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## In the Throes of 'the People': The Populist Challenge to South African Courts

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In recent years, South Africans have borne witness to a gradual decline in the democratic governance of its constitutional institutions, increased polarisation in public discourse and an ascendance of populist rhetoric – all of which undermine its nascent constitutional order. Populist rhetoric has gained much ground, manifesting itself publicly both from within and without the ruling African National Congress (ANC). This shift towards populist politics has had a ripple effect not only on parliamentary and electoral politics, but also broadly on the behaviour of other institutions in the constitutional system.

This paper interrogates a more recent and more worrying phenomenon of populist attacks on the courts, considers the effects of such attacks, and seeks to provide potential strategies for warding off those attacks and safeguarding the courts' institutional integrity.

In Part II, I offer a working definition of populism and situate the phenomenon in the South African context. In Part III, I explore the causes of the rise of populism in the country's politics. Part IV closely examines the features of common populist attacks on the courts. I conclude in Part V with an analysis

of the effects of the attacks on the courts as constitutional institutions and suggest ways in which judges ought to respond to populist attacks on the judiciary.

## I. WHAT IS POPULISM?

'Populism' is a term that has been abused and misused, and it admits of no obvious or rudimentary definition. Instead of offering a categorical definition to identify the phenomenon, much of the literature on populism seeks to highlight some of its features, presumably so that we may know it by its fruits.<sup>1</sup> From the literature I reviewed, I have distilled the following features as characteristic of populism. The first and most prominent is the populist's moral claim as a representative of 'the people' as a homogeneous and unified whole pitted against an immoral, corrupt or 'out of touch' (or aloof) elite, from whom they must wrestle their absolute freedom and autonomy. As a result, populists are necessarily anti-pluralist, perceiving any form of difference or dissent as disunity with or a breakaway from 'the people' proper.<sup>2</sup> Second, populists tend to view 'majority rule' not as a procedural component of democracy (i.e., a means by which democratic decisions are reached), but as the *essence* of democracy, so that majority rule means rule by a (or, indeed, *any*) majority.<sup>3</sup> Third, populists espouse an instrumentalist attitude towards the law, viewing it not as a constraint on what they consider the 'people's will' or the 'popular will', but instead as a way of entrenching their own rule, thus weaponising (or instrumentalising) the law for their own populist ends.<sup>4</sup> Fourth, while populists are largely regarded as anti-institutional, this is not necessarily the case. As Nadia Urbinati convincingly argues, populists often use the selfsame democratic institutions they deride as elitist in order to achieve their own goals. Therefore, it is a mistake to categorise populism as categorically anti-institutionalist, because, she argues, it is essentially 'parasitic' and relies for its emergence on existing democratic institutions and practices.<sup>5</sup> Lastly, populism evinces a certain type of 'legal resentment' towards constitutionalism (and *democratic* constitutionalism, in particular). Paul Blokker argues that a deep skepticism prevails about the existence of 'a non-political, neutral rule of law that transcends politics'.<sup>6</sup> Each of these features will be highlighted and expanded on in the South African context.

It is necessary to delve deeper into the literature to discover what exactly it is about populism that renders it such a grave threat to constitutional democracy. Jan-Werner Müller, for instance, emphasises that the representative claim on behalf of 'the people' is a moral claim. It presupposes the existence of the people as a unified *entity* univocally expressing *its will* through the populist party and/or leader. As a moral claim, he says, the force of the populist's appeal to an idea of 'the people' cannot be displaced by empirical reality.<sup>7</sup> In order to be successful, the representative claim requires the construction of a fictional morally pure and homogeneous 'people', whose (assumed) existence is invoked to delegitimise the empirical results of elections held in accordance with existing democratic procedures and under

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<sup>2</sup> Gospel of Matthew 7:20, 'Wherefore by their fruits ye shall know them', *King James Version* (see verses 16-20 for the full context).

<sup>3</sup> Nadia Urbinati, 'Populism and the Principle of Majority', in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford: Oxford University Press, 2017), 719.

<sup>4</sup> Jan-Werner Müller, 'Populism and Constitutionalism', in Cristóbal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (Oxford: Oxford University Press, 2017), 744.

<sup>5</sup> Paul Blokker, 'Populism as a Constitutional Project', *International Journal of Constitutional Law* 17(2), 2019: 535.

<sup>6</sup> Urbinati, 'Populism and the Principle of Majority', 724.

<sup>7</sup> Blokker, 'Populism as a Constitutional Project': 552.

<sup>8</sup> Müller, 'Populism and Constitutionalism', 747.

which the populist loses.<sup>8</sup> In this view, electoral losses for populists do nothing more than solidify their claim that 'the people' – the fictional entity – are kept repressed by immoral and corrupt elites.<sup>9</sup>

Majorities play an important role in the construction and maintenance of 'the people' as a populist concept. Urbinati, using Aristotle's analysis of 'demagoguery' in Athens, explains the importance of a leader in raising a demagogic government from the democratic assembly where that leader served:

According to Aristotle, demagoguery was certainly the worst among the forms democracy could take because it exploited free speech by putting it at the service of unanimity or the appeal to the whole, rather than a free and frank expression of the ideas and thus the appeal to a majority vote. Demagoguery could not exist without a leader because it was not simply the spontaneous horizontal mobilization of ordinary citizens. And it could not exist without the public either because the demagogue constructed his success in the assembly, drawing his audience from the public. We can say the same of populism which, when it aspires to power, cannot be headless and cannot impose the headless will on the people without people's assent and support.<sup>10</sup>

From this analysis, it appears that the ascendance of populism to power relies in large part on the co-optation of majority rule into the gradual concentration of power in the often-charismatic leader, on whose shoulders the realisation of the will of 'the people' will ultimately lie.<sup>11</sup> It is tempting to read Urbinati as a warning against the dangers of majority rule, but that would be mistaken – after all, democracies, constitutional or otherwise, depend for their existence on the convergence of a majority of the public on a political vision espoused by one party or leader or the other.

