Politics by Other Means in South Africa Today

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Rick Abel’s classic Politics by Other Means (1995) used South Africa to argue for law’s ‘potential nobility’, but it did so avoiding a heroic mode characteristic of much anti-apartheid writing. Abel showed how law could, with strenuous exertion, be turned into a defensive shield for the oppressed. As a sword, however, it was ‘two-edged’. It allowed the powerful to frustrate or overturn hard-won symbolic victories. Recently, the heroic mode has returned to South Africa. The Constitutional Court, in particular, is lauded for having combated ‘state capture’ under deposed President Jacob Zuma. A closer examination of this period, however, does much to vindicate Abel’s earlier scepticism about law’s offensive value. The spectacular deployment of law to fight politicians’ crimes has exposed the judiciary to unexpected political threats. Meanwhile, civil society’s efforts to entrust judges with administrative duties shirked by the government has inevitably entailed the sacrifice of some rule of law values.

I. INTRODUCTION

Rick Abel’s recent studies of the rule of law and the ‘War on Terror’ extend an enquiry begun in late-apartheid South Africa. As he writes in the Preface to Law’s Wars, the United States (US) appeared to possess all manner of comparative advantages: a written constitution, a non-racial franchise, judges appointed by different political parties, a vibrant and aggressive media, and a powerful and well-funded non-governmental organization (NGO) sector.¹

¹R. Abel, Law’s Wars: The Fate of the Rule of Law in the US ‘War on Terror’ (2018) xiv.

*I would like to thank Sara Dezalay and Tim Gibbs for their comments on this manuscript, and Cora Hoexter for stimulating conversation on the South African case. I benefited a great deal from discussions at the Cardiff conference about the more general questions raised by Abel’s work.

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Yet in *Politics by Other Means* (1995), Abel showed how even in 1980s South Africa, which lacked all these features, the law could still be used, with painstaking effort, to gradually dismantle the legislative and administrative apparatus of grand apartheid. Abel's, however, was not a simple story of legal heroism. He did not celebrate lawyers as 'freedom fighters'.\(^2\) In fact, he wrote, ‘[l]aw, like any other resource, augments and strengthens existing inequalities of wealth and power’.\(^3\) He described how the apartheid government used core procedural components of the rule of law against its internal opposition and created ‘legal’ forms dispensing with these components in other cases.\(^4\) Following E. P. Thompson, Abel argued for law’s ‘potential nobility’ but refused to deny its ‘class-bound and mystifying functions’.\(^5\)

Perhaps the central conclusion of *Politics by Other Means* was, indeed, a sober one: that law had consistently proved ‘more effective as a shield than a sword’.\(^6\) ‘Reactive’ opposition strategies – such as postponing forced removals or demanding damages – were ultimately more telling than celebrated ‘test cases’ designed to restructure the apartheid state.\(^7\) This conclusion need not always hold true. For Abel, ‘context is all’.\(^8\) For example, while his analysis of apartheid generally downplayed the importance of judges’ personalities, ‘the most important conclusion’ of his recent books is that political parties in the US have appointed judges with significantly different attitudes towards state abuses.\(^9\) ‘Each case is idiosyncratic’, and ‘strategies that work in one time and place may be ineffective in another’.\(^10\) Yet Abel had hoped nonetheless to ‘offer lessons to those resisting other oppressive regimes’,\(^11\) and nowhere are his claims broader in scope than when underscoring the limits to law’s offensive power.\(^12\) Law as a sword, he wrote,

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2 African lawyers are often ‘construed in heroic terms … as freedom fighters … or … as mercenaries of neo-colonial interests’; S. Dezalay, ‘Lawyers’ Empire in the (African) Colonial Margins’ (2017) 24 *International J. of the Legal Profession* 25, at 27. For South Africa, see T. Madlingozi, ‘South Africa’s First Black Lawyers, amaRespectables, and the Birth of Evolutionary Constitutionalism’ (2018) 34 *South African J. on Human Rights* 517.

3 R. Abel, ‘Legality without a Constitution: South Africa in the 1980s’ in *Recrafting the Rule of Law: The Limits of Legal Order*, ed. D. Dyzenhaus (1999) 66.

4 Id., p. 75.

5 R. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994* (1995) xv; E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975) in Abel, op. cit., n. 1, p. 5.

6 Abel, op. cit., n. 3, p. 71; also R. Abel, ‘Speaking Law to Power: Occasions for Cause Lawyering’ in *Cause Lawyering: Political Commitments and Professional Responsibilities*, eds. A. Sarat and S. Scheingold (1998) 103.

7 Abel, op. cit. (1995), n. 5, pp. 64–65, pp. 527–528.

8 Abel, op. cit., n. 1, p. 44.

9 Compare Abel, op. cit. (1995), n. 5, p. 545 with R. Abel, *Law’s Trials: The Performance of Legal Institutions in the US ‘War on Terror’* (2018) 611.

10 Abel, op. cit. (1995), n. 5, p. 545; Abel, op. cit., n. 1, p. 44.

11 Abel, op. cit. (1995), n. 5, p. 523.

12 At such points, Abel typically switches from the past to the present tense.
was ‘two-edged’. My central contention is that this conclusion still holds true in South Africa today, despite numerous caveats necessary to account for a radically altered political and constitutional context.

During the Presidency of Jacob Zuma (2009–2018), South Africa’s Constitutional Court (ZACC) ‘emerged as one of the few meaningfully independent institutions in the country’. Civil society organizations continually sought its assistance to fight what became known as ‘state capture’: the regime’s attempt to protect its (corrupt) interests by placing pliant personnel in government ministries, state-owned enterprises, and constitutionally protected independent institutions. The demise of Zuma’s increasingly disastrous Presidency was, eventually, precipitated by a ZACC ruling that he had breached the constitution by failing to implement the recommendations of a Public Protector’s report. The first paragraph of this ruling, read live on national television, asserted boldly that ‘constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck’.

