

Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations

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Online ISSN
1727-3781

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Date Submission

18 April 2019

Date Revised

20 September 2019

Date Accepted

20 September 2019

Date published

23 October 2019

Editor Prof W Erlank

How to cite this article

Venter F "Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations" *PER/PELJ* 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6253>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a6253>

Abstract

The (sometimes fragile) balance between South Africa's constitutional obligations to protect and promote human rights in the international arena and the realities of political practice is the focus of this paper. The Constitution provides for solid dualist mechanisms and procedures for parliamentary oversight of the executive's conduct in the governance of international relations, including the conclusion of treaties. There is, however, a congenital constitutional flaw in the oversight instrumentation of the Constitution: the president is endowed with practically unfettered control over cabinet, and through the cabinet and the parliamentary caucus, he has indirect but firm control over parliament. Consequently, parliamentary oversight of international relations is severely challenged, effectively leaving it to the minority parties, civil society and the courts.

This paper assesses the effectiveness of the protection of international human rights in South Africa by constitutional means. It begins by setting out the constitutional foundations that were designed to provide the desired protection and the place of international law in the South African legal order. This is followed by a description of the impact of political reality on the implementation of the constitutional oversight mechanisms.

Due to the justiciability of government conduct under the Constitution, parliamentary oversight of executive conduct in the international sphere has largely taken the form of judicial review. In this, the courts have performed very well. This emerges from a concise overview of some key cases in which the courts developed sound principles and delivered strong judgments about the government's failures to maintain the required constitutional standards in its international relations. The cases show a sensitivity on the part of the courts to avoid judicial overreach, while taking up the responsibility to uphold constitutionalism.

While the courts' stabilising interventions must be applauded, the executive tendency to flout its constitutional responsibilities remains a cause for concern.

Keywords

International human rights; constitutionalism; accountability; dualism; treaties; international relations; parliamentary oversight.

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1 Introduction¹

In constitutional terms the South African Parliament has final control over the ratification of international treaties and the country's withdrawal therefrom. However, in reality, parliamentary conduct is firmly under the, albeit indirect, control of the executive. South African constitutional democracy is founded upon a sound Constitution, but in political practice over the past decades South African governments and organs of state have sorely tested the constitutional limitations on executive discretion and wilful disregard for the precepts of constitutionalism.² Furthermore, a glaring dissonance has developed between the constitutional ideals and governmental practice insofar as parliamentary oversight of the ratification of and withdrawal from treaties is concerned.

This analysis begins with an outline of the constitutional foundations that were designed to protect international human rights and the place of international law therein in the context of what has been referred to as "double-facing" constitutionalism. The next section describes the impact of majoritarian politics under extra-parliamentary direction on constitutionalism and its effects on the management of the country's international relations. Section 4 below offers a concise overview of key judgments of the courts in which the judiciary has developed sound principles and delivered strong judgments following governmental failures to maintain the required constitutional standards in dealing with the country's international relations. In the final section some conclusions are drawn regarding the courts' search for and articulation of the appropriate balance between judicial deference and their constitutional responsibilities.

2 Human rights foundations of the *Constitution* and the place of international law

Constitutions are aspirational documents, and international law is a crucial component of the 21st Century ambition to order the world peacefully. Public international law, however, is notoriously malleable and difficult to enforce. The texts of the two South African constitutions adopted in the last decade

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¹ This paper was prepared for and presented at a workshop organised by the SARChI Professorship in International Constitutional Law, Faculty of Law, University of Pretoria, the Faculty of Law, University of Namibia and the Konrad-Adenauer-Stiftung (Kenya Office) in Windhoek, Namibia on 6-8 March 2019.

² See section 3 below for details.

of the 20th Century³ resonated well with the liberal ideals of the *communis opinio* underpinning international law.

A "Constitutional Assembly" consisting of both Houses of the 1994 Parliament was mandated and constrained to adopt a new constitution which would comply with a set of binding "Constitutional Principles", the second one of which began as follows:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution ...

Section 35(1) of the 1993 Constitution, essentially reproduced in section 39(1) of the 1996 Constitution, required judicial interpretation of fundamental rights in a manner that promotes the values that underlie an open and democratic society, while having regard to (that is, while being compelled to consider) applicable international law. Beginning with its section 1 the Constitution identifies a range of founding values of the South African state, the core of which is reflected in the triad human dignity, equality and freedom. Significantly, section 7(1) of the Constitution, the first of the Bill of Rights, provides as follows:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

The last chapter of the Constitution⁴ opens with three sections under the sub-heading "International Law".⁵ These provisions have the effect of constitutionalising key elements of South African law relating to international law, which has proven to be significant from various perspectives for the interpretation and application of the Bill of Rights especially. Beyond fundamental rights, section 233 instructs courts to—

³ *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter referred to as "the 1993 Constitution"), which introduced constitutionalism to South Africa when it came into effect on 27 April 1994 and provided the foundations and most of the notional principles of the current *Constitution of the Republic of South Africa*, 1996 (hereinafter referred to as "the Constitution"). The 1993 Constitution, often referred to (inaccurately because it was a comprehensive constitution) as the "interim constitution", was conceived as a transitional constitution which prescribed the process for the adoption and content of a "final" or permanent constitution, which the Constitution became on 4 February 1997.