Instead, the cautionary tale here is about the entrenching of a particular majority at any given time as *the majority* for whom the populist should speak and represent. A shift from conceptualising the majority as merely a procedural component of democracy to the embodiment of democracy or the democratic will – ergo, the will of 'the people' – is a firm indicator of populist politics taking root in any democracy.<sup>12</sup>

This point speaks to a more insidious one, which is the role of institutions in the populist imaginary. Blokker points out that while it is often assumed that populists are anti-institutional, this is not always the case. As Urbinati's analysis above shows, in order to gain a foothold with the public, populists often deploy rhetoric, which on the surface repudiates democratic institutions as elitist or simply 'proceduralist', while at the same time exploiting their access to those same institutions (the levers of power in a democracy) to entrench themselves in society. Importantly, because of its appeal to a unified 'people' for whom the leader speaks, populism is intolerant towards internal dissent, individual rights and independent institutions that are separate from political control, which are the hallmarks of liberal constitutionalism.<sup>13</sup>

As the populist's ultimate goal is to bring institutions closer to 'the people', the liberal distinction and/or separation between politics, law and morality becomes important to portray as illusory, and the law becomes merely an instrument at the disposal of the populist leader and always reflects the 'national interest' or 'the will of the people'.<sup>14</sup> The idea that the law can operate in a relatively neutral, non-politicised and non-partisan framework is abandoned in favour of an overtly political understanding of

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<sup>8</sup> Müller, 'Populism and Constitutionalism', 749–51.

<sup>9</sup> Müller, 'Populism and Constitutionalism', 751.

<sup>10</sup> Urbinati, 'Populism and the Principle of Majority', 728.

<sup>11</sup> Urbinati, 'Populism and the Principle of Majority', 728.

<sup>12</sup> Urbinati, 'Populism and the Principle of Majority', 729.

<sup>13</sup> Blokker, 'Populism as a Constitutional Project': 549.

<sup>14</sup> Blokker, 'Populism as a Constitutional Project': 549.

the law, in which the positive (or enacted law) must always reflect the populist conception of the good; failing which, it is liable to be broken.<sup>15</sup>

Contrary to popular discourses about populism, therefore, it does not seem to be entirely irreconcilable with constitutional democracy but may instead, according to Urbinati, be parasitic and dependent on it.<sup>16</sup> One of the dangers of populist rhetoric and discourse is that it takes the form of legitimate speech that, at face value, expresses deep and genuine grievances about societal conditions and promises to alleviate them. At the same time, it seeks to assimilate populist politics into existing constitutional and democratic institutions and procedures, thereby arrogating, for the populist, power that they would otherwise not be able to amass through a genuinely democratic process, in which citizens are given a free voice to engage in democratic discourse, and have their individual rights protected and enforced through independent institutions. Instead, the public is reduced to an immutable and homogeneous collective, whose views are reified in a fictitious ‘will’ under the direct enforcement of a cunning and manipulative leader. This process, short of a revolution, is necessarily gradual, and it is therefore important that we are able to identify and arrest it before it is too late.

I now turn to South Africa’s recent history to highlight some events and patterns of behaviour that point towards a creeping populism in the public discourse, especially as it relates to courts and the judicial process.

## II. WHY SOUTH AFRICA’S POPULIST TURN?

Diverse as the scholarship may be, the consensus is that populism does not simply arise as a matter of the political or social development of any given society. Indeed, even Aristotle noted that there were objective economic and social conditions in which demagoguery first gained popularity and then later flourished. He noted:

In democracies, the principal cause of revolutions is the insolence of the demagogues; for they cause the owners of property to band together, partly by malicious prosecutions among them (for common fear brings together even the greatest enemies), and partly by setting the common people against them as a class.<sup>17</sup>

While the malevolence of the demagogue may have been the animating factor behind the rise of demagoguery – or populism – in Ancient Greece, the same can certainly not be said for South Africa. According to Statistics South Africa, around 34.9% of working-age South Africans are unemployed.<sup>18</sup> The Reserve Bank also reported in 2019 that those who are employed earn below the rate of consumer price inflation.<sup>19</sup> The country periodically experiences bursts of public violence directed at the state and to which it responds with the use of force by police, sometimes with fatal consequences. The provision of public services remains out of reach for most South Africans, against the backdrop of decaying infrastructure and dysfunctional municipalities.

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<sup>15</sup> Blokker, ‘Populism as a Constitutional Project’: 550, quoting the interim speaker of the Polish lower house of parliament: ‘The good of the nation is above the law. If the law conflicts with that good, then we’re not allowed to treat it as something we can’t break.’

<sup>16</sup> Urbinati, ‘Populism and the Principle of Majority’, 724.

<sup>17</sup> Aristotle, *Politics* (trans. Harris Rackman, Harvard: Harvard University Press, 1998), quoted in Urbinati, ‘Populism and the Principle of Majority’, 729.

<sup>18</sup> Statistics South Africa, ‘Quarterly Labour Force Survey (QLFS) – Q3:2021’, <https://www.statssa.gov.za/?p=14957>.