These decisions saw a return of legal heroism, especially in media analysis. For Bheki Makhubu – writing in the Mail & Guardian, South Africa’s leading liberal newspaper – there is ‘no doubt’ that ‘the Constitutional Court

13 Abel, op. cit. (1995), n. 5, p. 11.
14 T. Roux, ‘Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years’ (2016) 42 J. of Southern African Studies 5, at 6.
15 This term is of course a loaded one, with as much political as analytical value. In 2017, it was South Africa’s ‘word of the year’, printed 20,311 times. It originated with World Bank analysis of post-communist transitions, and designated corrupt firms’ use of ‘private payments’ to shape the basic ‘rules of the game’; see J. Hellman et al., ‘Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition’ (2000) World Bank Policy Research Working Paper 2444. In South Africa, it dovetailed with popular Marxist analyses of the state as ‘captured’ by class interests, and with lived experiences of the state as the servant of racial minorities (touched on below). This helped journalists and the Public Protector to mobilize an unusually broad liberal-left coalition behind the term, following an explosive appointment scandal at the Ministry of Finance in late 2015. This ‘market economy’ coalition ranged ‘from Marxists in the union moment through to the chief executives of banks’; see S. Friedman, ‘The More Things Change …: South Africa’s Democracy and the Burden of the Past’ (2019) 86 Social Research 279, at 296; see also Z. Saul, ‘Is South Africa a “Captured State”? The Anatomy of a Captured State’ (2016) at <https://www.anceasterncape.org.za/is-south-africa-a-captured-state-the-anatomy-of-a-captured-state>; M. O. Dassa, ‘Theoretical Analysis of State Capture and Its Manifestation as a Governance Problem in South Africa’ (2018) 14 The J. for Transdisciplinary Research in Southern Africa 1, at 5–7. The latter also surveys relevant conceptual issues.
16 S. 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’ (2018) 8 Constitutional Court Rev. 155.
17 Economic Freedom Fighters v. Speaker of the National Assembly and Others [2017] ZACC 47; Democratic Alliance v. Speaker of the National Assembly and Others [2016] ZACC 11.
saved South Africa, the continent and the world from the rise of a new dictatorship’.18 For Kabelo Khumalo, business editor for the Sunday World, ‘the separation of powers, particularly an independent judiciary … saved South Africa from the brink of being a failed state’,19 while for the Financial Times, finally, the ‘descent under Mr Zuma into crony capitalism has been arrested only by institutions prepared to stand up for the constitution and the rule of law’.20

Among South African lawyers and academics, however, the verdict is more ambiguous. Here, as I will show, there is widespread agreement that the ZACC’s ‘sharp and mighty sword’ has been two-edged. First, almost everyone concedes that the victory against state capture was brought at the cost of at least some rule of law components and the separation of powers (traditionally conceived), even if some have nonetheless insisted that this is a price worth paying in exceptional times to defend more basic legal values. Second, there are widespread anxieties surrounding the political consequences of judicial ‘overreach’. Even the judiciary’s supporters worry that it has been forced to make itself vulnerable politically. To this concern can be added another raised elsewhere in this Special Supplement: treating state capture as a crime risks fuelling populist efforts to (mis)attribute South Africa’s ills solely to a corrupt political class.21

II. STATE CAPTURE

The reality of the African National Congress (ANC) in exile frequently belied its self-presentation as a disciplined liberation movement.22 Yet when it came to power, under Presidents Nelson Mandela (1994–1999) and Thabo Mbeki (1999–2007), bureaucratic tendencies at least constrained increasingly violent and volatile competition for patronage.23 A top-down developmentalism reconciled Marxisant rhetoric with liberal globalization (indeed, the Communist Party still remains in the ruling alliance).24 Jacob

18 B. Makhubu, ‘Nkandla Ruling Is a Short, Sharp Lesson in Democracy’ Mail & Guardian, 6 May 2016, at <https://mg.co.za/article/2016-05-06-00-a-short-sharp-lesson-in-democracy>.
19 K. Khumalo, ‘Get Our Electoral System Right’ IOL Business Report, 25 April 2019, at <https://www.iol.co.za/business-report/opinion/opinion-get-our-electoral-system-right-21914139>.
20 D. Pilling, ‘Jacob Zuma Wages War on South Africa’s Institutions’ Financial Times, 28 June 2017, at <https://www.ft.com/content/102ee466-5bdc-11e7-b553-e2df1b0c3220>.
21 Compare Engelmann and de Sa e Silva on Brazil (this volume).
22 See for example S. Ellis, External Mission: The ANC in Exile, 1960–1990 (2012) ch. 5.
23 See for example R. Southall, ‘Understanding the “Zuma Tsunami”’ (2009) 121 Rev. of African Political Economy 317, at 327–329.
24 For a critique, see P. Bond, Talk Left, Walk Right: South Africa’s Frustrated Global Reforms (2004).
Zuma, however, preferred a different style. Head of the ANC Intelligence Department during late apartheid, Zuma had mastered a ‘boss politics’ that blended persuasion and coercion to bring warring parties to the negotiating table. These skills proved invaluable when negotiating peace in Kwa-Zulu Natal during the post-apartheid transition, but would become catastrophic when used to manage a complex bureaucratic-capitalist state. Mbeki’s allies tried to prevent Zuma’s accession by waxing ‘lawfare’ against him in South Africa’s courts. Prosecutions aired a series of (apparently well-founded) corruption allegations, centring on an arms deal brokered by Zuma early in his Deputy Presidency (1999–2005).

Nonetheless, Zuma’s ‘patronage faction’ gained control of the ANC in December 2007. They did so running on a broadly Left platform, supported by most trade unions and the ANC Youth League. The ANC ‘recalled’ Mbeki in 2008, replacing him with Kgalema Motlanthe until Zuma could run for office in 2009. Straight away, however, the future President’s supporters began appointing pliant staff to key agencies, protecting Zuma from prosecution and shielding his associates’ business interests from investigation. In 2008, the ANC disbanded the Scorpions, an independent unit in the National Prosecution Agency (NPA) fighting corruption and organized crime. Other ‘captured’ institutions included the NPA itself and the South African Revenue Service (SARS). The economic interests of Zuma’s associates and the ANC patronage faction were protected by the new leadership of Transnet and Eskom (the state-owned telecommunication and electricity providers). A nearly-signed $76 billion deal for a Russian-run nuclear plant came close to bankrupting South Africa. Such predation was legitimized by accountants (including KPMG), public relations firms (including the UK’s notorious Bell Pottinger), and media outlets created by the Gupta business family to promote Zuma’s agenda (notably the news network ANN7 and the newspaper The New Age). These outlets dressed state capture in radical clothing by branding it as an assault on ‘white monopoly capital’.