⁴ Chapter 14 under the heading "General Provisions".

⁵ These provisions were preceded by and were modelled upon ss 231 of the 1993 Constitution.

... prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

An essential characteristic of the Constitution (as provided for in section 2) is its supremacy, which renders invalid all other law and conduct which is inconsistent with it. Furthermore, although the pre-constitutional common law position regarding customary international law was incorporated in South African law in terms of section 232 of the Constitution, not only the supremacy of the Constitution but also the primary legislative authority of Parliament over customary international law was entrenched. This was achieved with the qualification "unless it [customary international law] is inconsistent with the Constitution or an Act of Parliament" included in the same provision, section 232.

The origin of South African common law relating to international relations is, for obvious historical reasons, the English Common Law. The continued authority of Common Law thinking in the South African legal order has naturally been affected by the introduction of a supreme constitution. Nevertheless, subject to the acknowledgement of the prevalence of constitutional norms, guidance may still be taken from English sources concerning notions such as dualism derived from the Common Law. Such an excellent source is to be found in the recent article by a scholar from New Zealand, Professor Campbell McLachlan, who exhaustively analysed and contextualised four judgments of the UK Supreme Court delivered in January 2017, focussing on the question of the extent of the jurisdiction of municipal courts to regulate the external exercise of executive power.⁶

Although constitutional supremacy (and the demise of the royal prerogative) has the effect that if McLachlan's question were applied to South Africa it would not necessarily produce precisely the same outcome, it is informative for the present purposes to take note of his application of the expression, a "double-facing" constitution. He uses the concept to express the notion that a constitution determines both "internal relations within a state" and "the manner in which the organs of the state engage outside its borders".⁷ He identifies "two fundamental principles of legality", being firstly that the executive is not above the law, and that the executive has no power to alter the law.⁸ He points out, with reference to English precedent, that "the rationale for the dualist theory [is] a form of protection of the citizen from

⁶ McLachlan 2018 *LQR*.

⁷ McLachlan 2018 *LQR* 380.

⁸ McLachlan 2018 *LQR* 380.

abuses by the executive",⁹ and that the fact that Parliament (not the executive) has the power to determine the law has two fundamental outcomes:

In the first place, it protects ordinary people against the arbitrary exercise of executive power – a basic function of the rule of law. Secondly, it ensures that only democratically-elected representatives in Parliament can change the law – a basic tenet of representative democracy.¹⁰

The review in section 4 below of South African jurisprudence on this point shows that the motivation of the South African judiciary in its adjudication of matters relating to legislative and executive conduct regarding foreign relations is similar to the rationale behind English precedent, as discussed by McLachlan.

Regarding treaties ("international agreements" in the constitutional text), an expressly dualistic approach has been ensconced in section 231 of the Constitution: entering into treaties is a function reserved for the government, but to be internationally binding on the Republic they require parliamentary approval. To become binding municipal law, a treaty needs to be incorporated by means of parliamentary legislation.¹¹ Creating an area of interpretational opaqueness, section 231(3) provides that treaties "of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive" do not require parliamentary approval to be binding, and in terms of sub-section (4) "self-executing" provisions of treaties become law with the approval of Parliament without requiring incorporation by means of legislation.

In addition to its core function as the national legislator, the National Assembly is required by section 55(2) of the Constitution to establish mechanisms "to ensure that all executive organs of state in the national sphere of government are accountable to it" and "to maintain oversight of the exercise of national executive authority", obviously including the maintenance of international relations.

⁹ McLachlan 2018 *LQR* 381.

¹⁰ McLachlan 2018 *LQR* 394.

¹¹ Where a parliamentary Act provided that the national executive may enter into an agreement with the government of any other country whereby arrangements are made to avoid double taxation, it was determined in *Commissioner, South African Revenue Service v Van Kets* 2012 3 SA 399 (WCC) that provisions of such an agreement ranked at least equal with domestic law, including the provisions of the Act.

Over the past 25 years the role of the judiciary in developing and maintaining constitutionalism in South Africa has been and continues to be a mainstay of the constitutional order. Judicial oversight of all conduct under the law, including compliance with the demands of international law relating to human rights, is ensured by section 172(1) of the Constitution, which enjoins the courts when dealing with constitutional matters to "declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency" and to then "make any order that is just and equitable".