<sup>19</sup> South African Reserve Bank, *Quarterly Bulletin*, No. 293, September 2019, <https://www.resbank.co.za/en/home/publications/publication-detail-pages/quarterly-bulletins/quarterly-bulletin-publications/2019/9505>.

In short, the material conditions of most South Africans are less than ideal. Trends in electoral outcomes show that voters are becoming disillusioned with the ruling ANC government and are actively searching for alternatives. The ANC's declining electoral performance has slowly created a vacuum in the political arena that other political parties have attempted to fill.

Given the current social and economic conditions in the country, appeals to populist rhetoric have played an important role in mobilising support from the public and slowly dwindling the ANC's electoral majority. In turn, the ANC itself has had to adopt a measure of populist rhetoric and thinking in order to hold on to its base. Theunis Roux provides a useful analysis of the populist turn in South Africa.<sup>20</sup> He identifies two phases in South African populism: the first was characterised by a power struggle in the ANC, which culminated in the presidency of Jacob Zuma. During this phase, Zuma and his supporters in the ANC portrayed then President Thabo Mbeki as aloof, arrogant and elitist, compared with Zuma's 'man-of-the-people' image. They capitalised on the failure of Mbeki's conservative economic policies to deliver job creation and investment, and they cultivated a negative public sentiment towards Mbeki.<sup>21</sup> Zuma's populist appeal was further strengthened by Mbeki's dismissal of him as the country's deputy president in 2005, following a court ruling that Zuma had had an improper relationship with corruption-convicted businessperson Schabir Shaik.<sup>22</sup> The ruling set the scene for Zuma's portrayal of himself as the victim of Mbeki's manipulation of prosecutorial processes to malign Zuma because he posed a threat to elitist interests within the ANC.

Roux notes that on his ascendance to power, Zuma set about using the state's elaborate empowerment and procurement machinery to create vast networks of patronage, where membership of the ANC in general, and alliance with Zuma in particular, became a stepping stone towards personal enrichment.<sup>23</sup> Moreover, during this phase of South African populism, the institutions that were derided by Zuma and his supporters as having been tools of political warfare by Mbeki were systematically dismantled or decapitated. The first casualty was the Scorpions (officially the Directorate of Special Operations),<sup>24</sup> which was responsible for some of the most high-profile arrests and prosecutions of politicians at the time. The Scorpions were followed by the National Prosecuting Authority, which, under Zuma, faced serious leadership challenges and led to an exodus of skilled prosecutors, from which it is yet to recover. Roux identifies the second phase of the rise in populism as the emergence of the Economic Freedom Fighters (EFF) – an ANC splinter party. The EFF is led by Julius Malema, a former youth leader in the ANC, who was expelled after several transgressions against the party, stemming primarily from his inflammatory public statements that espoused a populist bent.<sup>25</sup>

Malema, a one-time ally and fierce defender of Zuma, fully embraced populist politics as one of the founding values of the EFF. This can be seen in the party's use of populist rhetoric and its decision to don red overalls and domestic worker uniforms to identify itself variously with 'the workers', 'the people' or 'the masses' who have been abandoned by the elitist ANC.<sup>26</sup> Faced with the EFF's advocacy of policies such as nationalisation, expropriation without compensation and its identification with the black radical tradition,<sup>27</sup> the ANC has had to refashion some of its approaches to issues in order to counter the EFF's influence. Roux notes that this task has notably been taken up by Zuma's allies in the party, who are

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<sup>20</sup> Theunis Roux, 'Constitutional Populism in South Africa', in Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism* (Cambridge: Cambridge University Press 2022), 99.

<sup>21</sup> Roux, 'Constitutional Populism in South Africa', 108.

<sup>22</sup> *S v Shaik and Others*, 2007 (1) SACR 142 (D).

<sup>23</sup> Roux, 'Constitutional Populism in South Africa', 108.

<sup>24</sup> Disbanded in terms of the South African Police Service Amendment Act 57 of 2008.

<sup>25</sup> Roux, 'Constitutional Populism in South Africa', 114.

<sup>26</sup> Roux, 'Constitutional Populism in South Africa', 115.

<sup>27</sup> The EFF describes itself as 'Fanonian'.

loosely called the 'radical economic transformation' (RET) faction.<sup>28</sup> The faction has a real presence in the party and is not a fringe group. By using the threat of electoral loss to the EFF, the RET faction has been able to influence the adoption of policies akin to those of the EFF on issues like the nationalisation of the South African Reserve Bank and expropriation of land without compensation.<sup>29</sup> The latter led to the drafting and introduction of the Draft Constitution Eighteenth Amendment Bill, which failed to attract the requisite two-thirds majority needed to pass in the National Assembly due to the EFF's refusal in late 2021 to sign on to the ANC's more moderate and watered-down version of expropriation without compensation.<sup>30</sup>

The EFF, therefore, without being in power and without a sizeable electoral base, has been able to shift the ANC towards left-wing populism through its use of populist rhetoric and imagery that appeals to emotion rather than reason, both in and outside of parliament.

Of course, the preceding discussion only highlights the populist turn but does not adequately account for its causes. In Roux's compelling account, South Africa had always been ripe for populist politics. He notes that the 1996 Constitution contains broad, progressive, left-leaning commitments, such as socioeconomic rights, and guarantees for equality and human dignity.<sup>31</sup> This meant that any failure to meet these commitments or to realise the guarantees would be met with popular backlash. And, given the state of the fiscus at the end of apartheid and the challenges faced by the black majority then, the ANC was always going to have a difficult time delivering on those promises.

