

Constitutional Populism in South Africa

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1. Introduction

On 13 December 2019, the Parliament of South Africa published a notice inviting public comment on a proposed change to that country's widely admired 1996 Constitution.¹ In seven, tersely worded pages, the explanatory memorandum on the draft Constitution Eighteenth Amendment Bill sets out the need for a change to the wording of section 25 – the property clause. If adopted, the amendment would add a provision stipulating that a court, 'where land and any improvements thereon are expropriated for the purposes of land reform', may determine that the compensation payable is 'nil'. In addition, Parliament, rather than the judiciary, would be given the authority to specify the circumstances in which this kind of determination could be made.

The circumstances leading to this proposed change bear some resemblance to the factors driving the rise of constitutional populism in other parts of the world, albeit with South African characteristics. As is the case in North America and Europe, public attachment to the ideal of liberal constitutionalism in South Africa has been weakened by persistent inequality. As internationally celebrated as the 1996 Constitution is, there is a large constituency of poorly paid or unemployed South Africans who feel it has delivered them few benefits. Their discontent has fuelled the rise over the last seven years of a left-wing populist party, the Economic Freedom Fighters (EFF). With just shy of 11% of the vote in the 2019 general elections, the EFF does not yet have sufficient electoral support to govern on its own. But its aggressive, clickbait political tactics mean that it is exerting a disproportionate influence on the national policy debate. If adopted, the proposed amendment to the property clause would in effect implement the EFF's long-standing call for 'expropriation without compensation' (EWC).

In addition to its headline-grabbing political style, the reason why the EFF has been able to exert such a degree of influence has to do with the way its political programme plays into the ongoing struggle for control of the ruling African National Congress (ANC). As this chapter will explain in more detail, the ANC is currently split between a moderate faction, which still sees the 1996 Constitution as the most appropriate governance framework for the country, and a so-called 'radical economic transformation' ('RET') faction, which is ideologically hard to distinguish from the EFF. Given this balance of forces, constitutional populism in South Africa is being driven by the political advantage that the RET faction sees in fronting some of the EFF's policies. In particular, policies like the proposed amendment to the property clause are being used by the RET faction as a political wedge, forcing the moderate faction either to oppose them and take responsibility for any resultant loss of support to the EFF or to embrace them and, with that, relinquish control of the party's ideological direction.

In developing this argument, this chapter starts in the next section by setting out the main contours of the debate about whether populism is good or bad for liberal democracy. The point of this section is to establish a baseline against which the South African case can be examined and its contribution to the literature assessed. The third section then gives a brief description of the two distinct phases of populism in South Africa, starting with the ousting of President Thabo Mbeki by Jacob Zuma in

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¹ Draft Constitution Eighteenth Amendment Bill (Notice 652 in GG No. 42902).

2008 and moving on to the establishment of the EFF in 2013. As with many populist movements, no account of the EFF would be complete without an explanation of the personal political appeal of its charismatic leader, Julius Malema. His combative style has shaped the EFF's tactics and its character as an organisation to the point where it is hard to imagine what this form of politics in South Africa would look like without Malema at its head.

The fourth section moves to the main topic of this chapter: the impact of populism on liberal democracy in South Africa. In keeping with the thread in the literature that sees this as a question that needs to be determined on a case-by-case basis,² a variety of impacts, some positive and some negative are identified. On the positive side, there is no doubt that the EFF has given voice to a previously marginalised constituency. The emergence of the EFF as a political force must thus be seen as an appropriate democratic correction that has the potential to re-legitimate the system. In addition, the EFF has been involved in several important constitutional cases, which have pushed the courts to refine their understanding of key doctrines. In this guise, the EFF, wittingly or unwittingly, has been at the vanguard of efforts to ensure that liberal democracy fulfils its egalitarian and emancipatory promises.

On the other hand, populism also has had an undeniably negative impact on liberal democracy in certain respects. In its first phase, associated with the rise and fall of former President Zuma, populism provided rhetorical cover for what was in essence an attempt to take over the state for private economic gain. In the roughly ten years that Zuma was in office, critical constitutional institutions, such as the National Prosecuting Authority, were deliberately incapacitated and hollowed out. While the moderate faction under current President, Cyril Ramaphosa, has managed to arrest this process, it is proving much harder to repair the affected institutions than many anticipated.

In its second phase, associated with the rise of the EFF and its influence over a weakened and internally divided ANC, populism in South Africa has seen the tabling of a number of policies that, if implemented, might seriously damage the economy, either by discouraging investment or by persuading skilled people to emigrate. In addition to the proposed amendment to the property clause, the ANC has thus been toying with the idea of nationalising the Reserve Bank and creating a sovereign wealth fund, neither of which is affordable given the current state of the national finances. The ANC is also pursuing the creation of a National Health Insurance scheme that many fear would simply serve as a further opportunity for nepotism and corruption.³

While the impact on liberal democracy of these policies, if adopted, would be more indirect than the destruction of state institutions that has already occurred, the consequences would be no less severe. If support for liberal democracy in South Africa is tied to the 1996 Constitution's capacity to deliver on its promises, populist policies that impede economic growth may undermine that support even further. In a sense, populists have nothing to lose. In the unlikely event that their policies *do* deliver on their utopian promises, they will be able to claim credit for improving the lives of their constituents. In the more likely event of their failure, populists will have contributed to the perpetuation of the social and economic conditions under which their style of politics flourishes. Either way, prospects for liberal democracy in South Africa would be severely diminished.

The fifth section spells out the ways in which the South African case both confirms and challenges current thinking on the nature of constitutional populism. The sixth section concludes.

² Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford UP, 2017) 79.

³ These measures are discussed in more detail in section 3.2 below.

2. Main contours of the debate

The main disagreement running through the literature on the impact of populism on liberal democracy is between those who contend that populism necessarily is (or is not) incompatible with liberal democracy and those who think that the relationship between populism and liberal democracy is something that has to be examined on a case-by-case basis. For authors in the first group, the two central points in dispute are whether (1) populism is necessarily incompatible with a commitment to political pluralism and (2) this form of politics is intrinsically anti-institutionalist. For authors in the second group, these two questions cannot be answered in the abstract, but only by looking at populism's actual effects. There is also an earlier generation of more empirically-minded scholarship on left-wing populism's macro-economic consequences, particularly in Latin America. While not dealing specifically with the impact of populism on liberal democracy, this strand suggests that the threat that populism poses to liberal democracy lies not just in its direct effect on political pluralism and institutions, but also in its indirect effect on the conditions that liberal democracy requires to flourish.

In his well-known contribution to the first strand in the literature,⁴ Jan-Werner Mueller mounts a powerful case for populism's necessary anti-pluralism. In Mueller's view, populists' characteristic posture that they represent the real people in their struggle against some or other elite is best understood as a 'moral' rather than an 'empirical' claim.⁵ It follows that populism has no place for a pluralist conception of democracy. For their moral claim to ring true, populists must perforce deny the existence of a more complex range of competing social interests, each with an equal right to political representation. On the other hand, Mueller thinks, populism as a mode of politics is not necessarily anti-institutionalist. Populists are in fact quite comfortable with institutions, he points out, provided that they are *their* institutions.⁶ When in power, populists thus characteristically try either to refashion or pack constitutional institutions to serve their purposes rather than doing away with them altogether.

Against this, Ernesto Laclau and Chantal Mouffe have, in a sustained body of work, depicted populism as being, not just compatible with democracy, but integral to the most normatively attractive conception of that form of government. In their early joint work in the 1980s,⁷ Laclau and Mouffe sought to map a new left political project that de-emphasised class conflict in favour of a wider range of forms of domination. While the focus of their analysis at this early stage was not on populism per se, they stressed the role that popular social movements could play in drawing attention to the 'chain of equivalence' between the various forms of domination that they identified.⁸ In playing this role, Laclau and Mouffe argued, popular social movements had the potential to re-invigorate European democratic systems that had become stultified by practically indistinguishable centre-left and centre-right visions of economic and social policy.

In 2005, Laclau, writing alone, directed his attention specifically to populism, arguing that its characteristic 'political logic' was essential to democratic politics.⁹ Politically driven social change, he contended, is always a function of one or another group's demanding something. Where political

⁴ Jan-Werner Mueller, *What is Populism?* (University of Pennsylvania Press, 2016); Jan-Werner Mueller, 'Populism and Constitutionalism' in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo, and Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford University Press, 2017) 590.

⁵ Ibid.

⁶ Ibid.

⁷ Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985).

⁸ Ibid.

⁹ Ernesto Laclau, *On Populist Reason* (London, Verso 2005).

demands remain unsatisfied, the demanding group will seek to prosecute them by drawing a distinction between those supporting the existing political system and 'the people'. As an 'empty signifier', the idea of the people is necessarily socially constructed and can be given whatever content is required to unify diverse social groups against a common political opponent. Far from being a pathology, then, populism's political logic should be seen as central to democracy.