25 I owe this phrase to Tim Gibbs.
26 For hopes that his Presidency might ‘reconcile’ South Africa, see J. Hofmeyr, ‘Reconciliation and the Zuma Presidency’ (2009) 7 South African Reconciliation Barometer Newsletter 7. Reconciliation and legal rigour have co-existed uneasily since a Truth and Reconciliation Commission (1995–2002) amnestied some of apartheid’s worst criminals.
27 One reason that the ANC gave for Mbeki’s eventual recall was a judicial finding that prosecuting Zuma was politically motivated; M. le Roux and D. Dennis, Precedent & Possibility: The (Ab)use of Law in South Africa (2009) 190–194.
28 This label comes from Friedman, op. cit., n. 15, p. 289.
29 This created much confusion; see P. Devan, ‘COSATU, the SACP and the ANC Post-Polokwane: Looking Left but Does It Feel Right?’ (2008) 41 Labour; Capital and Society 4.
30 The matters discussed in this paragraph are now being aired publicly by Justice Raymond Zondo’s Judicial Commission of Inquiry into Allegations of State Capture, but are also discussed in M. le Roux and D. Dennis, Lawfare: Judging Politics in South Africa (2019) chs 1 and 13.
Not all of Zuma’s appointments worked as planned. Thuli Madonsela, appointed in 2009 to the post of Public Protector, an ombud position constitutionally mandated to protect democracy, would play a crucial role in his downfall, while Mogoeng Mogoeng, appointed as Chief Justice in 2011, proved not to be the ‘sweet-heart appointment’ that some court-watchers feared.\textsuperscript{31} Indeed, Mogoeng turned the Constitutional Court into a bastion of resistance to state capture. Some defenders of the bureaucratic state also clung on to their posts, despite threats and disciplinary proceedings on (often) contrived grounds. Some targeting of these figures was coordinated by the captured Crime Intelligence division of the South African Police Force, an agency charged with counter-terrorism and operating with much of the same secrecy and opacity described in Abel’s recent work on the US.\textsuperscript{32} At times, intelligence agencies turned the language of state capture against those resisting it. The best-known example was their claim late in 2014 that SARS harboured a ‘rogue unit’, an allegation aimed at supporters of Pravin Gordhan (a former SARS Commissioner and Minister of Finance who became a poster child for good government).\textsuperscript{33} On other occasions, Crime Intelligence preferred the language of the War on Terror. Anwa Dramat, a former member of the ANC’s armed wing and an ex-prisoner on Robben Island, was suspended as head of the Directorate for Priority Crime Investigation after being accused of the illegal ‘rendition’ of Zimbabweans to their home country (a crime unknown in South African law). Another liberation struggle veteran, Robert McBride, was purged from the Independent Police Investigative Directorate after resisting the campaign against Dramat.\textsuperscript{34} Dramatically, this new rule of law hero in South Africa had once been a hate figure in white society; another former member of the ANC’s armed wing, he had been jailed for bombing a bar in 1986 and amnestied by the Truth and Reconciliation Commission.

III. THE RULE OF LAW IN EXCEPTIONAL TIMES

Almost every one of these appointments, suspensions, and redeployments was challenged in court. Both government and opposition waged constant

\textsuperscript{31} T. Roux, \textit{The Politics of Principle: The First South African Constitutional Court, 1995–2005} (2013) 188, n. 149; S. Ellmann, ‘The Struggle for the Rule of Law in South Africa’ (2016) 60 \textit{New York Law School Law Rev.} 57, at 101, ns. 300–301.

\textsuperscript{32} See G. Cawthra, ‘The Death of Security Sector Reform? The South African Exemplar Revisited’ (2019) 19 \textit{Conflict, Security & Development} 223, at 226–230.

\textsuperscript{33} This saga continues; see Legalbrief, ‘Gordhan Fights for His Political Survival’ 16 January 2020, at <https://legalbrief.co.za/diary/legalbrief-today/story/early-pp-reaction-copy-in-here/pdf/>.

\textsuperscript{34} McBride’s own’s testimony to the Zondo Commission (see n. 30 above), discussing Dramat and ‘rendition’, is at <https://sastatecapture.org.za/site/files/transcript/83/11_April_2019 Sessions.pdf> 72–91.
‘lawfare’. At times, plaintiffs deployed law as a shield, using due process to contest suspensions and removals. At other times, they turned it into a sword, challenging the rationality of appointments and reshuffles. This latter possibility flows from post-apartheid South Africa’s expansive Bill of Rights. The ZACC judges have read the Bill in ‘activist’ mode, holding that all exercises of public power are justiciable. They have demanded substantive rationality, procedural fairness, and even reason giving. South Africa has no ‘political question’ doctrine, shielding discretion from review, and while ‘deference’ and a ‘separation of powers’ are often invoked, the first places no limits on justiciability and the second has little precise content. The result, in exceptional times, and amid state capture, is an extraordinarily activist jurisprudence. Judges have even asked for the reasons behind cabinet reshuffles, notably that removing Gordhan from the Ministry of Finance in 2017 – an intrusion into executive prerogative unthinkable in most jurisdictions.

In earlier, more ordinary times, the ZACC had only made sparing use of powers that it had granted itself. Unlike most of the legal profession at the dawn of democracy, its newly appointed judges were liberal-left in outlook, sympathetic to the ANC and acting in ‘fundamental solidarity’ with the other branches of government. Their desire to avoid conflict with the new authorities was clearest in the area of socio-economic rights. Abel had written that ‘litigation … as a shield … might win rights to residence but not the jobs, housing, schools, transportation, or safety necessary to make residence viable’. The 1996 constitution promised, however, to grant rights to health, housing, and education that provided precisely those goods. Yet the judges in Johannesburg eventually opted against a ‘minimum core’ approach, specifying exactly what government had to provide. Instead, they settled for

35 Le Roux and Davis, op. cit., n. 30, pp. 273–276.
36 P. H. J. Maree and G. E. O. Quinot, ‘A Decade and a Half of Deference’ (2016) 2 J. of South African Law 268 (part 1), 447 (part 2); Ellmann, op. cit., n. 31, p. 67; C. Hoexter, ‘South African Administrative Law at a Crossroads: The Paja and the Principle of Legality’ The Admin Law Blog, 28 April 2017, at <https://adminlawblog.org/2017/04/28/cora-hoexter-south-african-administrative-law-at-a-crossroads-the-paja-and-the-principle-of-legal/>. 37 The Chief Justice has recently declared himself ‘not aware of any judiciary in the world that wields the kind of power that we do’; see M. Mogoeng, ‘Full Transcript: 17th Nelson Mandela Annual Lecture by Chief Justice Mogoeng Mogoeng’ Nelson Mandela Foundation, 24 November 2019, at <https://www.nelsonmandela.org/news/entry/transcript-17th-nelson-mandela-annual-lecture-by-chief-justice-mogoeng-mogoeng>. 38 See for example R. Davis, ‘ConCourt Faces Difficult Decision on Disclosure of Reasons behind Cabinet Reshuffles’ The Daily Maverick, 15 February 2019, at <https://www.dailymaverick.co.za/article/2019-02-15-concourt-faces-difficult-decision-on-disclosure-of-reasons-behind-cabinet-reshuffles/>. 39 Roux, op. cit., n. 30, p. 230; Ellmann, op. cit., n. 31, p. 64. 40 Abel, op. cit., n. 3, p. 71.
mere reasonableness review. Perhaps the most the spectacular example of litigation changing policy was the Treatment Action Campaign’s obtention of a comprehensive national programme to combat mother–child transmission of HIV. This victory was, however, effectively won before the case reached the ZACC. In the media spotlight and facing an organized campaign co-ordinated with churches and unions, government had already conceded the principle. Law as a sword had thus proved most powerful when combined with other (political) weapons.