The slow pace of socioeconomic transformation that precipitated the country's present conditions is seen not only as a failure of policy on the part of the ANC, but also as a failure of the Constitution to deliver on its promises. The Constitution then becomes the primary target for populist attack. It is branded as a document that serves only to preserve the status quo ante and becomes the rightful object of 'the people's' anger about their material conditions. This will be elaborated on in the next section.

When one adds on to the economic inequality that bedevils South African society, racial tensions and resentment that stem from unresolved traumas from the apartheid and transitional periods, Roux's claim takes the form of a self-evident truth. Dissatisfaction with socioeconomic transformation, the failure of the ANC government to deliver the most basic of services, and the latent but potent racial animus that makes meaningful attempts at reconciliation impossible, all create the conditions necessary to cultivate populism as a viable alternative to the current liberal constitutional framework. The next section focuses on the exploitation of these conditions in service of power accumulation and to the detriment of constitutional democracy.

### III. POPULISM AND THE COURTS

As outlined above, South Africa's so-called post-liberal Constitution, in guaranteeing in the Bill of Rights the provision of services such as housing,<sup>32</sup> health, food and water as justiciable rights<sup>33</sup> against the state, inadvertently opens itself to populist abuse in that any failure on the part of the state to deliver may reflect negatively not only on the party of government but also indeed on the Constitution itself.

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<sup>28</sup> Roux, 'Constitutional Populism in South Africa', 112.

<sup>29</sup> ANC, 'Report and Resolutions of the 54th National Conference', [https://cisp.cachefly.net/assets/articles/attachments/73640\\_54th\\_national\\_conference\\_report.pdf](https://cisp.cachefly.net/assets/articles/attachments/73640_54th_national_conference_report.pdf).

<sup>30</sup> The Bill was rejected by the National Assembly on 7 December 2021 and therefore lapsed.

<sup>31</sup> Roux, 'Constitutional Populism in South Africa', 106.

<sup>32</sup> Section 26 of the Constitution.

<sup>33</sup> Section 27 of the Constitution.

Being what it is – a legal document – the procedural and substantive restraints on the exercise of public power contained in it may themselves then become the target of populist scorn and the scapegoat for policy failures.

This constitutional dimension is important for another reason: in a constitutional democracy like South Africa's, courts have the duty to decide the meaning of the Constitution and ultimately to act as its guardians – to ensure that it is not subverted, that any breach is declared invalid and remedied, and to ensure that no authority beyond that which it confers is claimed by public officials.<sup>34</sup> In this way, courts occupy a central role in ensuring the functioning of constitutional democracy. Once again, this exposes courts vested with the power of judicial review to attacks from populists, for whom the controlling power of the courts presents a great challenge.

The supremacy of the Constitution is entrenched in section 2 in peremptory terms, declaring that any 'law or conduct inconsistent with it is invalid'. The power to declare law or conduct constitutionally invalid is vested in the courts in terms of section 172(1),<sup>35</sup> which further empowers them to remedy any constitutional invalidity by making 'any order that is just and equitable'.<sup>36</sup> In addition, the Constitutional Court, the apex court, is given exclusive jurisdiction to determine, inter alia, the constitutionality of any constitutional amendment, the constitutionality of the president's conduct and whether parliament has fulfilled its constitutional obligations.<sup>37</sup>

These wide powers of judicial review, often invoked to settle major political disputes, ensure that the courts play an outsized role in public life. During the Zuma presidency, as institutions were being hollowed out and weakened, many of the political battles of the time were fought and won in courtrooms. Indeed, courts are considered as the last bulwark of democracy against the threat of complete collapse posed by the 'state capture' project undertaken by Zuma during his presidency. His overt hostility to the courts certainly played a role in their appraisal as constitutional safeguards.<sup>38</sup>

Throughout his presidency, Zuma publicly questioned the role of the courts in South Africa's democracy, stating as early as 2009 that judges of the Constitutional Court behaved like 'God'. In 2012, Zuma's government initiated a review of the powers and jurisprudence of the Supreme Court of Appeal and the Constitutional Court, which, instead of showing that the courts were obstructing transformation, actually proved that the problem was the implementation of court orders by the executive.<sup>39</sup> However, with Zuma's replacement by Cyril Ramaphosa as ANC president – an avowed constitutionalist – the courts have come to be viewed with suspicion by the RET faction and the EFF, both of which have publicly attacked courts and the judicial process.

In 2022, as the Judicial Commission of Inquiry into Allegations of State Capture began releasing its report and recommendations,<sup>40</sup> these attacks intensified, as those implicated feared prosecution. Before

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<sup>34</sup> Section 2 of the Constitution. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, 1999 (1) SA 374 [58]: 'It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.'

<sup>35</sup> Section 172(1)(a): 'When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its invalidity.'

<sup>36</sup> Section 172(1)(b): 'When deciding a constitutional matter within its power, a court may make any order that is just and equitable.'

<sup>37</sup> Section 167(4) of the Constitution.

<sup>38</sup> See, for instance, Moshoeshoe Monare, 'ConCourt's powers need reviewing, says Zuma', *The Star*, 13 February 2012, <https://www.iol.co.za/the-star/concourts-powers-need-reviewing-says-zuma-1232428>.

<sup>39</sup> Department of Justice and Constitutional Development, 'Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report', November 2015, <https://www.justice.gov.za/reportfiles/2017-CJPreport-Nov2015.pdf>.