A survey of the realities of South African constitutional life and the jurisprudence of the courts regarding international law reveals a dissonance between the constitutional ideals and governmental practice when it comes to parliamentary oversight of the ratification of and withdrawal from treaties. Against this background a review of the interplay between the South African national executive, Parliament and the judiciary as it is governed by the provisions of the Constitution is enlightening.

3 The realities of South African democracy and its impact on international relations

In terms of the Constitution and considering the extent to which the formal democratic requirements have been complied with, South Africa may since 1994 be described as a functioning multi-party democracy. National, provincial and local elections have been held regularly and in accordance with the constitutional and legislative schedules and, with the exception of a few cases which have required the attention of the judiciary,¹² elections have been managed well and are widely characterised as having been "free and fair".

Behind the formal constitutional façade, however, South African democracy suffers from a few significant flaws and shortcomings. This may to a large extent be attributed to the political culture that has developed in recent decades, and certain flaws in the constitutional framework that allow political exploitation.

The political culture in the country has been shaped on the one hand by the fact that, since 1994, the dominant and therefore governing party (the African National Congress (ANC)) has continuously nurtured the attributes of a revolutionary liberation movement. On the other hand it has enjoyed an unbroken electoral majority in the House of Assembly as well as in most of the other elected bodies in the system. The result is that the quality and

¹² Eg *Kham v Electoral Commission* 2016 2 SA 338 (CC).

course of South African democracy has been made dependent as much on the vagaries of the internal policies and processes of a revolutionary movement as on the constitutional arrangements of the state. That such is the case is demonstrated by the fact that, except for Nelson Mandela, who retired at the end of his term of office as president, all other changes in the presidency were not brought about by a shift in electoral support of the governing party but by the ANC's internal turmoil.

The weaknesses in the democratic culture of the ANC have been exacerbated by some constitutional arrangements regarding the presidency and the executive that are prone to abuse by a majority party. At the heart of these weaknesses are the arrangements in sections 86 and 87 of the Constitution regarding the election of the President and sections 83 to 85 setting out the powers of the president. In summary, these provisions ensure that the leader of the political party that obtained the majority of votes in an election of the House of Assembly becomes the president of the Republic. Upon election, the newly elected president vacates the top parliamentary seat but nonetheless retains firm control over the conduct of the rest of the members of the majority party in the House. The President becomes not only the head of state, but also the head of government, and presides over the cabinet, whose members' ministerial appointment and dismissal are within the unchecked power of the President. Under the directions of the President, the Cabinet is exclusively in control of policy development and implementation through the public service and of the preparation and initiation of new legislation and legislative amendments. Stripped of the legal niceties, this amounts to an excessively powerful presidency whose decisions regarding everything involving the exercise of state authority and the functioning of the government are paramount. Checks on presidential power do exist, but in practice they are primarily party political in nature. Secondary checks are the parameters for government conduct laid down in the Constitution, and the availability of judicial review.¹³

¹³ The Constitutional Court has acknowledged this state of affairs and has been prepared to defend the broad scope of presidential powers but has recently found reason to qualify this stance. In *Law Society of South Africa v President of the Republic of South Africa* 2019 3 BCLR 329 (CC) para 3, handed down on 11 December 2018, the Court offered the following qualification after referring to its previous judgments sympathetic to the extent of the powers: "But this is not to be understood as an endorsement of, or a solicitation for a licence to exercise presidential or executive powers in an unguided or unbridled way. All presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations. Our

Although problems with the system emerged before then,¹⁴ the darkest implications of the structural shortcomings of South African constitutionalism were starkly illuminated during the Zuma presidency between 2009 and 2018, the disconcerting details of which slowly began coming to light in evidence being presented to various commissions of enquiry established in 2018 and early 2019. That the Zuma presidency represents "lost years" for South African constitutionalism is attested to *inter alia* by the fact that the causes decided in the majority of the key judgments concerning human rights, international law and the country's involvement in international institutions arose during that period.

That the constitutional position of the President and of the parliamentary majority of the ANC were being employed to avoid the consequences of corruption and what eventually became known as "state capture" did not escape the attention of the international community. South Africa acceded to the *Convention of the Organisation for Economic Co-operation and Development* (OECD) in 2007 (becoming an associate in six OECD bodies and projects and a participant in fifteen),¹⁵ which led the organisation's Working Group on Bribery in International Business Transactions (WGB) to publish a report in 2008 on the country's implementation of the Convention.¹⁶ Reacting to the government's announcement that the

President is never at large to exercise power that has not been duly assigned. Crucially, public power must always be exercised within constitutional bounds and in the best interests of all our people."