This ‘fundamental solidarity’ between government branches started eroding during Zuma’s Presidency. Judicial activism was not the only catalyst. NGOs and opposition parties began litigating regularly when faced with a parliament unwilling to scrutinize state capture and administrative failure. By March 2017, the ANC Secretary-General candidly admitted that ‘the very fact that the courts are playing a more interventionist role in governance is reflective of our role in abdicating our governance responsibilities’. An extreme example was the 2014 AllPay case, which concerned a tender to distribute welfare grants to 17 million South Africans. The ZACC ruled that the tender had been irregularly awarded, and (more controversially) proposed an innovative remedy allowing the tender to be re-run under judicial supervision. As Okpaluba and Mhango put it, it ‘would be difficult to conceive of an argument that … [these] interdicts … were non-intrusive’. Even the Court itself has recently conceded that it is ‘pushing at its limits’ of its powers in correcting unlawful administrative action in this way. The Johannesburg judges had long been criticized – especially (but not only) by lawyers trained under the old order – for an ‘outcomes-based’ jurisprudence that failed to clarify legal principle. However, such criticisms have now become harder to ignore. As argued by one of the Court’s clerks during AllPay, it was at least ‘unfortunate’ that the majority refused to specify exactly how the courts

41 See for example le Roux and Davis, op. cit., n. 30, ch. 9.
42 M. Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1 J. of Human Rights Practice 14.
43 J. Fowkes, Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa (2016) 350–351.
44 Mantashe in H. Corder and C. Hoexter, ‘“Lawfare” in South Africa and Its Effects on the Judiciary’ (2018) 10 African J. of Legal Studies 105, at 120.
45 C. Okpaluba and M. Mhango, ‘Between Separation of Powers and Justiciability’ (2017) 21 Law, Democracy & Development 1, at 13.
46 M. Wallis, ‘Can Judges (and Ombuds) Overreach?’ 30 March 2018, 7, at <https://supremecourtofappeal.org.za/index.php/speeches-and-conferences/category/14-conference-papers#>.
47 See for example J. Gauntlett, ‘The Silence of the Lawyers’ PoliticsWeb, 1 February 2011, at <www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=219487%26sn=Detail%26pid=71656>. In interviews that I have conducted for other projects, old-order judges have often labelled this jurisprudence ‘palm-tree justice’.

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should seek to ‘correct’ for government failure in similar cases. It is very unclear, furthermore, how lower courts with higher caseloads could ever to hope to exercise such supervision. In this sense, once again, there are limits to law’s offensive powers.

The most politically charged debates about precedent have concerned the Office of the Public Protector. These debates followed the ZACC’s famous attempt in *Economic Freedom Fighters* (2016) to ‘chop the ugly head of impunity off its stiffened neck’ (see above). The immediate context was a report issued by Thuli Madonsela in March 2014. Entitled *Secure in Comfort*, it concluded that President Zuma had used state resources to improve his private homestead at Nkandla. (A month later, *Time Magazine* listed Madonsela among the world’s 100 most influential leaders.) It rejected claims that these were legitimate ‘security upgrades’. Most infamously, a swimming pool – complete with deep end and shallow end – had been labelled a ‘firepool’ for firefighting. Madonsela ordered that the state be recompensed for the improvements. Her remedies, however, were set aside by an *ad hoc* parliamentary committee. In early 2016, opposition parties overturned this decision at the ZACC. The Court found that the President was bound by the Public Protector’s remedial actions and had breached the constitution by failing to comply. It held that Madonsela’s decisions could only be set aside by a court of law. This was a landmark ruling. The most common criticism of the Public Protector’s office had centred precisely around the law’s failure to make its remedial actions binding. The only sign that this could change dated from months beforehand, when an ‘agitated’ Supreme Court of Appeal – likely frustrated by government persistently ignoring court orders – ruled that such actions were merely binding ‘in this matter’.

For most political commentators, the ZACC ruling had underscored ‘the centrality of the rule of law in holding the powerful to account’. (The accompanying scandal contributed to the ANC losing support in the August

48 M. Finn, ‘*AllPay Remedy: Dissecting the Constitutional Court’s Approach to Organs of State*’ (2016) 6 *Constitutional Court Rev* 258, at 261–262.
49 M. du Plessis and A. Coutsoudis, ‘Considering Corruption through the *AllPay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law’ (2016) 133 *South African Law J.* 755.
50 Office of the Public Protector, ‘*Secure in Comfort: Public Protector’s Report on Nkandla*’ *PoliticsWeb*, 19 March 2014, at <https://www.politicsweb.co.za/documents/secure-in-comfort-public-protectors-report-on-nkan>.
51 See Woolman, op. cit., n. 16.
52 M. Bishop and S. Woolman, ‘Chapter Nine Institutions: Public Protector’ in *Constitutional Law of South Africa*, eds S. Woolman and M. Bishop (2008) ch. 24A, p. 3.
53 Woolman, op. cit., n. 16, p. 172, p. 177, emphasis in original. Preceding judgements had held that reasons, at least, must be given for non-compliance.
54 J. February, ‘*Nkandla Judgement: High Noon for President Zuma*’ *ISS Today*, 1 April 2016, at <https://issafrica.org/iss-today/nkandla-judgment-high-noon-for-president-zuma>.
2016 municipal elections, which ultimately precipitated Zuma’s recall.\textsuperscript{55} The judgement’s rule of law credentials have, however, been much debated within the legal profession. Michael Tsele of the Cape Bar, for example, has ‘welcomed the outcome … as a citizen … but … dislike[d] it as a scholar’. He excoriates the ZACC’s refusal to provide a legally principled justification for its new view of the Public Protector’s powers. He sees \textit{Economic Freedom Fighters} as ‘a quintessential example’ of the kind of ‘outcome-based’ jurisprudence long derided by the ZACC’s critics (see above).\textsuperscript{56} Indeed, most of the Court’s legal supporters have not defended it in terms of principle or precedent. Instead, they have argued that some pristine features of the rule of law had to be sacrificed in South Africa’s exceptional circumstances.\textsuperscript{57} Just as Tsele says, for example, ‘there has been a suggestion by some in legal and political circles that because the other political branches are dysfunctional, the courts have … become a legitimate last resort’ for essentially political decision making.\textsuperscript{58} Meanwhile, for Stu Woolman – a leading academic authority on the constitution – although recent court rulings ‘might appear to have turned the Office [of the Public Protector] into cop, prosecutor, judge and jury’, this is on balance a price worth paying given the few effective constraints on power in South Africa: ‘the Office functions as a mediator between state and subject necessitated by the legacy of a racist, totalitarian state’. The courts may thus have ‘pushed the boundaries of the separation of powers doctrine’, but they did so in the interests of a broader ‘politics of accountability’.\textsuperscript{59} This particular weapon was thus the only one available in desperate times.