<sup>40</sup> One of Zuma's last acts as president was to reluctantly appoint the commission led by then Deputy Chief Justice Zondo as directed by the Public Protector in terms of her remedial action in the 'State of Capture Report'

that, Zuma had engaged in a long legal tussle with Deputy Chief Justice Raymond Zondo over the latter's insistence that Zuma appear before and give testimony to the commission. That fight produced three different judgments from the Constitutional Court, all of which went against Zuma.<sup>41</sup> After unsuccessfully applying for Zondo's recusal on the basis of an extra-marital relationship with one of Zuma's sisters-in-law, Zuma launched a series of attacks on the commission, Zondo, and the courts. Zuma's public statements gradually moved from expressing his discontent with what he regarded as unfair treatment at the hands of the commission to claiming that there had been an abuse of law and the authority of the court by 'a few lawless judges who have left their constitutional post for political expediency' and alleging that Ramaphosa had paid off some judges in return for court victories.<sup>42</sup> This latter sentiment was echoed by the EFF, which alleged, without any proof, that some judges were 'on the payroll of the white monopoly capitalist establishment'.<sup>43</sup>

On the day of the hearing in *Zuma No. 3*, in a media statement, Zuma alleged that 'the judiciary is now in the position where they are beyond reproach and the judges in this country are continuously taking extra powers for themselves to the detriment of the legitimate political process'.<sup>44</sup> He attributed the idea of an emerging judicial dictatorship to a 'public sentiment', with which he agreed. These remarks would only foreshadow his lengthy address to the ANC's National Executive Committee when he made the clearest case for a populist overhaul of the Constitution:

We are living in what we term a 'constitutional democracy' but fail to interrogate its real meaning. The painful struggle we fought was for democracy and not the constitutional democracy we have today . . . I say this because the Constitution we all praise has turned into an instrument to subvert the will of the people. The majority of people who mandate us at every election to represent them in Parliament can no longer see their aspirations being attained by us because the decisions and actions of Parliament are permanently arrested by the judiciary through the Constitution. In other words, we are forced into implementing only that which an unelected judiciary agrees with. That is not a real democracy but a pseudo-democracy. The role of the judiciary was only intended to be the enforcement of the law, not to control the outcomes of a democratic process . . . How can just 11 people have so many powers to control a whole elected legislative assembly? . . . We fought for democracy. The majority rules . . . What happens when they are turned into counter-revolutionary forces against the people? What happens when they assume more powers than they are allowed? . . . There is something fundamentally wrong in this model, [a]nd it is our task as the liberation movement to rectify this.<sup>45</sup>

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(<http://www.saflii.org/images/329756472-State-of-Capture.pdf>) and following his failed bid to have it reviewed and set aside in *President of the Republic of South Africa v Office of the Public Protector*, 2018 (5) BCLR 609 (GP).

<sup>41</sup> *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*, 2021 (5) SA 1 (CC) ('Zuma No. 1'), in which the court held that Zuma was under an obligation to appear before and give testimony to the commission; *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*, 2021 (5) SA 327 (CC) ('Zuma No. 2'), in which a majority of the court found Zuma to have been in contempt of its earlier order in *Zuma No. 1* and ordering his imprisonment for 15 months; *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State*, 2021 (11) BCLR 1263 (CC) ('Zuma No. 3'), in which a majority of the court dismissed an application by Zuma to rescind its earlier judgment in *Zuma No. 2*.

<sup>42</sup> Franny Rabkin, 'Who Will Judge the Judges? Zuma Says He Can', *Sunday Times*, 21 February 2021, <https://www.timeslive.co.za/sunday-times/news/2021-02-21-who-will-judge-the-judges-zuma-says-he-can/>.

<sup>43</sup> Rabkin, 'Who Will Judge the Judges?'

<sup>44</sup> Aron Hyman "'Judicial Dictatorship' Is Emerging, Jacob Zuma Complains', *Business Day*, 26 March 2021, <https://www.businesslive.co.za/bd/national/2021-03-26-judicial-dictatorship-is-emerging-jacob-zuma-complains/>.

<sup>45</sup> 'Jacob Zuma on ANC Top 6 Meeting', *Financial Mail*, 6 April 2021, <https://www.businesslive.co.za/fm/opinion/letters/2021-04-06-read-in-full-jacob-zuma-on-anc-top-6-meeting/>. The quotation is edited for coherence and length.

From this extraordinary statement, we get a clear sense that Zuma's quarrel with the judiciary, while rooted in his own legal woes, proceeds from the premise that constitutional democracy as a system subverts the 'will of the people'; that majority rule is equated with democracy (anything else is 'pseudo-democracy'); and that, ultimately, judicial review and judicial authority are unjustified (and perhaps unjustifiable). Casting judges as an obstacle to achieving electoral promises is a classic populist move – one that is wholly cynical – recently adopted by KwaZulu-Natal premier Sihle Zikalala, who is seeking re-election as the ANC's chairperson in that province and seemingly appealing to the support of the RET faction.<sup>46</sup>

Zikalala is not the only ANC leader who has resorted to public attacks on the courts in a bid to gain internal party electoral support. Seven days into the new year, the Minister of Tourism, Lindiwe Sisulu, published an op-ed, in which she derided senior judges as 'mentally colonised Africans' who cosy up with their 'elitist colleagues to sing from the same hymn book, spouting the Roman-Dutch law of property' when deciding cases that deal with land reform and espouse 'the worldview and mindset of those who have dispossessed their ancestors'.<sup>47</sup> She questioned whether the advent of the Constitution and the rule of law had heralded any positive outcomes for the victims of colonialism and apartheid (i.e., black people), given the sluggish pace of socioeconomic transformation. In the article, Sisulu also makes a passing reference to the violent riots of July 2021 following the imprisonment of Zuma, and she views them as a warning about the urgency of economic transformation and wealth redistribution. Judges, it appears, are the people she has identified as the real culprits who have stood in the way of the achievement of these goals. The solution then is quite clear:

