What Role Does the Constitution Play in Shaping and Implementing South Africa's Foreign Policy?

By:

Jonathan Klaaren
Daiyaan Halim

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We have argued that the Constitution primarily allocates foreign policy responsibility to the national executive. The President and the Department of International Relations and Cooperation (DIRCO) and its foreign missions are the key actors in the executive responsible for making and overseeing foreign policy. The Constitution prescribes both substantive and procedural rules to guide the executive in its foreign policy choices.

The Constitution also assigns foreign policy responsibilities to other governmental actors. It allocates oversight and treaty ratification responsibilities to the legislature, including Parliament's Portfolio Committee on these matters. In addition, some sub-national actors are expected to play a role in foreign policy making. For instance, guided by its Constitutional and statutory mandates, the South African Human Rights Commission (SAHRC)

plays a small but significant role in South Africa's foreign policy. Beginning in the 1990s with its involvement in refugee affairs (then a newly established domestic policy domain), the SAHRC has played an acknowledged role in foreign policy, often working with civil society organisations. The SAHRC currently holds observer status in the UN Human Rights Council and is supporting the implementation processes of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

A foreign policy area close to the hearts of Afronomicslaw readers is that of international economic law and policy –this involves using international relations to promote "the national interest in economic development." Backed up by economists such as Lumkile Mondi, we identified the national interest in foreign policy as encompassing economic development within South Africa and throughout Africa.

Concerning the national interest in economic development, the Constitution's substantive influence on at least three sub-areas is significant: business and human rights, socio-economic rights and goals, and the transparency of trade negotiations.

In the area of business and human rights, the horizontal application of the South African Bill of Rights – which extends the application of human rights to the private sphere – could be instructive for the development of a binding human rights treaty for transnational corporations. While progress has been made in the soft law of investment policy, international law has thus far attempted without success to create a binding legal framework to resolve the issue of violations of human rights by transnational corporations. One potential policy model here is contained within the Protection of Investment Act. It attempts, in a balanced manner and through municipal law, to protect the interests of investors while binding them to the Bill of Rights and applicable duties.

The application of the Bill of Rights to foreign direct investment (FDI) has important implications for, at least, two critical policy areas. Firstly, in addressing social economic inequality, a Constitutional imperative to promote the advancement of historically disadvantaged groups provides legitimacy to

the South African government's use of local content requirements and measures that traditionally run counter to non-discrimination principles under international trade and investment laws. Secondly, in the environmental context, the right to an environment protected for the benefit of future generations could have implications for economic diplomacy and government's attempts to attract FDI. Rights consideration may be particularly relevant where potential foreign investments into South Africa effectively entail the investor exporting pollution offshore by moving heavy industry to South Africa. In a current example, despite support from both Pretoria and Beijing, the need to comply with the environmental rights and related South African legislation is expected to be a formidable hurdle for over $10 billion in Chinese investment in the Musina Makhado Special Economic Zone. This proposed investment has faced fierce opposition from civil society, particularly because an official Environmental Impact Assessment has concluded that the environmental harm outweighs the economic benefit.

The national interest in economic development is also implicated in South Africa's efforts to promote the socio-economic rights of its citizens, as mandated by the Constitution, and the closely-linked Sustainable Development Goals (SDGs) proclaimed by the UN and supported by the South African government. The SDGs provide measurable international standards and goals for the realisation of certain rights spelled out in the South African Constitution, such as the right of access to housing, education, and water and sanitation. A foreign policy which explicitly seeks to promote the realisation of these socio-economic rights could potentially offer South Africa a basis on which to negotiate better trade and investment arrangements. It would enable South African negotiators to argue for trade and investment arrangements that are consistent with its international obligations under the International Covenant on Economic Social and Cultural Rights and with its responsibility to contribute to the realisation of the SDGs. Moreover, they could argue that this obligation and responsibility should help define the meaning of 'sustainable development', which is an objective of the World Trade Organisation and its Dispute Settlement Body. A developmental interpretation of the WTO's objectives in this way could allow for more lenient treatment of South Africa's domestic industrial policies, in a manner that could support transformational industrial growth.

Another area where the Constitution should inform South Africa's foreign policy is its stance on trade negotiations. However, this creates an interesting challenge for South Africa's trade negotiators. The prevailing practice in trade discussion/diplomacy worldwide is certainly to favour closed and opaque negotiations. But the constitution favours transparency in governmental affairs, including the conduct of foreign policy, aligning with a global trend to open up such discussions to wider participation. Transparency has become an increasingly powerful discourse within public international law, building on arguments for a human right to information and transparency. This is important because trade agreements (and other international agreements) often have profound domestic effects. This will be true for the African Continental Free Trade Area (AfCFTA), which has largely been negotiated with limited public participation. This leads many stakeholders in this agreement to be skeptical about its benefits and to be concerned that the opaqueness of the negotiations was potentially shielding corporate influence.

The Constitution offers a counter-weight to this tendency to secrecy. For example, section 32 of the Constitution protects the right of access to information. This might be especially relevant for the purposes of ensuring proper oversight by the legislature, civil society, and interested parties. Opening trade discussions would ensure that foreign policy decisions remain congruent with the national interest and the Constitution.

As evidenced by the issues above, the relevance of the constitution – long thought of primarily in domestic terms -- to foreign policy is likely only to grow. This is particularly likely to be the case, as regulatory capitalism spreads across the continent and the structures and regimes for economic regulation increasingly intertwine domestic and cross-border effects.

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