¹⁴ See eg Venter 2011 *CCR*.

¹⁵ According to the OECD website (OECD 2019 <http://www.oecd.org/southafrica/south-africa-and-oecd.htm>): "South Africa has also adhered to 19 OECD instruments, including most recently the Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption (2016). It participates in various OECD flagship projects and publications, e.g. the Economic Outlook, Education at a Glance, Going for Growth, Green Growth, the Employment Outlook, the OECD-FAO Agricultural Outlook, Pensions at a Glance, and the Science, Technology and Industry Outlook. South Africa is also integrated in almost half of all OECD datasets and participates in key horizontal projects, such as the OECD Strategy on Development. South Africa has championed several of the OECD's regional initiatives with sub-Saharan Africa. For example, as vice co-chair it has actively contributed to the work of the NEPAD-OECD Africa Investment Initiative. South Africa also participates in the activities of the SADC Regional Investment Policy Framework project, in the OECD African Development Bank (AfDB) Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa, in the annual International Economic Forum on Africa and the African Economic Outlook. It is also an Associate in the Base Erosion and Profit Shifting (BEPS) project and a key and active member of the Inclusive Framework for BEPS Implementation Steering Group, feeding its own perspectives into the BEPS process as well as supporting the efforts of developing countries to provide input through the African Tax Administration Forum (ATAF) Technical Committee."

¹⁶ OECD Working Group on Bribery 2008 <http://www.oecd.org/dataoecd/51/30/40883135.pdf> (hereinafter the "WGB Report 2008").

Directorate of Special Operations (popularly known as the "Scorpions"), which was mandated to investigate and prosecute high level crimes, was to be disbanded and replaced with a unit under the control of the executive, the WGB recognised the dangers of executive interference with prosecutorial authority:

The Working Group expresses serious concern in regard of this issue, and notes that it will monitor this further in the context of future evaluations, to ensure that the effective enforcement of the foreign bribery offence is not affected by this rearrangement of law enforcement responsibilities.¹⁷

It later emerged that the OECD had good reason to be concerned, because the machinations of the Zuma administration to neutralise the Scorpions could be directly related to the scourge of state capture. The WGB was sensitive to these developments, as is evidenced by the following comment in its report of 2014:¹⁸

The lead examiners remain very concerned by the strikingly low level of foreign bribery enforcement in South Africa. The lack of proactivity raises questions of whether considerations prohibited under Article 5 are influencing law enforcement decision making. This, coupled with the domestic context, where a number of obstacles have undermined the investigation and prosecution of high-profile domestic corruption cases – often involving high level public officials – continues to raise questions on whether law enforcement is able to do their jobs independently and without interference. They further regret that since Phase 2, perceptions persist throughout South African society that the NPA's credibility has been jeopardised because of political interference.

More diplomatically, but still unambiguously, the lead examiners "strongly" recommended that—

South Africa take concrete steps to ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases, including decisions made by the NDPP.

The relevance of corruption and state capture to the protection of human rights is that, especially in an unequal society such as South Africa, the negative effect on the dignity of the indigent members of this highly unequal society who are accorded constitutional protection of their socio-economic rights is evident when the state's financial capacity to provide much needed basic services is devastated by the corrupt misappropriation of public funds. A crucial element of state capture has been the ANC's established policy of

¹⁷ WGB Report 2008 para 96.

¹⁸ OECD Working Group on Bribery 2014 <http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf> (hereinafter the "WGB Report 2014") 41-42.

"cadre deployment", indicating the placement of pliable loyalists in strategic positions in government and state entities to ensure unhindered unfolding of projects, especially to avoid legal consequences for illegal and unconstitutional conduct.¹⁹

Concerning the role of Parliament in the developments surrounding the undermining of the ability of state institutions to combat corruption independently, it must be noted that the ANC was complicit in using its majority to adopt defective legislation and avoid effective oversight.²⁰

The systematic assault on human rights by the Mugabe government in Zimbabwe is well-documented.²¹ South Africa's complicity in the undermining of the rule of law and the protection of Zimbabweans' rights has mostly taken the form of tacit approval or passive cognisance. When, however the Zimbabwean government's conduct met with international judicial sanction, the Zuma government did not balk at supporting Mugabe.