There is a need for an overhaul of a justice system that does not work for Africa and Africans. If the law does not sufficiently address the issue of the food fight, the law will fail, and inevitably it will play out in the streets. We have a neo-liberal Constitution with foreign inspiration, but who are the interpreters? And where is the African value system of this Constitution and the rule of law? If the law does not work for Africans in Africa, then what is the use of the rule of law?<sup>48</sup>

While the article itself is not a model of clarity, one is able to identify the signposts of the argument, which proceeds along the same lines as that of Zuma's, complete with the rhetorical flourish about abandoning the rule of law. Predictably, Sisulu is expected to make a play for the ANC presidency later this year at its elective conference. The op-ed, along with Sisulu's rejoinders to rebuttals from fellow ANC leaders, seems to have been calculated to appeal to the RET faction for support.

According to both Zuma and Sisulu, judges are identified with the elites, who are stifling the country's progress towards socioeconomic transformation by subverting the will of the people. Further, according to this view, these elites are so emboldened because the Constitution itself subverts the will of the people. Of course, the entire record of observable history proves that, contrary to these allegations, it is the courts that have sought to concretise claims to socioeconomic rights and to give effect to the transformative nature of the Constitution, often against strident opposition from successive ANC governments.

Consider, for instance, the case of *Government of the Republic of South Africa v Grootboom*, where the Constitutional Court found that the government had violated the respondents' right to housing by

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<sup>46</sup> Stephen Grootes, 'Going RETrograde – Zikalala's Questioning of ConCourt Supremacy Opens a New Front in ANC Leadership Battle', *Daily Maverick*, 23 March 2022, <https://www.dailymaverick.co.za/article/2022-03-23-going-retrograde-zikalalas-questioning-of-concourt-supremacy-opens-a-new-front-in-anc-leadership-battle/>.

<sup>47</sup> Lindiwe Sisulu, 'Hi Mzansi, Have We Seen Justice?' *IOL*, 7 January 2022, <https://www.iol.co.za/dailynews/opinion/lindiwe-sisulu-hi-mzansi-have-we-seen-justice-d9b151e5-e5db-4293-aa21-dcccd52a36d3>.

<sup>48</sup> Sisulu, 'Hi Mzansi, Have We Seen Justice?'.

failing to provide suitable alternative accommodation to them after they were evicted from their homes.<sup>49</sup> The court also found that the state had a constitutional duty to take positive measures to 'meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing'.<sup>50</sup> It is worth noting that the government had insisted that it had met its constitutional obligation in terms of section 26 to ensure the progressive realisation of the right through the adoption of its housing programme. The court found that it had not met 'the obligation imposed upon it by [section] 26(2) of the Constitution'.<sup>51</sup> Tragically, Irene Grootboom, the named respondent, died homeless years later.<sup>52</sup> Also consider the judgment in *Minister of Health v Treatment Action Campaign*, in which the court held that the government's failure to provide antiretroviral treatment to pregnant women and new-born babies at hospitals and clinics beyond ones that the government had designated as testing and research facilities for the drug (nevirapine) was not reasonable and therefore constitutionally invalid.<sup>53</sup> This led to South Africa adopting a universal HIV treatment programme, which has been hailed as one of the best in the world.

Lastly, recall the court's judgment in *Khosa v Minister of Social Development*, in which it was declared that the Social Assistance Act 59 of 1992 was unconstitutional for its exclusion of non-citizens from the provision of social grants, in line with section 27 of the Constitution. The court found that the exclusion of non-citizens (specifically 'permanent residents') amounted to unfair discrimination as the section 27(1) right applied to 'everyone'.<sup>54</sup>

Each of the preceding cases involved a policy or implementation failure on the part of the ANC government. In each case, the court upheld the socioeconomic rights claim at issue, rebuking the government for its failure to meet its constitutional obligations, and highlighting that whatever budgetary or resource constraints existed, the state was under a duty to ensure the progressive realisation of those rights. This empirical reality appears to have been lost on Sisulu, who, ironically, has been part of successive ANC administrations since 1994 and has served as a Cabinet member in various portfolios. However, as Müller noted above, the populist's claim as the one true representative of 'the people' does not rely on empirical grounds for its validity – it is a moral and emotional appeal to a public whose valid grievances are co-opted by the populist for purposes of acquiring power. Shifting the focus away from what the government has failed to do, to those cases where judges have struck down policy and legislation, allows the populist to portray courts as meddling in the business of governing.

Something remains to be said about the 'anti-institutionalist' populist posture as it relates to South African politics. As I explained in Part I, populists are often not anti-institutionalist. In fact, they are content with using democratic institutions and practices to achieve their goals. A prime example of this is Malema, who sits as a member of the Judicial Service Commission (JSC).<sup>55</sup> During its public interviews of candidates for judicial office, Malema has tended to use the platform for partisan, and often populist, ends. He has especially developed a penchant for questioning judges who ruled against him as a litigant

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<sup>49</sup> *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC) ('Grootboom').

<sup>50</sup> *Grootboom*, (n 49) [24].

<sup>51</sup> *Grootboom*, (n 49) [69].

<sup>52</sup> See Pearlie Joubert, 'Grootboom Dies Homeless and Penniless', *Mail & Guardian*, 8 August 2008, <https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless/>.

<sup>53</sup> *Minister of Health v Treatment Action Campaign (No. 2)*, 2002 (5) SA 721 (CC), para 135.

<sup>54</sup> *Khosa v Minister of Social Development; Mahlaule and Another v Minister of Social Development*, 2004 (6) SA 505 (CC), [80] – [85].