Following Laclau's death in 2014, Mouffe has developed their joint approach in the context of the contemporary debate over the rise of right-wing populism in Western Europe. In Mouffe's view, the left needs to reclaim a positive conception of populism as providing an 'adequate strategy to recover and deepen the ideals of equality and popular sovereignty that are constitutive of a democratic politics'.¹⁰ Describing the current political conjuncture as one of 'post-democracy', in which economic liberalism has reduced liberal democracy to its 'liberal component',¹¹ she argues that left-wing populism should aim to 'federate' various democratic struggles, and in this way 'recover democracy' and 'deepen and extend it'.¹² In addition to workers, the groups whose struggles Mouffe thinks could be linked in this way are 'immigrants', the 'precarious middle class' and the 'LGBT community'.¹³ By getting these groups to see the connections between their various experiences of subordination, she argues, left-wing populists might be able to build a social movement powerful enough to construct a new hegemonic understanding of liberal democracy.

In this latest iteration of Laclau's and Mouffe's argument, left-wing populism is neither inherently anti-pluralist nor inherently anti-institutionalist. It is not anti-pluralist because Mouffe accepts the existence of a range of social groups with different experiences of domination and does not seek to homogenise them under a single, real people. Rather, what her recommended political project should strive to do is to build a political coalition strong enough to oppose and eventually transform neoliberalism's discursive hegemony. At the same time, Mouffe's understanding of left-wing populism is not inherently anti-institutionalist in so far as she says that her radical democratic project can and should be pursued within the framework of existing liberal-democratic institutions.¹⁴ Indeed, the aim of such a project would be to perfect liberal democracy by taking its egalitarian and emancipatory promises to their logical conclusion.

Setting themselves apart from this debate about populism's necessary impact on liberal democracy, more empirically-minded scholars tend to argue that generalisations about populism's necessary relationship to liberal democracy are apt to mislead given that populism takes on so many different forms depending on the political context. The main proponents of this approach, Cas Mudde and Cristóbal Rovira Kaltwasser, define populism as 'a thin-centred ideology that considers society to be ultimately separated into two homogeneous 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'.¹⁵ As a 'thin-centred ideology', they argue, populism's implications for liberal democracy are always a work in progress, contingent on the particular political context in which this form of politics is deployed. On the positive side, populism can work as 'a democratic corrective' by allowing an excluded constituency to find its political voice. On the negative side, populism can undermine the institutions on which liberal democracy depends.¹⁶

¹⁰ Chantal Mouffe, *For a Left Populism* (London: Verso 2018) 9.

¹¹ *Ibid* 16.

¹² *Ibid* 22-24.

¹³ *Ibid*.

¹⁴ *Ibid* 36. See also *ibid* 39, 44-45, 48.

¹⁵ *Populism: A Very Short Introduction* (note 2 above) 6.

¹⁶ *Ibid* 84.

One final thread in the literature worth noting dates to an earlier period when the focus of concern was not the right-wing populism of Europe but the left-wing populism of Latin America. In this earlier literature, the concern was less with populism's impact on liberal-democratic institutions and more with its economic effects. In the early 1990s, for example, there was a thriving line of research on the 'macroeconomics of populism'.¹⁷ Proceeding empirically, this literature examined the practical effects of the macroeconomic strategies deployed in various Latin American countries in the 1980s. While a little dated, this literature is still relevant to South Africa in so far as some of the populist policies now being mooted in that country resemble those attempted in Latin America thirty years ago. The broad conclusion of this literature – that the implementation of such policies invariably leads to macroeconomic crises that leave the poor worse off – seems particularly germane. If the conditions for the rise of left-wing populism lie in inequality, this conclusion suggests, radical economic transformation measures will tend to perpetuate the economic conditions in which this form of populism thrives. That may well be the most dangerous threat that left-wing populism poses to liberal democracy in South Africa – not its direct impact on the functioning of liberal-democratic institutions, but its indirect impact, through the macro-economic instability it engenders, on popular support for liberal constitutionalism.

3. The two phases of populism in South Africa

Despite its celebrated transition to liberal democracy in the mid-1990s, South Africa is in many ways a country that was always ripe for populist politics and, eventually, some form of constitutional populism. As Mark Tushnet has argued, '[c]ontemporary populism emerged when, and because, political elites failed to follow through on international social welfare constitutionalism'.¹⁸ If there was ever a constitution that embodied that aspirational ideal, it was the 1996 South African Constitution. Enacted at the zenith of the seeming triumph of liberal democracy,¹⁹ the text contains a wide range of left-progressive commitments, from rights to housing, healthcare and water to guarantees of respect for human dignity, freedom and equality.²⁰ Even with the assistance of the finest civil service in the world, any new government would have found this array of commitments difficult to meet. Instead, the ANC inherited a racially divided public administration in which a culture of corruption had already begun to take root.²¹ Making matters worse, the 1996 Constitution was introduced in a deeply damaged society, riven by inter-racial suspicion and vast inequalities of wealth.²² Unless it delivered on its promises very rapidly, this suggested, the chances were strong that there would be a public backlash against it as the primary symbol of a failed transition. This was especially so given the extensive Western liberal influence on the 1996 Constitution and the easy association between that influence and the economic advantages enjoyed by the white minority.

Given these starting conditions, the surprising thing is how long it took, first, for populist politics to become a force in South Africa and, then, for this form of politics to be directed towards the legitimacy of the constitutional settlement. Part of the explanation lies in the initial groundswell of support for the ANC as the party that had secured the black majority's liberation from apartheid.

¹⁷ Rudiger Dornbusch & Sebastian Edwards, *Macroeconomics of Populism in Latin America* (Chicago: University of Chicago Press, 1991).

¹⁸ Mark Tushnet, 'Varieties of Populism' (2019) 20 *German Law Journal* 382, 384.

¹⁹ Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000).

²⁰ See, for example, sections 9-12 and 22-29.

²¹ R. W. Johnson, *Fighting for the Dream* (Johannesburg: Jonathan Ball, 2019) chapter 6.

²² At the dawn of democracy in 1994, South Africa had the second worst Gini coefficient in the world, behind Brazil. Despite decent economic growth at times after 1994, it continues to rank as one of the most unequal societies in the world.

While the ANC was associated with the transition to a new elite, it was initially seen as embodying the aspirations of the black community as a whole. In the first ten years of democracy, therefore, the public's attention was mostly focused on what the ANC was doing to improve the life chances of its supporters. The predominant political mood was one of anxious expectation that the 1996 Constitution would deliver on its promises. While there was some criticism of the negotiated transition as an 'elite pact',²³ no political party was able to mobilise that sentiment into an effective opposition movement. The party best placed to take advantage of the 1996 Constitution's Western liberal influence, the Pan Africanist Congress (PAC),²⁴ never fared very well at the ballot box and was more or less a spent force by the end of the century.

Over the next decade, however, as the slow pace of social and economic transformation started to become apparent, things began to change. The first decisive move came in 2007, when Jacob Zuma deposed Thabo Mbeki as President of the ANC and then, in 2008, as President of the country. While this change was technically just a shift in the balance of political power in the ANC, Zuma displayed certain populist tendencies in his personal style.²⁵ His supporters, too, proved themselves to be adept at using populist rhetoric to weaken support for Mbeki, who was identified with the new elite. Thus, while not conforming to the traditional model of a populist insurgency, the succession from Mbeki to Zuma shared some of its characteristics. In its consequences, too, the transition to Zuma displayed several of the pathologies associated with populism, including the undermining of constitutional institutions and the growth of patronage networks.

After Zuma's ousting in 2017, populism in South Africa has entered a second phase associated with the rise of the EFF. Founded in 2013, the EFF has increased its support at every election since then, winning 11% of the vote in 2019. While this percentage may seem small, the EFF exerts a disproportionately large influence on public policy. It achieves this partly through its militant rhetoric, which tends to dominate the newspaper headlines, and partly by exploiting the political divisions within the ANC. With the rump of the Zuma faction now reorganised under the banner of 'radical economic transformation', left-wing populism has a presence both inside and outside South Africa's dominant political party. In consequence, current President Cyril Ramaphosa has had to move quite cautiously. He is acutely aware of the need to repair liberal-democratic institutions that were incapacitated during the Zuma era, but does not yet have the support to do so effectively.

The rest of this section turns to explain these two phases of South African populism in more detail.

3.1 The first phase: the Zuma presidency

The full story of the transfer of power from Mbeki to Zuma has been exhaustively chronicled elsewhere.²⁶ The essential point is that Mbeki was a political moderate who favoured a gradual, market-friendly approach to social transformation.²⁷ In the lead-up to the constitutional negotiations process, he persuaded more radical members of the ANC to strike a deal with the apartheid government rather than wait for it to be defeated militarily. Thereafter, as de facto President under Mandela, Mbeki replaced the ANC's statist Reconstruction and Development Plan (RDP) with the fiscally conservative Growth and Economic Redistribution strategy (GEAR).²⁸ While GEAR succeeded

²³ Patrick Bond, *Elite Transition: From Apartheid to Neo-Liberalism in South Africa* (London: Pluto Press, 2000).

²⁴ The PAC was the ANC's main political rival in the struggle against apartheid, espousing a more Africanist approach.

²⁵ Zuma, for example, is fond of singing an ANC struggle song ('Umshini Wami' – my machine gun).

²⁶ See, for example, Jeremy Gordin, *Zuma: A Biography* (Johannesburg: Jonathan Ball, 2008); Frank Chikane, *Eight Days in September: The Removal of Thabo Mbeki* (Johannesburg: Picador Africa, 2012) 11.

