The Role of the Constitution and Courts in the Making and Implementation of Foreign Policy

By:

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Introduction

The advent of constitutional democracy in South Africa brought with it the need for South Africa to radically transform the manner it conducts its foreign policy. The Constitution of the Republic of South Africa, 1996 (Constitution) is the supreme law of the Republic of South Africa meaning that, any “law and conduct inconsistent with it is invalid”. Among the foundational values upon which the Republic of South Africa is anchored is the advancement of human rights. The courts have stated that in everything it does, the state must demonstrate its commitment to human rights. Thus, the Constitution brought an epoch where foreign policy is justiciable and the sphere of foreign policy is not immune from the Constitution. In its dealings at regional and international levels, South Africa stands guided by the Constitution and the values enshrined therein. The foreign policy aims pursued by South Africa must not be at odds

with the ethos of the Constitution, otherwise the courts are empowered to strike such foreign policy down.

Unfortunately, South Africa's foreign policy positions have sometimes been challenged for being ambivalent because they are not always in line with the constitutional values espoused in the Constitution. Some have argued that South Africa has moved away from a human rights and democracy based approach towards an "economically 'pragmatic'" approach to foreign policy. At times it has taken the courts to declare certain foreign policy or conduct unconstitutional. In instances where the courts find the State to have acted unconstitutionally in creating or implementing foreign policy and they overturn or alter such decisions, they arguably play a role in the creation and implementation of foreign policy.

How the Constitution and Courts have been relied upon in foreign policy issues

In light of the fact that foreign policy is not out of the reach of the Constitution, apart from the courts, other actors have played a critical role in holding South Africa to its constitutional obligations in conducting foreign relations. Civil society has often litigated in matters where South African foreign policy undermines the country's constitutional values. The South African Human Rights Commission (Commission) has also on many occasions called on government to ensure that its positions in foreign policy are consistent with the country's constitutional values. A case in point was in 2016 when the Commission wrote to government to express its concerns about South Africa's voting pattern at the Human Rights Council, a voting pattern which was, for example, anathema to the protection of the rights of sexual minorities.

South Africa should principally be guided by the Constitution when creating and implementing foreign policy. This position has been emphasised in numerous court cases. Interestingly most of the litigation has centred on human rights issues. Rightly so because the promotion and protection of fundamental human rights is the leitmotif of the Constitution. The courts have often gone to great lengths to explain their decisions and in the process enunciated what values South Africa's foreign policy should imbue in order to pass constitutional muster. Even though courts have held that in principle they should not be

involved in policy matters, the reality is that they have taken policy decisions with a view to align South Africa with internationally accepted standards. If the courts had not played the important role that they continue to play, foreign policy would have in some instances departed completely from the constitutional principles underpinning democracy in South Africa. The few cases cited below, demonstrate that the courts have interpreted South Africa's foreign policy through the framework of the Constitution. The Constitution has become the guiding torch when it comes to the foreign policy of South Africa. The courts have had to light that torch and shine the path on which South Africa should travel in its foreign relations journey.

A number of cases decided by the courts illustrate how South African foreign policy has been shaped by decisions of courts of law. In making these decisions, the courts have been guided by the supremacy of the Constitution and the primacy of human rights. One of such cases is that of *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (2016 (3) SA 317 (SCA), where the Court of Appeal noted that even though the matter that was being handled was moot (the arrest of former President of Sudan Omar Al Bashir could not be effected as he had left the country) the Court held that "the order had a continuing effect that would have to be taken into account by the Government in the future conduct of its diplomatic relations." As the Court noted further, future invitations to similarly placed heads of State or government officials as Al Bashir would have to take into account the order of the court. It was on the basis of this court order that subsequent invitations directed at the Sudanese head of State stated that Sudan may want to consider sending someone in his place due to the warrant of arrest that would be executed if Al Bashir was to return to South Africa. The Court through its order played a role in shaping South Africa's foreign policy as people who were similarly placed as Al Bashir could no longer enter the country freely on the basis that they had diplomatic immunity. The Court in this case went to great lengths to clarify the issue of diplomatic immunity and instances when it could not be used as a basis for not arresting a wanted person. Reliance was placed on the Constitution in arriving at this conclusion. This is an instance demonstrating the role a court can play in interpreting foreign policy to bring it in line with the ethos of the Constitution.

Another judgment which illustrates the instrumental role played by the courts in the creation of foreign policy is the *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Intervening)* 2001 (3) SA 893 (CC). In that case, the Court using the Constitution and the central plank of the Constitution which is the advancement of human rights and freedoms as well as the obligations imposed upon the State to respect, protect, promote and fulfil human rights and carved out an important principle which has shaped South African foreign policy. The principle is that the South African government has no power to extradite or deport or in any way remove from South Africa to jurisdictions that may impose the death penalty for offences they are suspected or convicted of. This case illustrates that courts articulate conduct which is antithetical to the norms, standards and values espoused in the Constitution.

The *Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC)* is another judgment which demonstrates the role a court may play in the creation of foreign policy. This was the matter involving the suspension of the Southern African Development Community Tribunal (SADC Tribunal). Whereas South Africa's government had taken a decision to follow fellow members of SADC in disbanding that Tribunal because it had made a decision that was not favourable to Zimbabwe, in overturning the South African position which had aligned itself with Zimbabwe's position on the matter, the court was scathing in its criticism of the then South African President signing a protocol that set out to undermine human rights and access to justice and was therefore contrary to the constitutional principles that the South African President was required to uphold. The Court arrived at the decision that the "President's participation in the decision-making process and his own decision to suspend the operations of the Southern African Development Community Tribunal is unconstitutional, unlawful and irrational." The decision of the Court in this case which restated the earlier position whereby South Africa's position was in support of the SADC Tribunal in principle resulted in a foreign policy decision being made in favour of the constitutional values of South Africa.

Conclusion

South Africa's constitutional democracy marked the commencement of an era where foreign policy would be guided by the Constitution. The Constitution

became the compass which provides the trajectory of South Africa’s foreign policy both in terms of its development and implementation. The Constitution ensured that foreign policy became justiciable thereby allowing courts to be involved in foreign policy. The courts, utilising their Constitution given powers, have in certain cases declared foreign policy unconstitutional for being inconsistent with the Constitution. The courts have also interpreted foreign policy in order to bring it in line with the Constitution. In so doing, it can be argued that courts have invariably played a role in the making and implementation of South Africa’s foreign policy.

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