<sup>55</sup> Malema is designated as one of three opposition members of parliament representing the National Assembly on the JSC in terms of section 178(1)(h) of the Constitution.

to explain their rulings. His conduct was the subject of litigation,<sup>56</sup> and resulted in a guilty finding by Parliament’s Joint Committee on Ethics and Members’ Interests.<sup>57</sup> When asking candidates to explain their rulings, Malema does so not for clarity but for theatre. When judges explain that their rulings are much more nuanced than he makes it appear, his strategy has been to ask reductive questions designed to corner judges into repudiating their decisions.<sup>58</sup> This is of course only symptomatic of the malaise that pervades the JSC process.

However, Malema’s tactics have a more worrying effect: they are designed to ensure that certain candidates whom Malema finds politically unpalatable are excluded from the recommendations that the JSC makes to the president. In this way, judges that Malema perceives as hostile to him, or his conduct, are maligned in favour of those against whom he has no strong feelings. This, itself, is a concern for the rule of law and independence of the judiciary, given that Malema seems to be able to influence other commissioners’ views of candidates, based on how they respond to his often-aggressive and badgering questioning. It is even more concerning when one takes into account that the JSC has recently resurrected the idea of merging the Supreme Court of Appeal and the Constitutional Court into one court, ostensibly under the guise of minimising the cost and length of appellate litigation.

It is not inconceivable that this seemingly benign reason is only a cover for a more sinister animating goal: when appointing judges to the Supreme Court of Appeal (other than the president or deputy president of that court), the president appoints on the advice of the JSC.<sup>59</sup> Judges of the Constitutional Court, however, are appointed in terms of a unique procedure that entails some measure of discretion in relation to which of the recommended candidates to appoint.<sup>60</sup> One can see why this would be irksome to anyone seeking to leverage the institutional mechanisms of the JSC in the service of populist goals. Yaniv Roznai and Tamar Hostovsky Brandes identify the expansion of the size of a court and ‘packing’ it with judges who are sympathetic to, or not hostile to, a particular leader as a typical populist tactic.<sup>61</sup> With a possible merger of the two courts, Malema’s strategy of resorting to populist rhetoric and political posturing when questioning candidates for judicial appointment then presents a graver danger of the possibility of him being able to disqualify candidates by suggesting that they are actively working against ‘the people’.

Finally, having reviewed the various forms that populist attacks on the courts can take, I now turn to the effects these attacks have had on the courts, if any, and conclude by offering suggestions on how courts may counter or respond to them.

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<sup>56</sup> The JSC interviews and recommendations of April 2021 were set aside by settlement between the JSC and the Council for the Advancement of the South African Constitution (CASAC) after CASAC approached the Gauteng Division of the High Court, Johannesburg, seeking an order to set them aside, and alleging, among other things, that they were procedurally unfair and arrived at irrationally. The founding affidavit can be found at <http://casac.org.za/wp-content/uploads/2021/08/Founding-affidavit.pdf>.

<sup>57</sup> ‘Report of the Joint Committee on Ethics and Members’ Interests on the Complaint against Honourable J.S. Malema, MP’, <https://pmg.org.za/tailed-committee-report/4784/>.

<sup>58</sup> Louise Vincent notes that ‘the populist style of politics is to speak in the “language of the people” which may include . . . adopting a style of expression that is simple and direct, avoiding intellectualisation . . . Any attempt to make things seem complex or subtle is a target for populist derision’ (‘Seducing the People: Populism and the Challenge to Democracy in South Africa’, *Journal of Contemporary African Studies* 29(1), 2011: 1–14). This is certainly true of Malema’s rhetorical style.

<sup>59</sup> Section 174(6) of the Constitution.

<sup>60</sup> Section 174(4) of the Constitution.

<sup>61</sup> Yaniv Roznai and Tamar Hostovsky Brandes, ‘Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine’, *Law & Ethics of Human Rights* 14(1), 2019: 19. They note further: ‘Limiting the power of democratic institutions is needed in order to neutralise them until populists are able to control them. Once the transition has been complete, and populists have taken over, these institutions can then be used to strengthen, legitimize, and reinforce the populist’s rule.’

## IV. ANALYSIS AND CONCLUSION

In the previous section, I outlined the reasons why courts have become targets for populist attacks, chief among them being the central role that they play in South Africa’s constitutional democracy as the final arbiters and guarantors of the Constitution. When assessing the effect or impact of populist attacks on the courts, one should always keep that role in mind. Indeed, as Chief Justice Ismail Mahomed remarked in the early days of the country’s constitutional democracy:

Unlike Parliament or the executive, the court does not have the power of the purse, or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its [the court’s] ultimate power must therefore rest on the esteem in which the judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity. No politician anywhere, however otherwise popular, would want to be seen to defy the order of a court enjoying within the nation a perception of independence and integrity; his or her future would then be at mortal risk.<sup>62</sup>

Mahomed CJ’s observations above reinforce the view of American founding father Alexander Hamilton of the judiciary as ‘the least dangerous branch’ of government.<sup>63</sup> Without a willingness to be bound by or implement the orders of courts, they would be reduced to mere ‘paper tigers’. The danger of populism, as we have seen, is that it pits ‘the people’ against independent, democratic, and constitutional institutions to cultivate a negative public sentiment about them. In the process, the legitimacy and integrity of those institutions are brought into question, and their decisions are easily ignored. Thankfully for South Africa, those populist portions of its society have not yet gained complete control of its institutions. While executive compliance with court orders leaves much to be desired, it still occurs.