²⁷ See Mark Gevisser, *The Dream Deferred: Thabo Mbeki* (Johannesburg: Jonathan Ball, 2007).

²⁸ See William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Cape Town: Zebra Press, 2007) 71-73.

in reducing government debt, it was less successful in achieving its other aims of stimulating investment and promoting job creation.²⁹ When this started to become apparent in the mid-2000s, Mbeki took much of the blame.³⁰ His policies, left-wing critics claimed, had met the demands of the international financial community but left the economic power structures of the apartheid state largely untouched.

Mbeki's other vulnerability was his reputation as an aloof technocrat, which was unfavourably compared with Zuma's man-of-the-people persona.³¹ This problem was exacerbated in 2005 when Mbeki was forced to 'relieve' Zuma of his position as Deputy President after a court decision found that Zuma had been involved in a 'corrupt relationship' with an ANC-aligned businessman, Schabir Shaik.³² While Mbeki had little choice in the matter, Zuma was able to depict himself as the wronged victim of an emotionally distant President who had manipulated the prosecution process to sideline him. In 2008, after another judicial decision gave some credence to these allegations,³³ the ANC's National Executive Committee (NEC) asked Mbeki to resign.

The initial move towards populism in South Africa was thus associated with a leadership struggle in the ruling political party. Populism gained a foothold, not because an insurgent political party successfully mobilised a disaffected populace against an incumbent elite, but because the Zuma faction in the ANC found it convenient to use this form of politics to dislodge Mbeki.

Despite these slightly unusual origins, the consequences of South Africa's turn to populism were depressingly familiar. With no realistic prospect of electoral retribution, the Zuma faction in the ANC set about using its control of state institutions to favour its interests. Under the legitimating cover of 'black economic empowerment' (BEE),³⁴ tenders were improperly awarded, kickbacks given, and friends and relatives appointed. In the process, the ANC changed from a governing political party into a vast patronage network. Membership of the party was seen, not as an opportunity for public service, but as a stepping-stone towards personal enrichment.

In addition to the legitimating cover provided by BEE, the Zuma faction's corrupt activities were facilitated by the ANC's long-standing policy of 'cadre deployment'. According to this policy – a hangover of the Stalinist influence on the ANC in exile – all important governmental positions had to be filled with loyal ANC members, who would faithfully implement the NEC's mandates. Rather than effective governance, the predictable result of this approach was that influence within the party replaced technical competence as a qualification for office. This in turn facilitated the growth of patronage networks through the ANC's internal party structures.

The country's state-owned enterprises were particularly ripe for this form of corruption. Supposedly the centrepiece of the 'developmental state', they became, under Zuma's presidency, sites for some of the most serious patronage. As details of the extent of misappropriation of state funds started to become clear, the Zuma faction tightened its grip on constitutional institutions that in theory could have done something to prevent it, including the National Prosecuting Authority. In the final chapter of this first stage, the South African state itself was said to have been captured by a family of foreign businessmen, who had inveigled their way into Zuma's affections.³⁵

²⁹ Ibid 112-113.

³⁰ Ibid.

³¹ Gordin, *Zuma* (note 26 above).

³² *S v Shaik and Others* 2007 (1) SACR 142 (D).

³³ *Zuma v National Director of Public Prosecutions* [2008] ZAKZHC 71; [2009] 1 All SA 54 (N).

³⁴ This term is used to describe affirmative actions measures aimed at redressing racially based economic disadvantage.

³⁵ Jacques Pauw, *The President's Keepers: Those Keeping Zuma in Power an Out of Prison* (Cape Town: Tafelberg, 2017); Pieter-Louis Myburgh, *The Republic of Gupta: A Story of State Capture* (Cape Town: Penguin, 2017).

Fortunately, three critical constitutional institutions maintained their independence during this time: the judiciary, the Public Protector and the free press. While Zuma was able to appoint two new chief justices, Sandile Ngcobo and Mogoeng Mogoeng, neither proved as politically pliable as he may have wished. The latter in particular defied expectations by delivering several forceful judgments. Outside the courts, the Public Protector's office, under the leadership of Thuli Madonsela, began for the first time properly to play its constitutionally designated role.³⁶ Its reports, often using information unearthed by investigative journalists, revealed the full extent of the rot that had set in.³⁷

The beginning of the end for Zuma came when Madonsela produced a damning report on his use of state funds to refurbish his rural homestead at Nkandla.³⁸ When Parliament refused to act on her recommendations, a group of political parties, led by the EFF, brought a case to the Constitutional Court for an order declaring both Parliament and the President to be in breach of their constitutional obligations.³⁹ In ringing tones, Mogoeng Mogoeng condemned the President's behaviour and ordered the repayment of all unauthorised expenditure.

The Constitutional Court's judgment in the Nkandla matter turned public opinion decisively against Zuma. In the ensuing 2016 local government elections, the ANC's overall share of the vote was reduced to its lowest percentage ever (53.9%), and the Democratic Alliance (DA) party, in cooperation with other minority parties, including the EFF, was able to take control of the Nelson Mandela Bay (Port Elizabeth), Johannesburg and Tshwane (Pretoria) metropolitan municipalities.⁴⁰ While Zuma still had extensive support within the organisation, the ANC's poor electoral performance convinced just enough of its members that he had become a liability. At the party's 2017 conference, Cyril Ramaphosa was elected President of the ANC, narrowly defeating Zuma's chosen successor, his ex-wife Nkosasana Dlamini-Zuma. Although Zuma tried to cling on as President of the country, he was forced to resign in early 2018, clearing the way for Ramaphosa to take over.

The first phase of populism in South Africa was therefore one in which a populist faction within the ANC took control of the party and used its dominant position within Parliament and the public administration to create an extensive network of patronage. Constitutional institutions were attacked, not so much for ideological reasons, but because they presented a barrier to the Zuma faction's 'state capture' project. The takeover was eventually stopped through the concerted actions of opposition political parties, civil society, the courts and the Public Protector. Ironically, the EFF, itself a populist party, was at the centre of these efforts, its determined focus on the Nkandla matter helping to turn back the tide. In addition, several key constitutional institutions maintained their independence. While the National Prosecuting Authority was undermined, the courts, the Public Protector and the free press were able to expose the Zuma faction's populist rhetoric for what it was – a thinly veiled excuse for looting.

3.2 The second phase: the rise and influence of the EFF

As resilient as these key constitutional institutions proved to be, however, populism in South Africa has now entered a second phase that may yet prove to be more destructive than the first. Part of the problem is that the Zuma faction's influence over the ANC was not eliminated just because its leader was deposed. Even after all the revelations about Zuma's unconstitutional behaviour, the

³⁶ Thandeka Gqubule, *No Longer Whispering to Power: The Story of Thuli Madonsela* (Johannesburg: Jonathan Ball, 2017).

³⁷ Office of the Public Protector, *State of Capture*, Report 6 of 2016/17 (October 2016).

³⁸ Office of the Public Protector, *Secure in Comfort*, Report 25 of 2013/14 (March 2014).

³⁹ *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC).

⁴⁰ https://en.m.wikipedia.org/wiki/2016_South_African_municipal_elections.

vote at the crucial 2017 ANC party congress was a close-run thing, with Ramaphosa winning only because a Zuma-faction ally switched sides at the last moment.⁴¹ Of the top six positions in the NEC, three are still held by former supporters of Zuma.⁴² In addition, while Zuma himself has fallen out of favour, his supporters have been able to re-organise themselves into the new RET faction. Given this situation, Ramaphosa's control over the party is far from guaranteed. While his mission over the last two years has been to rehabilitate constitutional institutions that were undermined during the Zuma era, he has had to proceed cautiously lest he trigger a counterattack.

The further difficulty for Ramaphosa is that the RET faction is not so very different in ideological terms from the EFF. Both the EFF and the RET thus use the rhetoric of 'black economic empowerment' and an associated critique of 'white monopoly capital' to justify their increasingly radical policy proposals. And in both instances, too, there are serious doubts about whether this rhetoric represents a sincere commitment to left-wing policies or whether it is simply a device to win power for corrupt purposes. There is accordingly a sense in which the ANC's moderate faction, which is still committed to the values underlying the 1996 Constitution, has to contend with populists on every front. While the EFF, with just under 11% of the national vote, currently has no chance of forming government itself, it has been able to exert a left-wing populist drag on ANC policy. The proposed amendment to the property clause, as noted, implements the EFF's long-standing call for expropriation without compensation ('EWC').⁴³ In other respects, too, the ANC is now proposing policies that are more in line with the EFF's radical agenda than they are with the fiscally responsible approach favoured by the Ramaphosa faction. Among these are the on-again, off-again proposal to nationalise the Reserve Bank; the rather whimsical idea, given the current state of South Africa's finances, of creating a sovereign wealth fund; and a more serious proposal to establish a National Health Insurance scheme by absorbing the private health insurance industry ('the NHI proposal').⁴⁴

The reasons why the EFF has been able to exert this degree of influence are complex and yet essential to understanding the political dynamics of constitutional populism in South Africa. Of the two most likely explanations – that the ANC has adopted some of the EFF's policy positions as a containment strategy versus the possibility that the RET faction is using the electoral threat posed by the EFF as a political wedge to regain control of the party – the latter seems more plausible. To see why this is so, it is necessary to turn to the EFF itself – the history of its formation, its ideological character and political style, and its relationship to the ANC.