\textbf{IV. A TWO-EDGED SWORD}

In \textit{Economic Freedom Fighters}, the ZACC described the Public Protector as ‘the embodiment of a biblical David … one of the true crusaders

\textsuperscript{55} M. Justesen and C. Schulz-Herzenberg, ‘The Decline of the African National Congress in South Africa’s 2016 Municipal Elections’ (2018) 44 \textit{J. of Southern African Studies} 1133, at 1140–1142.

\textsuperscript{56} M. Tsele, ““Coercing Virtue” in the Constitutional Court: Neutral Principles, Rationality and the \textit{Nkandla} Problem’ (2018) 8 \textit{Constitutional Court Rev.} 193, at 193–194.

\textsuperscript{57} James Fowkes, a former ZACC clerk, argues that ‘constitution-building’ courts cannot be evaluated like others. What looks like ‘outcomes-based’ jurisprudence may in fact reflect the court’s changing assessment of whether a particular constitutional issue can be safely left to another constitution-building partner (like the ANC). Fowkes, op. cit., n. 43.

\textsuperscript{58} Tsele, op. cit., n. 56, p. 197. For the jurisprudential challenges that this poses, see H. Klug, ‘Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa’ (2019) 67 \textit{Buffalo Law Rev.} 701, at 742.

\textsuperscript{59} Woolman, op. cit., n. 16, pp. 172–174. Woolman, unlike his co-author, has thus dissociated himself from the view in Bishop and Woolman, op. cit., n. 52.
and champions of anti-corruption’. In saying so, however, the judges may not have anticipated ‘the possibility of a lapdog Public Protector’. Their precedent could be used very differently by a new appointee. Thuli Madonsela’s stint ended in October 2016. Her last report, State of Capture, recommended a judicial enquiry into improper influence on the Zuma administration, which judges eventually obliged a reluctant outgoing President to institute. Madonsela’s replacement, Busisiwe Mkhwebane, was appointed by parliamentary majority without controversy. Over time, however, she has become strongly suspected of representing the ANC patronage faction’s interests. She has clashed repeatedly with new President Cyril Ramaphosa and Pravin Gordhan, whom Ramaphosa had quickly appointed as Minister of Public Enterprises in order to distance himself from the corruption of the Zuma years (somewhat embarrassingly, he had been Deputy President at the time). Mkhwebane has revisited allegations of a ‘rogue unit’ at SARS (see above), ordering Ramaphosa to discipline Gordhan for his involvement, and she has investigated donations to Ramaphosa’s 2017 campaign for the ANC presidency, including some from businesses implicated in state capture. These actions have converted some of the Public Protector’s fiercest critics under Zuma into its most fervent supporters, and, of course, when Ramaphosa and his supporters have resisted Mkhwebane’s rulings, she has been able to point to the ZACC’s famous judgement that her remedial actions are binding. Michelle le Roux and Dennis Davis (a High Court judge) have summarized the situation as follows:

[This] … shows how adjudication is inherently political in nature, responsive to its contemporaneous context. The [Constitutional] court’s uncompromising endorsement of the binding nature of the Public Protector’s powers … was applauded and welcomed – when Madonsela was its occupant. However, once Mkhwebane took over … she, perhaps understandably, relied on the Nkandla judgement for justification for her far-reaching remedial action[s]. The latitude and authority defined by the Nkandla decision were then abused by the current Public Protector … This reflects the danger inherent in far-reaching court decisions on political questions in a system of precedent: what is desirable in one set of circumstances involving certain individuals can be wholly disastrous when circumstances change or other people are appointed.

60 Economic Freedom Fighters, op. cit., n. 17, para. 52.
61 Woolman, op. cit., n. 16, p. 165.
62 Public Protector of South Africa, State of Capture: Report No. 6 of 2016/7 (2016). See n. 30 above.
63 Supermajorities are required for appointment but not removal.
64 For a particularly critical overview, see F. Haffajee, ‘Saboteur-in-Chief: Public Protector Busisiwe Mkhwebane’ Daily Maverick, 19 December 2019, at <https://www.dailymaverick.co.za/article/2019-12-19-saboteur-in-chief-public-protector-busisiwe-mkhwebane-meng-xi-goes-crouching-tiger-hidden-dragon/>.
65 For the case of the ANC Secretary-General, see News24, ‘ANC Must Be Consistent on PP – Ace Magashule’ 30 June 2019, at <https://www.politicsweb.co.za/news-and-analysis/anc-must-be-consistent-on-public-protector-magash>.
66 Le Roux and Davis, op. cit., n. 30, p. 286.
There is debate, however, about how far some judges have felt constrained by this (inconvenient) precedent. One sympathetic interpretation of the ZACC is that it has always prioritized ‘constitution-building’ partnerships over strict precedent and principle, so we would expect to see it change its jurisprudence if it changes its assessment of the President’s and the Public Protector’s commitments to constitutional values.\(^67\) Mkhwebane, certainly, has regularly complained that the courts have treated her differently from Madonsela,\(^68\) and Woolman, for one, has used the fact that judges have effectively ‘cabined’ Mkhwebane to argue that her ‘star chamber-like constellation of powers ought not to be feared’.\(^69\) The ZACC has even found the Public Protector personally liable for costs, on the grounds that she acted dishonestly.\(^70\) On at least one other occasion, the High Court has set aside her remedial actions after finding them *inter alia* ‘a breach of the separation of powers doctrine’.\(^71\) (This is, of course, the same ‘separation of powers doctrine’ whose very unsuitability for South African conditions Woolman used to justify the ZACC’s granting of expansive powers to the Public Protector.)

The implications of this changed political context have created controversy on the bench. ZACC judges, in particular, have issued a greatly increased number of (acrimonious) dissenting judgements in recent years.\(^72\) The most famous of these, issued by Chief Justice Mogoeng – who had previously signed numerous strikingly intrusive judgements – described an order that Parliament create an impeachment mechanism for Zuma as ‘a textbook case of judicial overreach – a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament’.\(^73\) At least one commentator saw this as an indication that Mogoeng is looking to the future and the possibility of a level of governance where it would be counterproductive to the democratic development of the country for courts to play as active a role as they have under the constitutional delinquency of the Zuma era.\(^74\)

\(^{67}\) Fowkes, op. cit., n. 43. Compare Roux, op. cit., n. 31.