The events that followed the Constitutional Court’s decision in *Zuma No. 2*, however, may have inflicted noticeable damage to the esteem in which the court is held by the public. After Zuma’s imprisonment for contempt of court, what are believed to be orchestrated acts of public violence soon followed and descended into riots that led to the unnecessary loss and destruction of life, limb and property. Indeed, when the court heard arguments in the rescission matter, the country was in the grips of horrific violence – a fact that was said by Zuma’s counsel to be important for the court to consider when it retired to deliberate. In the media and elsewhere, the court was accused of having acted unconstitutionally and

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<sup>62</sup> Ismail Mahomed, ‘The Role of the Judiciary in a Constitutional State: Address at the First Orientation Course for New Judges’, *South African Law Journal* 115, 1998: 111.

<sup>63</sup> Alexander Hamilton, ‘The Federalist Papers: No. 78’, [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp), in which he says: ‘Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.’

having violated Zuma's rights to a fair trial. That this came directly from Theron J's dissent in *Zuma (No.2)* was unfortunate and has been a recurring theme of continued criticisms and attacks adopted by the RET faction and some EFF supporters.

In a survey released by Afrobarometer a month after the riots, the data showed that only 43% of the respondents had trust in the courts, a significant decline from earlier years.<sup>64</sup> Notably, the data also showed that 'respondents with greater experiences of lived poverty and less education are less trusting of the courts than are more secure and educated respondents'.<sup>65</sup> This does not augur well for the courts in the long run. On the one hand, it is of course difficult to draw causal inferences from data and anecdotal evidence without appreciating all the possible variables that may have contributed to the decline in confidence. On the other hand, Zuma's defiance of the Constitutional Court was so brazen and unprecedented and elicited a firm rebuke from the court (notwithstanding the use of emotive language in the judgment). It is thus conceivable that the saga dented the court's image, as it appeared to have been second-guessing itself when it set down the rescission application in *Zuma No. 3*.

The effects of populism on the court have adverse consequences for its legitimacy. That some members of the court accuse others of acting unconstitutionally is undesirable and poses a danger that public sentiment now has a disproportional sway over how the court decides cases. In *S v Makwanyane*, Chaskalson P said that 'public opinion is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication'.<sup>66</sup> Judicial independence requires independence from all extraneous influences, including the public. Judicial response to populist attacks and criticism should also be mindful of the delicate nature of the courts' legitimacy in a constitutional democracy.

In response to Sisulu's op-ed, Deputy Chief Justice Zondo called a press briefing, in which he addressed the content of the article and then subsequently fielded questions from the media. It is not my intention to offer my own view of that decision, but only to note that caution should be exercised in such circumstances, and judges should err on the side of 'judicial lockjaw'.<sup>67</sup> One reason for this is that a press conference in an extra-judicial setting on such a politically charged matter makes it easier for populists to exploit as an example of judges playing politics, of the non-existence of neutrality and impartiality in the law, and of the need for the judiciary to be brought under the control of 'the people'.<sup>68</sup> Any view of the courts as nothing more than political actors will only reinforce the populist view of the exercise of judicial authority as illegitimate for as long as it is not 'an expression of the political will' of the people.<sup>69</sup> Inherent in reactive responses to populist attacks on the courts is the danger that judges may be seen to be descending into the political arena with skin in the game, as it were. An alternative may lie in proactive attempts to educate the public about the judicial process, how courts function, how decisions are arrived at, and what the obligations of the parties involved are. This was an idea that was mooted at the recent JSC interviews for the position of Chief Justice. Even with resources and the necessary communications infrastructure, the Office of the Chief Justice has done less than admirably in ensuring that the public is educated on the role of the judiciary and to counter any misinformation that is in the public domain.

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<sup>64</sup> Mikhail Moosa and Jan Hofmeyr, 'South Africans' Trust in Institutions and Representatives Reaches New Low', Afrobarometer Dispatch No. 474, 24 August 2021, [https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south\\_africans\\_trust\\_in\\_institutions\\_reaches\\_new\\_low-afrobarometer-20aug21.pdf](https://afrobarometer.org/sites/default/files/publications/Dispatches/ad474-south_africans_trust_in_institutions_reaches_new_low-afrobarometer-20aug21.pdf).

<sup>65</sup> Moosa and Hofmeyr, 'South Africans' Trust in Institutions', 7.

<sup>66</sup> *S v Makwanyane*, 1995 (3) SA 391 (CC) [80].

<sup>67</sup> Leslie B. Dubeck, 'Understanding "Judicial Lockjaw": The Debate over Extrajudicial Activity', *New York University Law Review* 82(2), 2007: 569.

<sup>68</sup> Blokker, 'Populism as a Constitutional Project': 552.

<sup>69</sup> Blokker, 'Populism as a Constitutional Project': 551.

Importantly, populist attacks on the courts will require an institutional response that will include, inter alia, the close monitoring of behaviour at the JSC, ensuring that jurisprudential and other differences in the Constitutional Court are tempered so that they do not feed into populist rhetoric about the court, public education about the judicial process and an embrace of judicial modesty in relation to judges’ engagements with the public that may lend credence to any apprehension of political bias.

These measures alone may not be adequate to meet the challenge. Populism feeds on and contorts the valid grievances of the poor and vulnerable about the state of South African society. Widespread change is needed, starting with the delivery of basic services, the eradication of corruption and crime, renewed commitment to the rule of law and the democratic process, and the constant ‘inculcation of democratic values’ into both parliamentary and popular politics.<sup>70</sup>

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<sup>70</sup> Vincent, ‘Seducing the People’: 13.

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