The first important point to note is that the EFF's leader and co-founder, Julius Malema, is a former President of the ANC Youth League ('ANCYL'). He is thus a product of the governing party – someone who was once tipped as a potential national leader. Indeed, his rapid rise to prominence was

⁴¹ David Mabuza was expected to vote for the Zuma faction, but switched sides in return for the position of Deputy President. Zuma was not himself eligible for re-election as ANC President in 2017, having already served two terms.

⁴² David Mabuza (the Deputy President), Ace Magashule (the Secretary General) and Jessie Duarte (the Deputy Secretary General). Magashule, the acknowledged leader of the RET faction, is facing serious corruption allegations relating to his time as Premier of the Free State. See Pieter-Louis Myburgh, *Gangster State: Unravelling Ace Magashule's Web of Capture* (Century City: Penguin, 2019). David Mabuza has also been accused of corruption relating to his time as Premier of Mpumalanga.

⁴³ EWC is one of the 'seven pillars' of the EFF's political programme. See article 3 of the EFF Constitution as adopted by the First National People's Assembly in Mangaung, Bloemfontein (16 December 2014) (available at eff.online.org).

⁴⁴ South Africa's Reserve Bank is privately owned. There is thus some sense in the idea of nationalising it. The ANC, however, has not been able to point to any particular problem with the Bank's functioning, nor has it been able to show why this expensive policy option should be prioritised. See Mcebisi Ndletyana, 'Public approval is Ramaphosa's only defence against his enemies in the ANC' *Conversation* (24 January 2020). The sovereign wealth fund idea is supported by the ANC's National Executive Committee and was mentioned in Cyril Ramaphosa's 2020 SONA address. It is not being seriously pursued, however. For a highly critical view of the NHI proposal, see Michael Settas, 'Why the NHI is bad medicine for South Africa' *Daily Maverick* (4 February 2020).

associated with his involvement in the move to install Zuma as President, with Malema famously declaring that he would 'kill' for him.⁴⁵ Instead of entrenching his position in the organisation, however, Malema's role as Zuma's kingmaker appears to have identified him as a potential threat. What Malema had been able to do on Zuma's behalf, it was likely thought, he would eventually be able to do for himself. On top of this, Malema's inflammatory, borderline racist rhetoric was causing the ANC reputational damage – not so much among its supporters, but among the international community whose approval the ANC at that stage still courted. After one transgression too many, Malema was expelled from the party in April 2012.

Rather than disappearing into the political wilderness, however, Malema bounced back stronger and more influential than before. In July 2013, a little more than a year after his expulsion from the ANC, he co-founded the EFF, becoming its first, and still to this day, only leader. In its public statements, the EFF espouses a 'radical, working class' interpretation of the ANC's 1955 Freedom Charter.⁴⁶ The strategy behind this positioning is evidently to present itself as the authentic heir to the struggle for black economic empowerment in South Africa while simultaneously depicting the ANC as a party that has been led astray from that goal by the temptations of office.

In practice, the EFF's radical policy proposals reflect a crude (but ideologically powerful) combination of Marxist-Leninism and Fanonist post-colonial theory.⁴⁷ As the true representative of the South African people – its black majority – the EFF promises to deliver economic emancipation through a comprehensive programme of 'nationalisation of mines, banks, and other strategic sectors of the economy' and 'expropriation of South Africa's land without compensation for equal redistribution'.⁴⁸ In articulating these policies, the Preamble to the EFF's Constitution uses several quintessentially populist formulations, declaring for example that the party 'will be the vanguard of community and workers' struggles and will always be on the side of the people'.⁴⁹ Article 1(3) in turn commits the party to 'the establishment of the dictatorship of the people in place of the dictatorship of the bourgeoisie'.⁵⁰ In addition to these rhetorical devices, the EFF's political style conforms to many of the elements often associated with left-wing populism. Its so-called 'Central Command Team' is thus headed by a militaristic 'President and Commander in Chief'.⁵¹ In Parliament, EFF MPs demonstrate their identification with the working class by wearing red mineworkers' uniforms and matching domestic workers' outfits (in stark contrast to ANC MPs' expensive suits and designer clothes). Rather than engaging in reasoned debate, EFF MPs routinely disrupt parliamentary sessions with loud chanting and pedantic points of order. When expelled for misbehaviour, they take advantage of this opportunity, too, portraying themselves as the excluded victims of an oppressive political system. The final sartorial touch is on display at press conferences, when Malema and other EFF leaders exchange their mineworkers' helmets for Che Guevara berets.

As leader of the EFF, Malema has continued to deploy the highly confrontational style that saw him expelled from the ANC. He has been sued for defamation on several occasions and regularly appears before the Equality Court to defend himself against allegations of hate speech.⁵² In this respect, too,

⁴⁵ See Fiona Forde, *An Inconvenient Youth: Julius Malema and the 'New' ANC* (Johannesburg: Picador Africa, 2011) 208.

⁴⁶ This information is drawn from the EFF's website available at www.EFFonline.org.

⁴⁷ See Mandisa Makeshini, 'Each Generation Must Choose its Mission' (29 December 2019) available at EFFonline.org.

⁴⁸ EFF Constitution available at EFFonline.org.

⁴⁹ Ibid article 3.2 and 3.1 respectively.

⁵⁰ Ibid.

⁵¹ Ibid article 9.1

⁵² In May 2019, Malema and the EFF were ordered to pay R500 000 in damages to former Finance Minister, Trevor Manuel. In January 2020, they lost a further defamation case brought by journalists Anton Harber and Thandeka Gqubule after Malema and the EFF had falsely accused them of spying on behalf of the apartheid government.

Malema conforms to standard conceptions of the populist political leader – identified in the public mind with his party and it with him, his outrageous antics crucial to his party’s political appeal.

While the EFF is nowhere near to winning an outright majority, it has been relatively successful in electoral terms, faring better and proving more enduring than either of the two other parties to have broken away from the ANC.⁵³ Its main constituency comes from the mining areas of the North West and Limpopo provinces, where the EFF’s critique of the ANC elite’s complicity in the oppression of black workers has the greatest purchase.⁵⁴ In the 2014 general elections, just one year after its foundation, the EFF was able to win 6.35% of the national vote, far more than any other new political party. It increased this share to 10.79% in the most recent 2019 general elections. In the simultaneously held provincial elections, the EFF won 14.43% of the vote in Limpopo and 18.36% of the vote in the North West, becoming the official opposition in those two provinces.

These modest percentages do not fully reflect the EFF’s actual influence on politics, which comes from four factors. One is that the ANC’s support is increasingly rural, meaning that the EFF enjoys concomitantly more support in South Africa’s urban areas. In the 2016 municipal elections, for example, it won 8.31% of the overall vote, but its performance in the cities meant that it was able, together with the Democratic Alliance and other minority parties, to displace the ANC from three metropolitan municipalities (including Johannesburg).⁵⁵ The second factor is that the EFF’s 11% share of the vote means that its support is crucial to any constitutional amendments that the ANC might wish to make, where a two thirds majority is typically required. Third, the EFF’s radical policy agenda and confrontational political style mean that it attracts a disproportionate amount of media attention. Barely a day goes by without some new outrageous remark or piece of political theatre that journalists cannot help but cover. In this way the EFF is able to convey the impression that it is driving the national policy debate. Finally, the EFF’s left-wing populism is being played out against the background of the ongoing struggle for control of the ANC. It is this last factor in particular that is giving it a disproportionate influence over ANC policy.

As noted, the ANC is currently split into two main groupings: a moderate faction aligned with President Cyril Ramaphosa, and the RET faction, which consists of former Zuma supporters aligned with Secretary General, Ace Magashule. After Zuma’s ousting as President in 2017, the RET faction has tabled a number of radical policy proposals for adoption by the National Executive Committee of the ANC – its central policy-making body. Many of these proposals – such as that for the expropriation of land without compensation – are hard to distinguish from proposals that the EFF has long been making. The RET faction and the EFF also share an enemy in Public Enterprises Minister, Pravin Gordhan, who, as former Commissioner of the South African Revenue Service (1999-2009) and Minister of Finance (2009-2014 and 2015-2017) was responsible for resisting much of the state capture that has come to light. While this does not mean that the RET faction and the EFF make common cause on every issue, it does mean that the RET faction is able to use the electoral threat posed by the EFF as an important component of its strategy to regain control of the ANC. In essence, the strategy amounts to a political wedge in terms of which the RET faction introduces

⁵³ The United Democratic Movement (UDM) and the Congress of the People (Cope).

⁵⁴ The foundation of the EFF followed shortly on the so-called ‘Marikana massacre’ in 2012 in which 34 striking mineworkers were shot dead by police and 78 injured at a mine outside Rustenburg. Malema, who had just been suspended by the ANC, visited the site of the massacre and gave a speech in support of the mineworkers. President Cyril Ramaphosa was a non-executive director of the owner of the mine, Lonmin, at the time. After the massacre, it was revealed that he had sent an email encouraging the police to take strong action against the mineworkers. Ramaphosa, however, was cleared of any wrongdoing by the Farlam Commission, the commission of inquiry set up to investigate the massacre. See Marikana Commission Report available at <https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>.