Due to the closure of all avenues to judicial review within Zimbabwe against state expropriation of land without compensation, some landowners approached the Tribunal established by the Southern African Development Community (SADC) for relief, which found for the applicants in 2008.²² At the Summit of Heads of State (including the South African president) of 2010 it was decided not to insist on Zimbabwe's compliance with the judgment, but to effectively suspend the Tribunal. At the 2012 Summit it was resolved that the Tribunal should be reconfigured and that its jurisdiction be limited to the resolution of disputes between member states, thereby excluding citizens' access to the Tribunal on account of human rights violations by a member state. A new protocol for the Tribunal was adopted by the Summit of 2014, but to date the Tribunal has not been re-activated, the ratification process being expected to take many years.²³

South Africa's history with the International Criminal Court (ICC) aptly reveals contradictions in the country's and the governing ANC's attitude

¹⁹ See eg Jeffery *BEE: Helping or Hurting?* 84-87, 97-98, 101-103. In view of s 195 of the Constitution, which requires *inter alia* a public administration "governed by the democratic values and principles enshrined in the Constitution" including a "high standard of professional ethics", cadre deployment is patently unconstitutional. See eg *Mlokoti v Amathole District Municipality* 2009 6 SA 354 (E) 379-380.

²⁰ See eg Venter 2015 *SALJ*.

²¹ See eg Howard-Hassmann 2010 *Hum Rts Q*.

²² *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* 2008 SADCT 2 (28 November 2008).

²³ For an exposition of these proceedings, see eg *Law Society of South Africa v President of the Republic of South Africa* 2019 3 BCLR 329 (CC) paras 8-17.

towards constitutionalism and international human rights. South Africa was closely involved in the development of the Rome Statute in terms of which the ICC was established in 1998. When the President of Sudan, Omar al-Bashir, against whom the ICC had issued arrest warrants to stand trial for war crimes, genocide and crimes against humanity, visited South Africa in 2015 to attend a summit of the African Union (AU), South Africa was obliged to arrest him to be surrendered to the ICC. The government failed to do so, however, despite the issuing of a High Court order to effect the arrest. In this, however, South Africa is not alone, Chad, Uganda and Malawi also having defied the ICC warrants.²⁴

The South African government also has a poor track record regarding its reporting obligations to the treaty-monitoring bodies of the United Nations. Not having received official submissions from the government, the UN Human Rights Committee (HRC) in 2016 reviewed South Africa as it does states that show a disregard for the international human rights system. A whole range of South African non-government organisations did provide the HRC with submissions.²⁵

Another example of the government's laxity in this regard was reflected in the HRC's response to the government's report on the ICCPR in 2016, where it laconically stated that—

[t]he Committee welcomes the submission of the initial report of South Africa and the information presented therein, and regrets that it is 14 years overdue.²⁶

Another political reality is the government's tendency not to comply with, or to circumvent binding judgments of the courts. Thus, for instance in 2008, the Constitutional Court stated:

In more recent years, and in particular the period from 2002 onwards, courts have been inundated with situations where court orders have been flouted by state functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional state, as the right of access to courts entails a duty not only on

²⁴ See eg Okurut and Among 2018 *JLCR*.

²⁵ See Anon 2016 *ESR Review* 14, which ends as follows: "According to Lukas Muntingh of the Dullah Omar Institute, the fact that South Africa is late on reporting on all but one of the major human rights treaties gives the impression that the government is either unwilling or incapable, or both, of producing the required reports."

²⁶ *Human Rights Committee: Concluding Observations on the Initial Report of South Africa* UN Doc CCPR/C/ZFA/CO/1/Add.1 (2017) para 2.

the courts to ensure access but on the state to bring about the enforceability of court orders.²⁷

4 Searching for a balance between judicial deference and activism in the context of the separation of powers

Over the past 25 years the South African judiciary has served as the most consistent defender of the fibre of constitutionalism, including its implications for complying with the international demands for the protection of human rights. As appears from the following brief overview of the jurisprudence relating to sections 231-233 of the Constitution, the courts have been called upon to attempt to develop a balance between judicial deference on the one hand, and on the other interference with the tasks of the executive and the legislature regarding their compliance with international obligations.

4.1 *The Harksen case (2000)*

Shortly after the inception of constitutionalism in 1994, questions arose about issues of the extradition of non-citizens. The *Extradition Act* 67 of 1962 survived the constitutional transition, and is still in effect today, albeit after being amended a number of times. When Germany, with whom South Africa did not have an extradition agreement, requested the extradition in 1994 of a German citizen residing in South Africa, a spectrum of considerations ranging from customary international law, the *Vienna Convention*, presidential conduct, the impact of international law on municipal law arose. The person being sought for prosecution in Germany succeeded in dragging out the resolution of the matter for six years, ending in a judgment of the Constitutional Court in 2000.²⁸

In the absence of an extradition agreement, the President consented in terms of section 3(2) of the Act to Harksen's extradition in 1995. Harksen attacked the validity of the presidential consent in various suits, essentially on the argument that in terms of the common law a presidential consent to

²⁷ *Nyathi v MEC for Health, Gauteng* 2008 5 SA 94 (CC) para 60. These sentiments have been confirmed various times, more recently in eg *Economic Freedom Fighters v Speaker, National Assembly* 2016 3 SA 580 (CC) para 1.