\(^{68}\) *News24*, ‘Judiciary’s Position on PP’s Powers “Radically Changed” – Mkhwebane’ 7 September 2019, at <https://www.politicsweb.co.za/news-and-analysis/judiciarys-position-on-pps-powers-radically-change>.

\(^{69}\) Woolman, op. cit., n. 16, pp. 179–180.

\(^{70}\) *Public Protector v. South African Reserve Bank* [2019] ZACC 29.

\(^{71}\) Woolman, op. cit., n. 16, p. 179.

\(^{72}\) A. Makuwa et al. ‘Constitutional Court Statistics for the 2016 Term’ (2018) 34 *South African J. on Human Rights* 122, at 123.

\(^{73}\) *Economic Freedom Fighters*, op. cit., n. 17.

\(^{74}\) Serjeant at the Bar, ‘Mogoeng’s “Very Serious” Attack on Majority Judgment Difficult to Comprehend’ *Mail & Guardian*, 2 January 2018, at <https://mg.co.za/article/2018-01-02-constitutional-delinquency-of-zuma-era-has-muddied-the-separation-of-powers/>.

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This approach, in the words of one external observer, was a ‘tactical separation of powers doctrine’. Huq’s analysis of high-profile state capture cases at the ZACC before and after Zuma concludes that

the Court’s interventions were methodologically varied; they helped different entities; and they tacked between short-term and long-term effects … Rather than articulating a singular theory or jurisprudential decisions [sic], the Court’s decisions are better understood as fluid and contingent responses to specific political risks.

He identifies such tactics as an efficient way of saving constitutional democracy, and one that could be replicated in other jurisdictions. In his view, in other words, the other edge of the legal sword can be blunted if wielded with sufficient skill.

The difficulty with this position, however, is that when courts enter the political fray they become subject to the same legitimation constraints as other political actors. Encouraged by lofty judicial rhetoric, political parties opposed to Zuma invested significant political capital in the sanctity of certain judicial pronouncements. These attitudes were vividly displayed ahead of a ZACC ruling on whether a vote of no confidence in the President could be held by secret ballot. Opposition party activists, gathered outside the building, explained to journalists that ‘the heroic courts, and the Constitutional Court in particular, are the only thing standing between a hapless public and a rapacious ANC’. One pointed at the Court: ‘This here is our weapon … We know how to use it’. With such intense political scrutiny, comparisons between the Public Protector and ‘a biblical David’ could not help but entrench a certain political view of the Office’s powers under law. Recently, for example, the courts have interdicted Mkhwebane’s remedial action that Ramaphosa must discipline Gordhan for his involvement with the SARS ‘rogue unit’. Whatever the actual legal merits of this interdict, it is hardly surprising that opposition parties have attacked it as incompatible with the politically sacrosanct judgement in Economic Freedom Fighters that Presidents must comply with the Public Protector’s remedial actions until they are set aside in a court of law. These attacks have gone well beyond the courtroom, and as of late 2019 the Public Protector’s powers were perhaps the central focus of political controversy in South Africa. The Economic Freedom Fighters (EFF) is South Africa’s third largest party. It split from the ANC

75 A. Huq, ‘A Tactical Separation of Powers?’ (2019) 9 Constitutional Court Rev. 19.
76 Id., p. 26.
77 See generally Q. Skinner, Visions of Politics: Regarding Method (2002) 145–157.
78 P. de Wet, ‘“Judicial Overreach” Is Back’ Mail & Guardian, 19 May 2017, at <https://mg.co.za/article/2017-05-19-00-judicial-overreach-is-back/>.
79 For one account of this dispute, see N. Tolsi, ‘High-Stakes SARS Case Will Define Public Protector’s Powers’ New Frame, 29 November 2019, at <https://www.newframe.com/high-stakes-sars-case-will-define-public-protectors-powers/>.
Youth League in 2013, positioning itself on the ANC’s ‘populist’ left. On 22 July 2019, its leader Julius Malema delivered a speech at a rally outside the Gauteng High Court where he mobilized traditional rule of law ideas against a tactical jurisprudence attentive to the personality of particular appointees:

We don’t care about Mkhwebane. Whether she’s credible or not, that’s none of our business. Our business is that office. Once it has taken remedial action, you must implement those remedial actions … Pravin Gordhan behaves like an untouchable politician in South Africa. So the EFF goes after the untouchables … The EFF says it must be only with proper clearly outlined reasons as to why the remedial actions of the Public Protector must be interdicted. Because if you can interdict willy-nilly the remedial actions of the Public Protector, then we can just as well close that office.

Even the leader of the liberal Democratic Alliance – accused by some of ‘playing a dangerous game with the Public Protector’ – has declared that '[w]hatever the view one may hold of the Public Protector, the rule of law must be respected. The findings against Gordhan in relation to the SARS unit are serious'.

South Africa’s courts have thus become prisoners of expectations that they were obliged to create in order to sustain the coalition against state capture. Perhaps unsurprisingly, therefore, some of the best-known liberal legal commentators within the country are less sanguine than Huq about the courts’ ability to navigate the political headwinds. For le Roux and Davis, ‘the judiciary was forced to fill the void left while the legislature slumbered’, leaving it ‘in an extraordinary and undesirable position in the vanguard of politics’. For Corder and Hoexter, meanwhile, ‘because the courts have been drawn into the public arena and thrust into a relationship of constant tension with the political branches, the judiciary has become the primary casualty of this barrage of lawfare’. Even Dikgang Moseneke, a famously independent former Deputy Chief Justice, warned in late 2016 that '[w]e will over time …

80 Scare quotes are necessary. In places, for example, the EFF has been far more rooted in traditional working-class organization than archetypical populist parties (see T. Essop, ‘Populism and the Political Character of the Economic Freedom Fighters: A View from the Branch’ (2015) 48 Labour, Capital and Society 212). It also shares much of the ANC’s vanguardism.
81 ‘Mkhwebane’s Credibility Doesn’t Matter – We Care about Her Findings – Julius Malema’ YouTube, 23 July 2019, at <https://www.youtube.com/watch?v=Wf04TZAh7Y>.
82 Professor Balthazar, ‘DA Is Playing a Dangerous Game with the Public Protector’ Daily Maverick, 25 June 2019, at <https://www.dailymaverick.co.za/opinionista/2019-06-25-da-is-playing-a-dangerous-game-with-the-public-protector/>; L. Tandwa, ‘EFF Promises to Go to Court If Ramaphosa Fails to Implement PP’s Remedial Action’ News24, 5 July 2019, at <https://www.news24.com/SouthAfrica/News/eff-promises-to-go-to-court-if-ramaphosa-fails-to-implement-pps-remedial-action-20190705>.
83 Le Roux and Davis, op. cit., n. 30, p. 293.
84 Corder and Hoexter, op. cit., n. 44, p. 105, emphasis added.
over politicize the courts and thereby tarnish their standing and effectiveness
in the long term’.85