⁵⁵ https://en.m.wikipedia.org/wiki/2016_South_African_municipal_elections.

radical policy proposals in the NEC, leaving it to the Ramaphosa faction either to resist these proposals, and risk being blamed for any resultant loss of electoral support to the EFF, or to adopt them, and thus accept the change to the ANC's ideological direction that the RET faction favours.

Of course, this strategy would not work were there not considerable sympathy for radical economic transformation among the electorate. The fact that the EFF wins around 11% of the vote does not mean that this is the full extent of support for left-wing populist policies in South Africa. Many voters who would otherwise vote for the EFF continue to vote for the ANC out of loyalty and respect for its status as a former liberation movement. The RET faction in the ANC nominally represents these voters, and thus the proportion of the electorate that supports radical economic transformation measures is likely significantly higher than 11%.

Having said that, the RET faction includes several politicians who have been deeply implicated in corruption and state capture. The EFF and its leadership have also been named in several corruption scandals over the years.⁵⁶ There is thus little doubt that their populist rhetoric is being driven by motives other than a desire to represent the economically disenfranchised. Indeed, given the extent of the wrongdoing that has come to light, the RET faction in the ANC desperately needs to win its battle for control of the party in order to prevent the National Prosecuting Authority from being used to pursue its members for their misdeeds.

That concern aside, both the RET faction and the EFF may have calculated that they have nothing to lose from left-wing populism. Either their radical policy proposals miraculously achieve their redistribution targets, in which case they will be celebrated as heroes of the revolution, or they do not, in which case the resultant economic misery and deepening inequality in South Africa will drive even more of the electorate into their camp.

4. Impact of populism on liberal democracy in South Africa

When the EFF first arrived on the political scene in 2013, its brand of left-wing populism was greeted with cautious optimism.⁵⁷ The major threat to liberal democracy in South Africa, it had long been thought, was the ANC's political dominance. With only one political party in power since 1994, South Africa was not even democratic on some definitions.⁵⁸ Even if a less exacting definition was used, how could a culture of democracy be sustained when the ANC's dominance allowed it so easily to conflate party and state – its own interests with those of the nation? In a context like that, the EFF's in-your-face, gloves-off anti-elitism looked to many like a vital injection of political pluralism. Here, finally, was a tactically shrewd, black-led political party that could give the ANC a run for its money. Not just that, but the EFF was clearly necessary – its early electoral results showing that there was a significant constituency that no longer felt adequately represented by the ANC.

Seven years later, in 2020, assessments of the impact of left-wing populism on liberal democracy in South Africa need to be more cautious. While the EFF's brazen assault on the ANC's claim to be the natural party of government has reinvigorated democratic politics, left-wing populism has at the same time weakened liberal democracy in several ways. Three issues, in particular, are worth

⁵⁶ Senior EFF leader, Floyd Shivambu, is implicated in the so-called VBS Mutual Bank scandal, for example.

⁵⁷ Richard Calland and Shameela Seedat, 'Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighters on South Africa's Parliament' (2015) 28 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 304.

⁵⁸ Adam Przeworski, *Democracy and the Market* (New York, NY: Cambridge University Press, 1991) 10 (defining democracy as 'a system in which parties lose elections').

examining: the impact of left-wing populism on (1) constitutional institutions supporting liberal democracy; (2) parliamentary politics and political pluralism; and (3) liberal-democratic principles as defined and enforced by the courts.

4.1 Constitutional institutions supporting liberal democracy

The 1996 Constitution formally provides for a range of ‘state institutions supporting constitutional democracy’, collectively known as ‘Chapter 9 institutions’.⁵⁹ These include the Public Protector, the South African Human Rights Commission, the Commission on Gender Equality, the Auditor General and an independent authority to regulate broadcasting.⁶⁰ In addition, the Constitution provides for an independent judiciary, an independent National Prosecuting Authority, the right to freedom of the press and various other liberal-democratic institutions.⁶¹ Given the ANC’s resounding victory in the first democratic elections in 1994, the initial concern was that these institutions would be unable to assert their independence. In an environment in which the ANC had won an overwhelming majority in Parliament, the thinking went, what chance was there that they would be able hold the ruling political party to account?

In certain respects, this fear was borne out. When the Auditor General, for example, delivered a report in 2000 questioning key aspects of the so-called ‘Arms Deal’ – a multi-billion Rand armaments procurement package – the ANC used its majority in the Select Committee on Public Accounts (SCOPA) to close the investigation down. (This so alarmed one of the young ANC members on the Committee that he resigned from the party to pursue a career as an anti-corruption advocate in London.⁶²) In a separate incident, the South African Human Rights Commission conducted an inquiry into racism in the media, which showed worrying signs of political influence.⁶³

In general, however, most constitutional institutions were able to maintain their independence during the first decade of democracy. The key institution in this respect was the Constitutional Court. Staffed with judges who – though sympathetic to the ANC’s social transformation agenda – could not be said to be lackeys of the ruling party,⁶⁴ the Court developed a robust and distinctly South African understanding of the purposes and possibilities of liberal constitutionalism. At its centre was the idea of a caring and capable state, which the Court repeatedly identified as the principal agent of the realization of the 1996 Constitution’s values.⁶⁵ Despite the ANC’s political dominance, this approach succeeded during the first decade of democracy in maintaining the necessary distinction between the ANC as the fallible, but democratically legitimate, representative of the South African people, and the aspirational constitutional standards that it was the Constitutional Court’s duty to enforce.

This delicate arrangement began to fall apart in the mid-2000s, however, as South Africa entered its second democratic decade. As noted in the previous section, the main catalyst was the Mbeki-Zuma

⁵⁹ Constitution of the Republic of South Africa, 1996, chapter 9.

⁶⁰ Now known as the Independent Communications Authority of South Africa.

⁶¹ See s 179 (on the National Prosecuting Authority) and s 16(1)(a) (freedom of the press and other media).

⁶² See Andrew Feinstein, *After the Party* (Johannesburg: Jonathan Ball, 2007). For an accessible account of the Arms Deal, see Paul Holden, *The Arms Deal in Your Pocket* (Johannesburg: Jonathan Ball, 2008).

⁶³ See Daryl Glaser, ‘The Media Inquiry Reports on the South African Human Rights Commission: A Critique’ (2000) 99 *African Affairs* 373.

⁶⁴ See Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge: Cambridge University Press, 2013) 219-31.

⁶⁵ *Ibid*; James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (Cambridge: Cambridge University Press, 2017).

succession battle. What that battle revealed was just how pernicious the impact of the ANC's political dominance could be when combined with a bitter struggle for control of the party. As careful as the framers of the 1996 Constitution had been in providing for a range of institutions to protect democracy, they had not anticipated that these institutions would be required to manage a destructive conflict of this type. Nor had the framers imagined that these institutions would themselves become the sites of a major battle within the ruling party.

The still unfolding story of the National Prosecuting Authority (NPA) provides the clearest example of this unexpected challenge. Despite the constitutional safeguards supporting its independence,⁶⁶ the NPA was rapidly drawn into the Mbeki-Zuma succession battle. The initial trigger was the fateful 2003 decision to bring corruption charges against Schabir Shaik without at the same time charging his alleged co-conspirator, Zuma. While the head of the NPA at the time, Bulelani Ngcuka, justified this decision on the basis of a lack of evidence,⁶⁷ Zuma argued that it was prejudicial to him.⁶⁸ What it meant in effect, Zuma claimed, was that his allegedly corrupt relationship with Shaik went on trial without his being able to defend himself. When Shaik was convicted and Zuma thereafter dismissed as Deputy President, Zuma was consequently able to portray the prosecution process as having been politically manipulated.

The next stage of the story illustrates how well-meaning actions in defence of liberal constitutionalism can sometimes produce results contrary to the promotion of that ideal. As we have seen, Zuma was able to use popular dissatisfaction with his treatment by Mbeki to launch a successful come-back campaign. In December 2007, he defeated Mbeki in a tense election for President of the party. Prompted perhaps by fears of the threat that Zuma posed to South Africa's democracy, the new head of the NPA, Mokotedi Mpshe, immediately indicted him on charges of corruption relating to the Arms Deal. While long overdue, the timing of the charges was just too neat not to invite allegations that Mbeki, who was then still President of the country, had requested them. Zuma duly applied for judicial review of the NPA's decision. In a well-intentioned but poorly expressed judgment, Justice Chris Nicholson, who had been appointed to the Bench after a distinguished career as an anti-apartheid human rights lawyer, found in Zuma's favour. The problem was not so much the finding itself, but that it was couched in language that gave unnecessary credence to Zuma's allegations of political manipulation.⁶⁹ Within days of the judgement's delivery, Zuma was able to use Nicholson's remarks as ammunition to force Mbeki to resign.