²⁸ *Harksen v President of the Republic of South Africa* 2000 2 SA 825 (CC). As a matter of interest, the extradition application was granted by State President de Klerk prior to the coming into operation of the 1993 Constitution, and was again granted by President Mandela in 1995 prior to the coming into operation of the 1996 Constitution, but the presidential granting of the application was attacked for being unconstitutional first under the 1993 Constitution and later under the 1996 Constitution.

extradition amounted to an international agreement between the states concerned. He also argued that section 231 of the Constitution was a codification of a common law rule, and that the Presidents' decision(s) to surrender Harksen did not comply with the requirement that international agreements must be incorporated into municipal law by parliamentary legislation.

The Constitutional Court rejected the argument, finding that the presidential consent was a domestic act. For the present purposes the following dictum of the judgment is noteworthy for the Court's acknowledgement of its role relative to the other role players:²⁹

Although the judicial determination of the existence of an international agreement may require the consideration of a number of complex issues, the decisive factor is said to be whether 'the instrument is intended to create international legal rights and obligations between the parties'.

4.2 The *Glenister* case (2011)

As part of a protracted forensic battle concerning the disbandment, in terms of parliamentary legislation adopted in 2008, of the corruption-fighting Directorate of Special Operations ("the Scorpions"), the Constitutional Court thoroughly considered section 231 of the Constitution.³⁰ Significantly, the Court stated that³¹

[the] constitutional scheme of section 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature.

It was found that the *UN Convention against Corruption* did not create binding constitutional rights and obligations,³² but that the state could, also in terms of the *SADC Corruption Protocol* and in accordance with the reports of the OECD, be held responsible for preventing and combating corruption effectively in terms of its obligations in international law.³³ This, the majority

²⁹ *Harksen v President of the Republic of South Africa* 2000 2 SA 825 (CC) para 21, quoting Jennings and Watts *Oppenheim's International Law* 1202.

³⁰ This was induced by the signing and ratification of the *UN Convention against Corruption* of 2004 (although the Court was unable to determine whether the required resolution of Parliament had been passed): *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) (hereinafter *Glenister*), fn 64. The Court was split 5 to 4 in its findings, but there was largely consensus among the justices regarding the points of interest here.

³¹ *Glenister* para 89. This was a dictum in the minority judgment, but it also reflects the approach taken by the majority.

³² *Glenister* para 103.

³³ *Glenister* paras 178, 181, 187-189.

stated, was not to incorporate international instruments judicially, "through the back door" as it were, but simply being "faithful to the Constitution itself".³⁴ The Court emphasised that³⁵

... the very structure of our Constitution – in which the rule of law is a founding value, which distributes power by separating it between the legislature, the executive and the judiciary, and which creates various institutions supporting constitutional democracy, which it expressly decrees must be independent and impartial – affords the obligation [to create an independent corruption-fighting entity] a homely and emphatic welcome.

The outcome of this case was that parts of the impugned legislation were declared to be inconsistent with the Constitution, but Parliament was given eighteen months to remedy the defects.³⁶

4.3 The al-Bashir case (2015)

In dealing with the al-Bashir incident, the Gauteng High Court vigorously and explicitly justified its order and subsequent censuring of the executive for not complying with the order. The Court made it clear that the government's duty to arrest a head of state against whom an ICC warrant for arrest was current could not lawfully be neutralised by the mere adoption of resolutions of cabinet and the issuing of ministerial notices as the government attempted to do in contravention of the Constitution. The Court also expressed its displeasure with the executive for obviously facilitating al-Bashir's clandestine departure from the country before the ordered arrest could take place.³⁷ The Court made its dissatisfaction with the government's delinquency quite clear, while also acknowledging its own constitutional limitations:³⁸

Having regard to the principle of separation of powers between the executive, legislative and judicial arms of the state, it is in any event clear that this court would not have concerned itself with policy decisions which in their nature fall outside its ambit. As a court we are concerned with the integrity of the rule of law and the administration of justice.

³⁴ *Glenister* paras 195, 201 and 202.

³⁵ *Glenister* para 205.

³⁶ To date these defects have been attended to only grudgingly and, in the end, unsatisfactorily. See eg Venter 2015 SALJ.

³⁷ *Southern African Litigation Centre v Minister of Justice and Constitutional Development* 2015 5 SA 1 (GP) (hereinafter *Southern African Litigation Centre*) paras 36 and 37.

³⁸ *Southern African Litigation Centre* para 30.

The Court lucidly stated the constitutional foundation for its findings:³⁹

[A] democratic state based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the cornerstone of a democratic system based on the rule of law. If the state, an organ of state or state official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues.