V. POPULIST CONSEQUENCES

Recent events have largely confirmed these gloomy prognostications. The EFF, in particular, has made populist attacks on judges. It has been unwilling to abandon the themes of state capture and legal heroism after Zuma’s departure. The narrative essentials remain unchanged: a small coterie surrounding an ‘untouchable’ politician (now Gordhan, not Zuma) are resisting exposure by a righteous alliance of the Public Protector and political opposition. When journalists and judges suggest otherwise, it just proves they are themselves ‘captured’.86 The only new feature is that race has replaced greed as a central explanation for the emergence of corruption. In 2016, some of Zuma’s opponents in the ANC had already sought to explain his ‘capture’ by (indirectly) resurrecting allegations from the last days of the liberation struggle that a shadowy ‘Indian cabal’ had gained undue influence over anti-apartheid forces, most notably in the United Democratic Front (UDF)/Mass Democratic Movement in Kwa-Zulu Natal. This, some Zuma critics alleged, accounted for his close relations with Indian businessmen such as Schabir Shaik and the infamous Gupta family.87 Since Zuma’s recall, the EFF leadership have revisited old claims that Gordhan has been part of a ‘UDF cabal’ of Indians and whites working to undermine and capture ‘African leadership’ in the ANC – part of a wider EFF argument that endorsement by the late Winnie Madikizela-Mandela (famously condemned by the UDF in 1989) makes it the authentic inheritor of the liberation struggle.88 This ideological repositioning for the post-Zuma era was recently encapsulated in a speech delivered by Malema at an EFF memorial service for Robert Mugabe:

If the story had not leaked, we will never know [sic] … that [Judge] Nugent met Pravin [Gordhan]. If Pravin can meet a judge, who is a journalist? Who

85 D. Moseneke, The Helen Suzman Annual Memorial Lecture 17 November 2016, at <https://www.youtube.com/watch?v=lB1TMn1c2fI>.
86 During Zuma’s tenure, some journalists did indeed (albeit sometimes knowingly) publish embellished or misleading stories leaked to undermine opponents of state capture. The best-known example is the Sunday Times investigation of the SARS ‘rogue unit’ (discussed above).
87 C. Madlala, ‘Cabals and Cliques: The Roots of the Politics of Influence’ Daily Maverick, 29 March 2016, at <https://www.dailymaverick.co.za/article/2016-03-29-cabals-and-cliques-the-roots-of-the-politics-of-influence/>.
88 Id.; E. Naki, ‘Mama, Tell Us What to Do with UDF Cabal, the ANCWL that Sold You Out – Malema’ The Citizen, 14 April 2018, at <https://citizen.co.za/news/south-africa/1894159/mama-tell-us-what-to-do-with-udf-cabal-the-ancwl-that-sold-you-out-malema/>; M. Ndlozi, ‘Veterans’ Lousy Defence of Gordhan Rejected – EFF’ PoliticsWeb, 19 January 2020, at <https://www.politicsweb.co.za/politics/veterans-lousy-defence-of-gordhan-rejected-eff>.
is a journalist of [investigative reporters] amaBhugane? Who is a journalist of Scorpio [the investigative unit of the Daily Maverick]? They are the same. The pattern is the same. Let us treat amaBhugane, Scorpio, Daily Maverick the same way we treated [pro-Zuma] ANN7 and The New Age. They are the same. They are anti-us. And we shall treat them as enemies … We are children of Robert Mugabe, we are children of Winnie Mandela.89

Such criticisms of judges are certainly not new in post-apartheid South Africa. Over the last decade or so, ANC and Communist Party heavyweights have accused the courts of ‘judicial dictatorship’ and ‘counter-revolutionary’ tendencies.90 Yet by 2019 the mood had ‘shifted palpably and become more menacing’.91 When awaiting judgement against him in a land occupation case, Malema recently declared that:

[y]ou must know that when you are EFF, you are the enemy of the Rothschilds, you are the enemy of the Ruperts [Johann Rupert, the second wealthiest person in South Africa, had publicly denied the existence of ‘white monopoly capital’], you are the enemy of the establishment. The establishment is white monopoly capital, it’s the army, it’s the police, it’s the courts, every institution that existed 300 years ago … The judiciary is about to be captured, I’m warning you now and you’ll know, in the past five years, I’ve never misled you.92

The day after the Daily Maverick accused Malema of embezzlement, a list of judges began circulating on social media. This purportedly identified those who had received payments from Cyril Ramaphosa’s 2017 ANC presidential campaign (see below). It also included the new head of the National Prosecuting Authority. It was notable that all of the judges listed had made high-profile rulings against Zuma, the Public Protector, or the EFF. In September 2019, Chief Justice Mogoeng was forced to call a press conference denying allegations of a ‘captured judiciary’.93

89 This was broadcast live by the South African Broadcasting Corporation; ‘EFF Holds a Memorial Service for the Late Zimbabwean President Robert Mugabe’, 12 September 2019 (from 1 hour 17 minutes), at <https://www.youtube.com/watch?v=mZB4nulHCTEFrom>

90 H. Kawadza, ‘Attacks on the Judiciary: Undercurrents of a Political Versus Legal Constitutionalism Dilemma?’ (2018) 21 Potchefstroom Electronic Law J. 1, at 7–8.

91 H. Corder, ‘Critics of South Africa’s Judges Are Raising the Temperature: Legitimate, or Dangerous?’ The Conversation, 22 August 2019, at <https://theconversation.com/critics-of-south-africas-judges-are-raising-the-temperature-legitimate-or-dangerous-122209>.

92 News24, ‘The Judiciary Is about to Be Captured – Julius Malema’ 21 June 2019, at <https://www.politicsweb.co.za/documents/the-judiciary-is-about-to-be-captured-malema>.