Whether or not Mbeki had interfered with Zuma's prosecution, what was certain thereafter was that the latter would do everything in his power to ensure that the corruption charges against him were dropped. With the help of a sympathetic National Intelligence Agency official, Zuma was able to obtain two 'spy tapes' that allegedly showed that there had been political involvement in the decision to prosecute him.⁷⁰ On that basis, Mpshe withdrew the corruption charges against Zuma. Thereafter, the position of head of the NPA became something of a revolving door, with three heads and one acting head appointed during Zuma's term as President.⁷¹ Throughout this process, the

⁶⁶ Constitution of the Republic of South Africa, 1996, s 179.

⁶⁷ See Gordin, *Zuma: A Biography* (note 26 above) 89.

⁶⁸ The Supreme Court of Appeal ultimately upheld the lawfulness of the decision to indict Zuma on charges of corruption. See *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1.

⁶⁹ Nicholson J's judgment was overturned on appeal in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1. In the course of its appeal judgment, the SCA criticised the manner in which Nicholson J had unnecessarily strayed into deciding the allegation, which had been made in the public sphere but not in the court papers, that Zuma's prosecution was politically motivated.

⁷⁰ Pauw, *The President's Keepers* (note 35 above) 37-40.

⁷¹ Menzi Simelane, Nomgcobo Jiba (acting), Mxolisi Nxasana and Shaun Abrahams.

courts valiantly tried to defend the NPA's independence, laying down a series of principles that gave flesh to the formal guarantees in the 1996 Constitution.⁷² But the impression created was that of an institution whose integrity had been severely compromised in order to protect Zuma.

The assault on the NPA is in many ways representative of what happened to other state institutions during Zuma's term in office. The work of the South African Revenue Service, for example, was for a long time undermined by false allegations published in a Sunday newspaper that it had established a 'rogue unit'.⁷³ It is now clear that these allegations were used by members of the Zuma faction to sideline senior tax authority personnel who stood in the way of their state capture project.⁷⁴ In this instance, too, the Zuma faction's undermining of constitutional institutions was not so much the product of a carefully thought-through political strategy as the side-effect of its increasingly desperate attempt to hold onto power. Nevertheless, the impact on the institutions concerned was just as severe.

Apart from the Constitutional Court, the one constitutional institution that was able to survive this onslaught was the office of the Public Protector. Before Thuli Madonsela's appointment, the Public Protector had been a fairly ineffective institution, its investigations walking a fine line between minimal performance of its mandate and subservience to the ANC's wishes. Under Madonsela, however, the Public Protector stepped into the breach that had been left by the dismantlement of the NPA. In addition to her work on the Nkandla matter, her 'State of Capture' report revealed the full extent of the corruption that had been allowed to go unchecked under Zuma.⁷⁵

Part of the reason for the Public Protector's resilience was the support it received from South Africa's free press, which has built on its anti-apartheid foundations to forge what is now a fine tradition of investigative journalism. Without the *Mail & Guardian* newspaper's initial report on the Nkandla matter, the Public Protector would likely not have gotten involved. But this was not the only reason why this scandal proved to be such a decisive turning point. The Arms Deal, after all, had also been extensively covered in the press, and yet the ANC was able to ignore the Auditor General's recommendations. The difference between the two situations, as Stu Woolman has argued, lies in the way civil society organisations, the courts, the media and the Public Protector worked together to build a 'politics of accountability' in relation to the Nkandla matter.⁷⁶ The ANC on several occasions thus tried to bury the Public Protector's report by using its majority in Parliament to produce contrary findings.⁷⁷ But persistent newspaper reporting, civil society mobilisation and court actions worked together to produce a groundswell of public support for Zuma's sanctioning. By the time it was delivered, the Constitutional Court's judgment holding that both Parliament and Zuma had violated their constitutional obligations was the vindication of a view widely shared.

Not surprisingly, the emergence of the Public Protector as a powerful fourth branch of government in this way meant that it instantly became a target for populist capture. Before he was forced from office, Zuma was able to appoint Madonsela's successor, Busisiwe Mkhwebane. In a process that

⁷² See *Democratic Alliance v President of the Republic of South Africa and Others* [2011] ZASCA 241; *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*; *Nxasana v Corruption Watch NPC and Others* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC).

⁷³ Pauw, *The President's Keepers* (note 35 above) 80.

⁷⁴ *Ibid.*

⁷⁵ Office of the Public Protector, *State of Capture*, Report 6 of 2016/17 (October 2016).

⁷⁶ Stu Woolman, 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President' (2016) 8 *Constitutional Court Review* 155.

⁷⁷ Heinz Klug, 'State Capture or Institutional Resilience: Is There a Crisis of Constitutional Democracy in South Africa?' in Mark Graber et al (eds), *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018) 295, 304.

confirms the view that populists are not necessarily opposed to institutions, provided that they are their own,⁷⁸ Mkhwebane has been using the Public Protector's newly confirmed powers to conduct a number of investigations into the affairs of the Ramaphosa faction. These include an investigation into Ramaphosa's allegedly misleading answer to a question about a political donation to his 2017 ANC presidential campaign,⁷⁹ and an investigation into Pravin Gordhan's alleged involvement in the setting up of the previously mentioned 'rogue unit' at the South African Revenue Service (which has since been shown to be completely false).⁸⁰ The courts have again been called on as the last line of defence against what Ramaphosa and Gordhan allege is the abusive use of the Public Protector's office for partisan political purposes. Thus far, the judiciary has acquitted itself well, using punitive costs orders to sanction Mkhwebane's erratic behaviour.⁸¹ As with the undermining of the NPA, however, the Public Protector's decline after Madonsela's term ended reveals how the populist faction in the ANC has been able to use its appointments power to subvert constitutional institutions.

For some commentators, the battle for control of constitutional institutions is best described as a kind of 'lawfare', in which the courts have been politicised and the judicial process abused.⁸² There is very little actual evidence, however, that the judiciary's independence has been compromised.⁸³ The most serious scandal, that involving Western Cape High Court President, John Hlophe, has been running for more than a decade, ever since he was accused of attempting to interfere with the Constitutional Court's decision in one of the Arms Deal cases.⁸⁴ More recently, there have been fresh allegations against Hlophe in relation to his running of the Western Cape High Court.⁸⁵ The cloud surrounding Hlophe and the Judicial Service Commission's tardiness in resolving the original complaint against him are indeed worrying, but this is a relatively isolated case. Generally speaking, the judiciary has maintained its reputation for impartiality. While Zuma has been able to drag out the corruption case against him through the use of so-called 'Stalingrad tactics', the courts have been equal to the task, using the ordinary powers at their disposal to prevent the abuse of their processes.⁸⁶ In light of this, the use of the term 'lawfare' is both unjustified and counterproductive. The connotation of politicisation of the courts that it carries is precisely the impression that the RET faction in the ANC has been attempting to cultivate. Uncritical resort to this term therefore plays into its hands. In reality, the courts have frequently been the last line of defence against the attempted subversion of constitutional institutions. That South Africa's liberal democracy has proven to be as resilient as it has, is largely attributable to them.

⁷⁸ See Jan-Werner Mueller, *What is Populism?* (note 4 above).

⁷⁹ The complaint to the Public Protector was lodged by the EFF and the Democratic Alliance after Ramaphosa first denied knowledge of the donation and then tried to explain it as a donation to his son's company. Complicating matters further, the donation was made by Bosasa, a company deeply enmeshed in allegations of corruption during the Zuma era.

⁸⁰ See Pauw, *The President's Keepers* (note 35 above) 80.

⁸¹ *Public Protector v South African Reserve Bank* [2019] ZACC 29.

⁸² See Michele Le Roux & Dennis Davis, *Lawfare: Judging Politics in South Africa* (Cape Town, Juta: 2019); Klug, 'State Capture or Institutional Resilience' (note 77 above) 302.

⁸³ Theunis Roux, 'The Constitutional Court's 2018 Term: 'Lawfare' or Window on the Struggle for Democratic Social Transformation' (2019) 11 *Constitutional Court Review* (forthcoming).

⁸⁴ In May 2008, all of the then justices of the Constitutional Court lodged a complaint against Hlophe with the Judicial Services Commission alleging an attempt to influence two of their number in their decision in one of the Arms Deal cases.

⁸⁵ In January 2020, the Deputy Judge President of the Western Cape High Court, Goliath J, lodged a formal complaint against Hlophe with the Judicial Conduct Committee. Hlophe has since lodged his own counter-complaint.

⁸⁶ In February 2020, for example, a warrant was issued for Zuma's arrest after his lawyers produced an unsatisfactory medical certificate at a pre-trial hearing.

4.2 Parliamentary politics and political pluralism

In an early contribution to the literature, Richard Calland and Shameela Seedat analysed the impact that the EFF had had on parliamentary politics in the first two years of its existence. Examining four 'episodes' of political contestation in Parliament,⁸⁷ they argued that the EFF had in many ways given new relevance to an institution that had become stultified by the ANC's political dominance. While shocking in many respects, the EFF's disruptive tactics had had an undeniably positive effect on the performance by Parliament of its key constitutional obligation to hold the government to account. Exhibit number one in this respect, Calland and Seedat contended, was the EFF's ability to focus attention on Parliament's tardiness in responding to the Public Protector's report on Zuma's Nkandla homestead. On 21 August 2014, during Presidential Question Time, the EFF staged a disruptive protest against Zuma's evasive answers to questions about how he intended responding to the report. In an unprecedented step, the riot police had to be called in forcibly to remove chanting EFF parliamentarians from the floor of the house.⁸⁸ Though intensely concerning on one level, this incident led to renewed interest in the value of question time and the way in which the ANC had been abusing its parliamentary majority to protect Zuma.⁸⁹ On balance, the EFF's protest was therefore justified and could in fact be said to have promoted the core liberal-democratic value of executive accountability to Parliament.