4.4 The ICC case (2017)

In 2016 the South African government issued a notice of withdrawal from the Rome Statute. The validity of the notice was successfully attacked in proceedings before the Gauteng High Court due to non-compliance with section 231 of the Constitution, which required the approval of Parliament to validate the withdrawal. The operation of the principle of separation of powers ("clearly delineated in section 231") was once more emphasised in the judgment of February 2017:⁴⁰

Constitutionally, an important constitutional principle of the doctrine of separation of powers is implicated. Because the national executive had purported to exercise power it constitutionally does not have, its conduct is invalid and has no effect in law. Whatever Parliament does about the subsequent request to it by the national executive to approve the notice of withdrawal would not cure its invalidity.

The Court anticipated that the government would eventually introduce such legislation, and made it clear that, if the Constitution were complied with, the adoption of the required legislation would be in order, concluding that, "in deference to Parliament, no more should be said on this aspect".⁴¹

In July 2017 the ICC ruled that South Africa had failed to comply with its obligations under the Rome Statute by not arresting al-Bashir, but that referral of the matter to the Assembly of States Parties or the Security

³⁹ *Southern African Litigation Centre* para 37.2. In para 38 the Court cited jurisprudence of the Constitutional Court, concluding with the statement that where the rule of law is undermined, "the court must fearlessly address this through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional obligations to administer justice to all persons alike without fear, favour or prejudice".

⁴⁰ *Democratic Alliance v Minister of International Relations and Cooperation* 2017 3 SA 212 (GP) para 59.

⁴¹ *Democratic Alliance v Minister of International Relations and Cooperation* 2017 3 SA 212 (GP) para 63.

Council was not warranted as a means of enforcing South Africa's cooperation.⁴²

The government maintained its intention to withdraw from the ICC and introduced a Bill before Parliament towards the end of 2017⁴³ in terms of which, if adopted, the 2002 legislation that implemented the Rome Statute would be repealed. The Preamble of the Bill states that Parliament is mindful of the seriousness of international crimes, but that it is "also mindful that":

- the Republic of South Africa is a founder member of the African Union;
- the Republic of South Africa plays an important role in resolving conflicts on the African continent and encourages the peaceful resolution of conflicts wherever they occur;
- the Republic of South Africa, in exercising its international relations with heads of state of foreign countries, particularly heads of state of foreign countries in which serious conflicts occur or have occurred, is hindered by the Implementation of the Rome Statute of the International Criminal Court Act, 2002, which together with the Rome Statute of the International Criminal Court compel South Africa to arrest heads of state of foreign countries wanted by the International Criminal Court for the crime of genocide, crimes against humanity and war crimes and to surrender such persons to the International Criminal Court, even under circumstances where the Republic of South Africa is actively involved in promoting peace, stability and dialogue in those countries; and
- the Republic of South Africa wishes to give effect to the rule of customary international law which recognises the diplomatic immunity of heads of state in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent.

At the time of writing, this Bill was still before Parliament.

4.5 The NERSA case (2017)

Since 1994 the conduct of South Africa's foreign relations has, in line with ANC policy, steadily gravitated away from the West towards socialist alliances (such as BRICS, which South Africa joined in 2010). Illustrative of this trend, and of the mismanagement of the energy needs of the country, was a judgment of the Western Cape Division of the High Court in 2017,⁴⁴ which put paid to an attempt by the government to enter into an international

⁴² *Situation in Darfur, Sudan; In the Case of the Prosecutor v Omar Hassan Ahmad Al-Bashir* (Pre-Trial Chamber II) ICC-02/05-01/09 (6 July 2017).

⁴³ *The International Crimes Bill* [B37-2017].

⁴⁴ *Earthlife Africa v Minister of Energy* 2017 5 SA 227 (WCC) (hereinafter *Earthlife Africa*).

agreement with Russia that would have had disastrous economic consequences for the country.

After 1995 South Africa had concluded intergovernmental agreements (IGAs) relating to the peaceful uses of nuclear energy with various countries, including (in 2014) with the Russian Federation. The latter agreement was linked to a determination of the requirements of the country for the generation of energy using nuclear power, involving the National Energy Regulator of South Africa (NERSA) and first the Department of Energy, and later ESKOM. The IGA was steeped in controversy, *inter alia* due to strong suggestions of underlying corruption and the dismissal by President Zuma of the Minister of Finance (Nhlanhla Nene) for refusing to support the agreement.

