies this approach. Without any attempt to interrogate the transformative possibilities of the *Constitution*, he not only rejects the 1996 text as a reflection of the ideology of neo-liberal globalism and market fundamentalism, but then suggests that post-conquest constitutionalism is an ethical imperative to be pursued until it is realised. He argues that

[t]he contemporary discourse on “expropriation without compensation” is reminiscent of the doctrine of [d]iscovery, but it is certainly a far cry from the fundamental ethical problem, namely, the unresolved question of the land question, that is, sovereign title to territory. Captivity to a constitution that is not one’s own is no substitute to the ethical imperative to invoke the just war principle of *ad repetendas res*.⁴⁶

My argument against Ramose has nothing to do with the imperative of land restitution, which could – and should – have been implemented more than two decades ago. But this egregious failure has hardly anything to do with the constitutional text and much to do with the failure of politics and governance in South Africa. The Ramose argument is reflective of a particular strain of populist politics in that it attempts to reconstruct a narrative for a designated identity, while excluding others who fall outside of its designation. This narrative is based not on transformation of the existing socio-economic *status quo*, but rather on a nostalgia for a questionable nationalistic past, that is to say, *a past located more in imagination than in history*. At the same time, the Ramose claim elides over more than a century of struggle based on claims of rights for all who live in the country.⁴⁷

The sharp point is that the more the politics and economics of the country fail millions of South Africans, the greater the attraction of this narrative. This is not unique to South Africa. As indicated earlier, both Orbán and Modi have employed the same narrative. “Make America Great Again” similarly reaches back to a nostalgia, in this case to a middle America of fifty or more years ago, in which there was no rise of multiculturalism, nor a decline of traditional religious practices, and no possible election of a Black President of the United States of America. As Koskenniemi has observed about Trump’s America:

[T]he decline is real and prompts the memory of a better past, a time of confidence in one’s status, and the status of one’s values. And when the decline is then explained as unavoidable owing to the “facts” of globalization, while the “facts” are less than solid and the real cause of the situation is the choices that other people have made on the basis of

46 Ramose 2018:341. It is curious how an article, which so fiercely denounces the effects of colonialism so frequently, makes use of Latin phrases that are hardly sourced in anything other than our Roman-Dutch legal history. Ramose elides over the clear social democratic elements of the 1996 *Constitution*, which provisions make a nonsense of the equation of the 1996 constitutional text with neo-liberalism, howsoever this term is defined.

47 Much of this history is captured in Ngcukaitobi 2018.

those “facts”, rejection seems not at all that incomprehensible. Instead of knowledge, “fake news”.⁴⁸

When millions are left without economic hope for a better life, nostalgia for a past that never was becomes the replacement for hope. While insurrectionist forms of lawfare may bring some measure of accountability to the constitutional vision, its results are viewed as mere palliatives so long as the underlying social and economic structures remain unchanged. And, as is made clear by the critics of the constitutional enterprise in South Africa, the *Constitution* is then easily assailed as no more than a convenient pact to perpetuate privilege. In turn, the courts are caught between a government that eschews an embrace of the distributional challenges posed by the *Constitution* and populists who totally reject the very legal materials upon which lawfare is based, save that they employ lawfare opportunistically to protect projects and institutions that they deem important to continue their populist project.

5. CONCLUSION

To return to the question posed at the commencement of this paper: What are the implications of this analysis for the future of constitutional democracy in South Africa?

In their investigation of the future prospects of constitutional democracy in the United States of America in the Trump and post-Trump eras, Levitsky and Ziblatt argued that two fundamental (and interrelated) norms are central to the future of any constitutional democracy, namely “mutual toleration” and the concept of “institutional forbearance”. The first norm refers to the acknowledgement of the legitimacy of one’s political opponents to compete for power through the democratic process, as long as they play within constitutional rules. Mutual toleration excludes the use, or even encouragement of threats and violence to bar political opponents from competing for office. The second norm is closely related to the rule of law: “institutional forbearance” means that elected officials cannot exercise legal action that intentionally privileges one group of individuals at the expense of another.⁴⁹

Expressed in the negative, a country begins its journey away from its constitutional moorings when there is:

- A rejection, in words or action, of the democratic rules of the game;
- A denial of the legitimacy of political opponents;
- Toleration or encouragement of violence; and
- A willingness to curtail civil liberties of opponents, including the media.⁵⁰

Translated into the South African context, constitutional democracy cannot be sustained when the political discourse is dominated by a lack of tolerance

48 Koskenniemi “International law and the far right: Reflections on law and cynicism” <http://www.portalfinanceiro.net/sites/default/files/INTERNATIONAL%20LAW%20AND%20THE%20FAR%20RIGHT-Reflections%20on%20Law%20and%20Cynicism.pdf> (accessed on 24 July 2020).

49 Levitsky & Ziblatt 2018:102.

50 Levitsky & Ziblatt 2018:24-25.

as well as the pre-eminent view that only one narrative excludes all others. This danger is compounded when institutions, which are designed to be the guardrails of constitutionalism, are hollowed out to allow a parallel state to promote an unbridled rent-seeking project.

Over the past decade, the courts have managed to keep the possibility of the constitutional model alive by demanding compliance with constitutional principles of accountable, rational and transparent governance of the country. “Lawfare” was waged on many fronts, as increasing levels of political rivalry and contest were transformed into litigious battles before the courts. While the insurrectionist form of lawfare consistently produced positive results, it created space for a politics of resistance to the development of the parallel state that alone cannot sustain the constitutional model over the long run.

Long-term sustainability requires the implementation of economic policies that are congruent with the constitutional vision of a society based on freedom, equality and dignity. In addition, politics will need to be reconfigured. In this connection, Grimm warned that the current role of political parties undermines the central constitutional doctrine of separation of powers:

[P]arties leap over the constitutionally delineated boundaries because they shift the state decision-making process to the party level and then assert it through their representatives in the bodies of the state. Political parties thus have exercised their influence before the constitutional separation of powers can take effect. No longer do mutually independent state powers hold each other in check; rather it is the political parties which cooperate with themselves in varying roles.⁵¹

This observation is clearly applicable to South Africa, in that the role of the political party was critical to the rent-seeking project. Unless the role of the political party is harmonised with the *Constitution* – so that a democratically elected legislature can hold accountable the party appointees who make up the executive, whether at national, provincial or local level – the constitutional model will be imperilled.

The further threat that follows upon these developments concerns the consequences of populism. If the constitutional project is denigrated by being portrayed as no more than a tool of White monopoly capital, while the key institutions designed to protect and promote the *Constitution* (such as the NPA, the police, the Public Protector and, eventually, the courts) are captured by being rendered fit for rent-seeking purposes, the South African enterprise, which began with such ambition more than a quarter of a century ago, will surely die. Notwithstanding that the country is now run by a constitutionalist, the past decade and its aftermath that continues to bedevil our constitutional enterprise must serve as a warning to all South Africans. That warning is surely buttressed by recent developments in countries such as India, Brazil, Hungary, Turkey and the United States of America.

In sum, therefore, the danger has not passed.

51 Grimm 2016:249-250.

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