93 E. Mabuza, ‘Only a “Sworn Enemy of Democracy” Would Make Up Claims that the Judiciary Is Captured: Mogoeng’ Sunday Times, 13 September 2019, at <https://www.timeslive.co.za/news/south-africa/2019-09-13-only-a-sworn-enemy-of-democracy-would-make-up-claims-that-the-judiciary-is-captured-mogoeng/>; BusinessDay, ‘Editorial: Attacks on Judiciary a Red Herring’ 17 September 2019, at <https://www.businesslive.co.za/bd/opinion/editorials/2019-09-17-editorial-attacks-on-judiciary-a-red-herring/>.

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It is perhaps too early to tell if such attacks have changed attitudes towards legal institutions. Yet state capture rhetoric can clearly have unintended consequences, shading into scapegoating and dangerously misidentifying targets for critique. Perry Anderson, for example, has recently drawn comparisons between the ‘Clean Hands’ investigations in Italy (1992–2003) and the ‘Car Wash’ investigations in Brazil (2014–present). These, he argues, saw celebrity judges expose corruption on a grand scale and thus de-legitimize a (now criminal) political class, helping to pave the way for right-wing populism in the form of Silvio Berlusconi and Jair Bolsonaro.94 (Elsewhere in this volume, Engelmann describes the ideological uses of the Italian example in the Brazilian investigations, while de Sa e Silva describes popular understandings of crusading judges as super-heroes. By the spring of 2016, Zuma’s most radical supporters were themselves denouncing criticism of state capture as ‘regime change’ engineered by the same imperialist forces busy deposing Dilma Rousseff in Brazil.95)

In South Africa, however, state capture has always been more than simply a crime. The rhetoric of law as a sword often identifies judges as a solution to this problem. To the extent that it has done so, it has indulged a dangerous fantasy. As Friedman notes, state capture is ‘a symptom of patterns established long before democracy’s advent’.96 For the majority of South Africans, much has changed for the better since the end of apartheid.97 Yet those living in townships and informal settlements still lack recourse when confronted with the daily reality of poor services and dangerous conditions. Most dream of acceding to a middle class and formal employment that appear almost impossible to reach. The best hope remains attaching oneself as a client to patrons in the ruling party or politically connected business circles. In this sense, as Beresford argues, at some least form of patronage politics – and ‘a volatile politics of inclusion and exclusion’ – appears to be an inevitable product of South Africa’s distinctively skewed political economy.98 When the rhetoric of ‘lawfare’ serves to frame corruption as simply a matter of (criminal) choice, it fulfils precisely those mystificatory and class-bound functions to which E. P. Thompson was so alive.

Certainly, any hopes that state capture could be swiftly eradicated by moral renewal under Ramaphosa were bound to be dashed. The new President’s triumph over Nkosazana Dlamini-Zuma (Jacob Zuma’s ex-wife) in the 2017

94 P. Anderson, ‘Bolsonaro’s Brazil’ London Rev. of Books, 7 February 2019, 11, at 20.
95 A. Mngxitama, ‘Black First Land First (BLF) Sends Revolutionary Solidarity to the People of Brazil and the Workers Party’ 7 April 2016, at <https://blackopinion.co.za/2016/04/17/480/>.
96 Friedman, op. cit., n. 15, p. 282.
97 Social grants are an important example: E. Bähre, ‘Liberation and Redistribution: Social Grants, Commercial Insurance, and Religious Riches in South Africa’ (2011) 53 Comparative Studies in Society and History 371.
98 A. Beresford, ‘Power, Patronage, and Gatekeeper Politics in South Africa’ (2015) 114 African Affairs 226.
ANC leadership race was only secured thanks a series of compromises with the ANC patronage faction. When new Public Protector Mkhwebane asserted that she had jurisdiction for a wide-ranging investigation into the financing of his campaign (‘CR17’), this was widely interpreted in media and suburban circles as an anti-Ramaphosa ploy. However, details about this spending leaked by her office nonetheless ‘left South Africans open-mouthed’. News that CR17 funds were distributed to figures from numerous political parties – not all associated with fighting state capture – has tarnished Ramaphosa’s reputation.

Thus, even reformers operate within daunting constraints and must constantly compromise. These stark facts make it difficult for courts to identify certain figures or institutions as essentially ‘constitution-building partners’. Such political judgements are delicate in their own right, let alone when they must be reconciled with some notion of legal precedent. In this sense, socialist and (now) de-colonial critics of South Africa’s legal order, such as Tshepo Madlingozi and Joel Modiri, are entirely correct to highlight the dangers of ‘deifying’ the constitution. However, this recognition should not obscure the important role that law has played as a shield against state capture (even at the inevitable expense of some rule of law values).

VI. CONCLUSION

The study of ‘lawfare’ in South Africa today thus vindicates Abel’s cautious celebrations of the political virtues of the language of the law – virtues that it retains despite a formidable array of ‘class-bound and mystifying functions’. The new South Africa cannot, of course, be straightforwardly compared with the old. Constitutional religion has replaced narrow legalism as an ideology of state. The apartheid government justified itself abroad by proclaiming an adherence to procedure (even when procedure was actually used to conceal evidence of torture and secret killings). The post-apartheid legal order, by contrast, sees itself as a means of achieving accountable governance and even socio-economic change. A far wider range of activities are thus subject to legal scrutiny. This has not, however, been entirely to the opposition’s advantage. Law could still serve the interests of state capture just as easily as it could the racist authoritarianism analysed in Politics by Other Means,

99 See for example Friedman, op. cit., n. 15, p. 288.
100 F. Haffajee, ‘Protector Tries to Turn Ramaphosa into a Zuma’ Daily Maverick, 19 July 2019, at <https://www.dailymaverick.co.za/article/2019-07-19-protector-tries-to-turn-ramaphosa-into-a-zuma/>; F. Rabkin, ‘Court to Hear Argument on Public Protector’s CR17 Report’ Mail & Guardian, 4 February 2020, at <https://mg.co.za/politics/2020-02-04-court-to-hear-argument-on-public-protectors-cr17-report/>.
101 Madlingozi, op. cit., n. 2, p. 519; J. Modiri, ‘Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence’ (2018) 34 South African J. on Human Rights 300, at 308.
and some offensive uses have proved not just ineffective but even counter-productive for those defending the legal order. However, when used as a shield, the law has been able to slow, frustrate, and occasionally publicize attempts to undermine the bureaucratic state. This brought valuable time for its defence. ‘In the end’, Abel has written, ‘all that legality may be able to do is render the [United States] government’s domestic “War on Terror” as misguided, wasteful and counterproductive as its real wars in Afghanistan and Iraq’.¹⁰² Such defensive functions have proved as valuable in South Africa today as they were during late apartheid.

¹⁰² R. Abel, ‘Law under Stress: The Struggle against Apartheid in South Africa, 1980–94, and the Defence of Legality in the United States After 9/11’ (2010) 26 South African J. on Human Rights 217, at 245.