The Minister of Energy tabled the IGA with Russia (together with IGA's with the USA and Korea) in Parliament under section 231(3) of the Constitution, creating the false impression that it did not need parliamentary approval. Environmental NGOs then approached the Court, which determined that the tabling of the Russian IGA "was specific, often peremptory, of wide scope, and material consequence", did not merely deal with nuclear cooperation, but had the character of a binding agreement concerning the procurement of nuclear plants, requiring parliamentary approval to become binding. The Court found that⁴⁵

should an international agreement be tabled incorrectly under s 231(3) rather than s 231(2) the review of any such decision can be seen as upholding rather than undermining the separation of powers,

and the Russian IGA warranted the focussed attention of Parliament to⁴⁶

give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy.

The Court also found it necessary to decline expressly to adjudicate on the constitutional merits or shortcomings of the terms of the IGA regarding compliance with procurement procedures before the appropriate parliamentary processes and possible public consultation took place, considering "that the principle of separation of powers calls for the court to exercise judicial restraint" in this regard.⁴⁷

⁴⁵ *Earthlife Africa* para 103.

⁴⁶ *Earthlife Africa* para 114.

⁴⁷ *Earthlife Africa* para 121.

4.6 Grace Mugabe (2018)

Following charges of assault laid in 2017 in Johannesburg against (now former) President Robert Mugabe of Zimbabwe's wife, Grace Mugabe, and her subsequent swift departure from the country, the South African Minister of International Relations and Co-operation conferred diplomatic immunity from criminal prosecution on her, thereby terminating the criminal investigation. When this was challenged judicially, the Gauteng High Court thoroughly considered the applicable customary international law, foreign judgments and the relevant South African legislation, and found in its judgment of July 2018 that not even the Zimbabwean President enjoyed immunity in proceedings relating to the death or injury of any person, and even less could his wife be granted "derivative immunity" as the Minister had attempted to do.

The Court set the Minister's decision aside as unlawful and unconstitutional, stating that the granting of immunity to a person not falling within one of the relevant categories "will not withstand the test of legality, rationality or reasonableness. That is our law".⁴⁸

5 Addressing the gaps and the obstacles

An objective assessment of the judgments reviewed above shows that the South African judiciary has performed a sterling job in preventing the executive, and the executive-dominated legislature, from managing international relations, as it tends to do, in a cavalier manner. The courts have thereby been instrumental in curbing untrammelled executive disregard for human rights and international obligations. Judges are not in a position, however, to enforce consistent rationality, constitutionality and legality in the conduct of the public service, the executive and Parliament – they can merely correct misconduct *ex post* and provide grounds for successful legal attacks on future transgressions.

In their search for an appropriate balance between activism and deference, the courts have employed the appropriate, if not always clearly defined constitutional concepts and constructs: the rule of law, legality, democratic constitutionalism, and the separation of powers, all with appropriate judicial deference for the constitutionally allotted functional areas of the other branches. This the judiciary has been called upon to do amidst a political atmosphere and culture cultivated by a democratic majority, prepared – and

⁴⁸ *Democratic Alliance v Minister of International Relations and Co-operation* 2018 6 SA 109 (GP) para 30.

apparently unconcerned with the long-term consequences thereof – to exploit a constitutional weakness which concentrates an inordinate amount of power in the hands of its leader.

From the cases discussed above it would appear to be part of the government's strategy in the unfolding of its policies regarding international relations and the protection of fundamental rights to exploit the unavoidable lag between executive malpractice and judicial censure. This represents a worrying demonstration of governmental cynicism towards constitutionalism.

Addressing this problematic situation has largely depended on initiatives taken by civil society (NGO's, opposition political parties AND the media) using various means, including litigation. Beyond such actions, the democratic process, which has at least formally been preserved to date, is the most important means by which the trend of governmental impunity may be countered. It seems to be unlikely that a political majority which is insensitive to public, judicial and international censure for delinquency would of its own accord heal itself.

An executive approach of "shoot first and ask questions later" in matters of international relations is not an issue that would normally attract much of the attention of an electorate largely composed of citizens primarily concerned with the severe difficulties of day-to-day economic and social survival, however. In addition to continued public pressure and judicial correction, the future of sound and constitutional international relations and the protection of fundamental rights therefore largely depends on a fundamental moral reformation of the parliamentary majority, however unlikely this may be. This reality will therefore likely continue to place an immense responsibility on the judicial branch, in the hope that naming and shaming may eventually induce transformation towards respect for constitutionalism.

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List of Abbreviations

ANC	African National Congress
AU	African Union
BRICS	Brazil, Russia, India, China and South Africa
CCR	Constitutional Court Review
HRC	Human Rights Committee
Hum Rts Q	Human Rights Quarterly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IGAs	Intergovernmental agreements
JLCR	Journal of Law and Conflict Resolution
LQR	Law Quarterly Review
NERSA	National Energy Regulator of South Africa
NGOs	Non-governmental organisations
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
SALJ	South African Law Journal

UN

United Nations