In the five years since Calland and Seedat conducted this analysis, however, assessments of the impact of the EFF's aggressive political tactics have become more critical. The dominant view now is that the distraction caused by the EFF's regular abuse of the parliamentary process outweighs any benefit that might have accrued from holding the government to account. It is now almost routine, for example, for the EFF to disrupt the President's State of the Nation Address (SONA), which takes place every year at the opening of Parliament. While this form of protest might have been justified when the ANC was actively protecting Zuma, its use against Ramaphosa is more questionable. Rather than ensuring that Parliament plays its constitutionally designated role, the primary purpose of these disruptions seems to be to ensure that the EFF dominates the media's coverage of the event.

In the latest example of this, the EFF staged a disruptive political protest that delayed the start of Ramaphosa's 2020 SONA address by one and a half hours. On this occasion, the ostensible pretext for the protest was, first, the presence of former President F.W. de Klerk in the Chamber and, second, a call for the removal of Pravin Gordhan as Minister of Public Enterprises. While the first issue was arguably worth protesting about, the second was purely self-serving. A week before the SONA address, De Klerk had wrongly denied in an interview that apartheid was a crime against humanity. For that reason, his presence in Parliament was arguably offensive and he should have been asked to retract his remarks before being allowed to take up his seat. The EFF's ongoing campaign against Gordhan, on the other hand, seems to have no purpose other than to thwart his determined opposition to corruption, including cases in which the EFF's leadership has allegedly been involved.

Whatever one thinks of the impact of the EFF's aggressive political style on Parliament's accountability function, the party has unquestionably disrupted the ANC's formerly comfortable hold on power. Despite its relatively small share of the vote, the EFF was for a time able to govern two

⁸⁷ Richard Calland and Shameela Seedat, 'Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighters on South Africa's Parliament' (2015) 28 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 304.

⁸⁸ *Ibid* 313.

⁸⁹ *Ibid* 317.

metropolitan municipalities in cooperation with the Democratic Alliance (Johannesburg and Tshwane). The EFF now also holds an effective veto power over constitutional amendments, given that, without its support, the ANC cannot command the required two thirds majority.⁹⁰ Both of these things are in theory positive from the point of view of political pluralism. Indeed, the outcome of the 2016 municipal elections was joyfully greeted by liberals as a sign that the ANC's stranglehold on power was finally loosening. In practice, however, neither the EFF's participation in municipal governance nor its veto power over constitutional amendments has unambiguously improved the quality of South Africa's democracy. The EFF-DA coalition in the two metropolitan municipal governments concerned has thus proven to be a disaster, with the DA unable to contain the EFF's corrupt tendencies, and both these governments now back in the ANC's hands. The EFF's veto power over constitutional amendments, for its part, has fed into the factional battle in the ANC in ways that are bad for liberal democracy for the reasons already given. Rather than preventing questionable constitutional amendments, the EFF's electoral support has emboldened the RET faction to press ahead with the proposed change to the property clause and other illiberal policies.

Of course, it is still true that the EFF represents a section of the electorate that clearly feels abandoned by the ANC. To that extent, the party has helped to make South Africa's parliamentary politics more representative. In reality, however, given low voter turnout, the 11% support that the EFF commands equates to less than 5% of the eligible electorate. From that perspective, the influence it exerts over the national policy debate is disproportionate. For many public commentators, the EFF is being given too much oxygen by a headline-hungry press.

Against this, the current party-political structure in South Africa arguably masks the true extent of voter support for radical economic transformation measures. As explained in section 3.2, the factional split in the ANC makes it impossible to tell for certain what a vote for the ruling party really means. While some voters may be voting for the ANC as the party most likely to form a stable, fiscally responsible government, others may be voting for the policy proposals being tabled by the RET faction. As much as these proposals may be the product of a political wedge, they are not without appeal to an electorate frustrated by the slow pace of social and economic change. The true extent of support for radical economic transformation in South Africa may thus well be higher than the 11% of the vote that the EFF currently receives. If so, the EFF's influence on parliamentary politics may not be all that disproportionate after all.

The real question is whether the 1996 Constitution can accommodate voters' preferences in relation to radical economic transformation without losing its liberal-democratic character. This, of course, depends in part on the nature of the measures being proposed. Some of them, such as the creation of a Nation Health Insurance scheme, are not per se illiberal. The problem is rather that they are unaffordable given South Africa's current fiscal deficit and its rising debt to GDP ratio. There are also serious doubts about whether the public service has the capacity to implement them without falling into corruption. In relation to these proposals, there is thus still scope for the 1996 Constitution to shape the debate in a direction compatible with liberal-democratic values. Other proposals, however, such as the amendment to the property clause, seem to be intrinsically illiberal. If adopted, they would alter the fundamental character of the 1996 Constitution and put South Africa firmly on a path to constitutional populism.

⁹⁰ The ANC could also in theory pass a constitutional amendment with the support of the Democratic Alliance. But it is extremely unlikely that the DA would support amendments of the type being proposed, which means that it is the EFF's support that the ANC really needs.

4.3 Liberal-democratic principles as defined by courts

One respect in which left-wing populism has had an undeniably positive impact on liberal democracy has to do with the EFF's involvement in constitutional litigation, both as an applicant and as a respondent. In its relatively short life, and despite its frequent dismissive statements about the judiciary, the EFF and its leadership have been involved in numerous court cases, some of which have helped to establish important constitutional principles.

The best-known example of this is the *Nkandla* case, where the EFF acted as the lead applicant in the constitutional litigation that ultimately led to Zuma's resignation.⁹¹ The important constitutional point decided by this case concerned the legal status of 'remedial action' ordered by the Public Protector, and whether Parliament and the President's failure to act on Madonsela's report constituted a breach of their constitutional obligations. Following as it did the EFF's protests in Parliament on the same issue, the party's involvement in this case demonstrated its commitment to using different constitutional avenues to hold the ANC to account.

In another case, Malema in his personal capacity successfully challenged a decision by the Chairperson of the National Council of Provinces (the upper house) ordering him to leave the Chamber. The order had followed an allegation by Malema that the ANC government was responsible for the killing by police of striking mineworkers at Marikana, one of the more shocking examples of the breakdown of the rule of law in post-apartheid South Africa.⁹² The Speaker's decision to order Malema to leave the Chamber, the Court held, was based on an overly broad interpretation of the word 'government' and thus violated his right to free speech.⁹³

One final example of significant constitutional litigation in which the EFF has been involved concerned the important issue of whether the Speaker of the National Assembly (the lower house) had acted unconstitutionally in failing to make rules regulating applications for the removal of the President under section 89 of the Constitution.⁹⁴ The case followed a series of unsuccessful opposition-backed votes of no confidence in President Zuma in light of the Constitutional Court's findings in the *Nkandla* matter, and also an unsuccessful motion tabled by the official opposition, the DA, for the removal of Zuma as President under section 89.⁹⁵ The heart of the EFF's case in light of these failed attempts was that the National Assembly had breached its constitutional obligations and, in particular, that the National Assembly, represented by the Speaker, was required to make rules to guide the bringing of an application under section 89. In a controversial decision in which the Constitutional Court split 7:4, the majority decided that the National Assembly was indeed required to make rules under section 89.⁹⁶ The existing provision for the creation of an ad hoc committee, the majority held, was insufficient, given that a parliamentary finding that the President had seriously violated the Constitution was one of the preconditions for removal under the section.⁹⁷

In this instance, too, therefore, the EFF's tenaciousness in holding the ANC to account could be said to have promoted the enforcement of core liberal-democratic principles. While there were differing

⁹¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

⁹² See note 54 above.

⁹³ *Malema and Others v Chairperson of the National Council of Provinces and Another* (12189/2014 [2015] ZAWCH 39 15 April 2015).

⁹⁴ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC).

⁹⁵ *Ibid* para 8.

⁹⁶ Decision of Jafta J, with Cameron J, Froneman J, Kathree-Setiloane AJ, Kollapen AJ, Mhlantla J, and Theron J concurring.

⁹⁷ *Ibid* paras 160, 177-78.

views among the judges of the Constitutional Court on whether the separation of powers permitted it to instruct Parliament on what rules were required to govern its processes,⁹⁸ the fact that this issue has now been clarified is undoubtedly a good thing. If the essence of liberal democracy lies in legally enforced democratic accountability, the EFF's involvement in the two Nkandla matters has certainly contributed to the realization of this ideal.

Even when appearing as a defendant in defamation actions or proceedings under the Promotion of Equality and Prevention of Unfair Discrimination Act ('the PEPUA'), Malema has arguably himself also personally contributed to the development of liberal-democratic principles. In the latest instance of this, the South African National Editors Forum and a group of senior journalists brought proceedings under the PEPUA for a declaration that certain remarks Malema had made outside the so-called 'Zondo Commission'⁹⁹ constituted hate speech and harassment. In a carefully reasoned judgment,¹⁰⁰ the Equality Court dismissed the application on the grounds that the status of being a journalist was not an 'immutable characteristic' as required by the Act. While the circumstances giving rise to this case did not reflect particularly well on Malema's respect for the media, the Court's judgment clarified the reach of the PEPUA. Malema's often outrageous behaviour, precisely because it pushes the limits of the permissible, has in this way helped to define the boundaries of legitimate democratic politics.

5. Learning from the South African case

This paper might have gone on to consider the impact of populism, not just on liberal-democratic institutions, but on liberal-democratic values, such as the civility of public discourse. There is also a serious question about the indirect impact of the populist measures that are being proposed in South Africa on economic growth and, through that, on the conditions that liberal democracy requires in order to flourish. But enough has been said to illustrate that there has been a variety of impacts, some positive and some negative. The purpose of this section in light of this is to consider what the South African case adds to the conventional wisdom on the impact of populism on liberal democracy, if anything.

First, it is clearly true that economic inequality, as is the case elsewhere, is one of the main drivers of populism in South Africa. Neither the EFF nor the RET faction would have the political appeal that they do were they not operating in a context of serious wealth disparity. What the South African case adds to the usual thinking on this score relates to the initial effect of the ANC's political dominance. As noted in the section 3, it took more than fifteen years for the populist backlash against the 1996 Constitution to gather steam. This suggests that the adverse impact of inequality on liberal democracy may be mitigated by the presence of a popular liberation movement that gives its backing to the constitution as an instrument of social change. To the extent that liberal democracy still survives in South Africa, the explanation lies in the ANC's initial support for the 1996 Constitution as the most appropriate vehicle for its social and economic transformation project. Equally, of course, the South African case shows that this way of defending liberal democracy raises the stakes. In seeking to deal with the legitimacy challenge posed by inequality, 'transformative constitutionalism' (as it has been called¹⁰¹) ties support for liberal democracy to popular perceptions of the constitution's success in levelling the playing field.

⁹⁸ Both the Chief Justice (Mogoeng) and the Deputy Chief Justice (Zondo) dissented on this basis.

⁹⁹ The Commission established to investigate the corruption detailed in the Public Protector's 'State of Capture' report.

¹⁰⁰ *South African National Editors' Forum and Others v Economic Freedom Fighters and Another* [2019] ZAEQC 6.

¹⁰¹ Karl E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 12 *South African Journal on Human Rights* 146.

Second, the South African case largely confirms Mueller's insight that populists are not against institutions per se, provided that they can control them.¹⁰² This was particularly apparent in the fate of the National Prosecuting Authority under President Zuma, but it is also borne out by the more recent developments concerning the office of the Public Protector. The attack on this institution after its rehabilitation under Thuli Madonsela illustrates yet again that populists have more than one response to successful liberal institutions. In addition to explicitly amending their powers, there is the possibility of capturing and repurposing them. Mueller is thus right to say that populism is not necessarily anti-institutionalist. Equally, however, the South African case shows that populists cannot simply leave successful liberal institutions alone. They do need to control them in some way. Perhaps what we should say, then, is that there is a necessary incompatibility, not between populism and institutions, but between populism and specifically liberal institutions. The South African case shows that populism's anti-pluralism logically entails its anti-institutionalism in this sense. For populists to maintain their moral claim to exclusive representation of the real people, they must destroy, transform or capture liberal institutions that pose a threat to their rule.

The third insight emerging from this case study – that some of the very same people who scupper a liberal constitution's capacity to reduce inequality may benefit from the ensuing populist backlash – has received little attention in the literature to date. Whether or not this is true of other countries, in South Africa there is a certain hypocrisy in populists' critique of liberal democracy's role in the perpetuation of inequality. While the 1996 Constitution may be partially to blame, a much more significant cause of South Africa's inability to address inequality is the widespread corruption that has engulfed the country since 1994. To the extent that populists have been deeply implicated in this malaise, their attack on liberal democracy is disingenuous, to say the least.

Fourth, and closely related to the point about hypocrisy, political actors who have positioned themselves as left-wing populists in South Africa have generally lacked an authentic connection to organised labour and other popular social movements of the left. Neither the EFF nor the RET faction of the ANC enjoys the support of the major trade unions in South Africa,¹⁰³ and their ties to women's groups and grassroots movements of the urban and rural poor are either opportunistic or somewhat tenuous.¹⁰⁴ There is thus a sense in which they are *pseudo* populists. Not only is there no such thing as a real South African people in clear contrast to an identifiable elite. The EFF and the RET faction of the ANC have no justifiable claim to be the authentic representatives of that imagined constituency in any event. On the one hand, this means that South Africa cannot be said to be a proper testing ground for Laclau's and Mouffe's ideas about the democratising potential of left-wing populism.¹⁰⁵ Since neither the EFF nor the RET faction comes close to conforming to their prescriptions about what this form of politics should seek to do, the South African case does not clearly contradict their theorisation. On the other hand, the South African case suggests that Laclau's and Mouffe's theorisation may be a little too idealistic for the messy world of actually existing populism.

¹⁰² Mueller (note 4 above).

¹⁰³ While COSATU, South Africa's main trade union, initially supported Zuma's rise to power, it subsequently split into two, with the powerful National Union of Mineworkers of South Africa (NUMSA) breaking away in 2013 out of concerns over nepotism and corruption. In the 2019 general elections, NUMSA put its support by the Socialist Revolutionary Workers Party, which it had helped to found in 2018. The new party failed to win any seats, however.

¹⁰⁴ The RET faction of the ANC has strong ties to the ANC Women's League, but the League no longer has much credibility as a voice for women's interests. Its current President, Bathabile Dlamini, played a regrettable role as Minister of Social Development in the mismanagement of the South Africa Social Security Agency (SASSA), while the Women's League as a whole appears to be simply part of the ANC's patronage network. The major shack-dwellers' movement in South Africa, Abahlali baseMjondolo, which is an authentic popular social movement, is not affiliated to either the EFF or the ANC.

¹⁰⁵ Laclau and Mouffe (note 7 above).

The fifth and final respect in which the South African case adds something to the existing literature relates to the impact of populism on political pluralism. As noted in section 4.2, when the EFF first arrived on the political scene there was some cautious optimism on this score. As theorised by Mudde and Kaltwasser,¹⁰⁶ the EFF initially acted as a democratic corrective. In the context of the ANC's political dominance, its ability to build and retain a new constituency promised to open up democratic politics to greater competition. But this positive impact has not been sustained. The main reason for this is the relationship that has developed between the EFF and the RET faction of the ANC. By reinforcing certain pathological tendencies that were already present, the EFF has largely functioned to entrench the anti-pluralist effects of the ANC's political dominance. It has also attacked the parliamentary process in a way that has ultimately undermined the capacity of that institution to act as a properly representative body. This suggests that populism's notionally beneficial impact on political pluralism may be undermined by its generally adverse impact on liberal-democratic institutions.

6. Conclusion

As to the overarching question driving this paper, the most defensible (though admittedly somewhat fence-sitting) conclusion is that populism's impact on liberal democracy in South Africa depends on your attitude to the proverbial glass, either half full or half empty of water. On the most optimistic view, populism has had an unintentionally positive impact. While certain constitutional institutions have at times succumbed to illiberal attacks, many have emerged stronger from the challenges they have faced. This can only be a good thing. It is a truism, after all, that the ideal of independent state institutions is not something that can be sustained by careful constitutional design alone. It is an ideal that has to be continually fought for and refreshed. By that measure, neither populism in its first phase, associated with the succession battle between Mbeki and Zuma, nor populism in its second phase, associated with the rise of the EFF, has had a disastrous impact on liberal democracy. On the contrary, populism has provided a testing ground in which the true worth of that form of government and the institutions that it has developed to prevent the abuse of political power have been made manifest.

On a more pessimistic view, the last twenty-five years in South Africa have shown how vulnerable even a very carefully designed liberal-democratic constitution is to retrenchment in a situation of persistent inequality.¹⁰⁷ The 1996 Constitution, in its moral idealism and utopian social welfarism, was always going to be susceptible to attack if it was seen to be failing to deliver on its promises. The fact that South Africa's poor economic performance is not really a function of the 1996 Constitution, but rather of a combination of the enduring legacy of apartheid, international economic factors, poor policy choices, and the ANC's descent into corruption, does not make any difference. What matters is that charismatic leaders have been able to convince enough members of the electorate that the 1996 Constitution is in some way responsible for their predicament. Indeed, the political freedoms that the Constitution guarantees have provided the platform from which these leaders have been able to deliver their illiberal message. Worse than that, to the extent that their radical policy proposals lead to further economic misery, as seems likely, populists may be able to perpetuate the conditions in which their preferred form of politics thrives.

¹⁰⁶ *Populism: A Very Short Introduction* (note 2 above) 84.

¹⁰⁷ Rosalind Dixon and Julie Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 *University of Chicago Law Review* 369.