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Constitutional Delinquency

1. Introduction

Section 1 of the Constitution proclaims that South Africa is founded upon certain values, one of them being "supremacy of the Constitution and the rule of law". Section 2 emphasises this, providing that law or conduct that is not consistent with the Constitution is invalid, and that obligations imposed by the Constitution must be fulfilled.

Section 7(2) goes on to place a special responsibility on the state to "respect, protect, promote and fulfil" Constitutional rights, and section 8(1) says that the Bill of Rights "binds the legislature, the executive, the judiciary and all organs of state".

But increasingly, it seems, government is deviating from its constitutional duties under these two sections. Rather than being the champion of the Constitution, some of its policy and legislative decisions suggest that it sees the Constitution as an obstacle to be circumvented or even to be ignored entirely.

This is not just about the myriad failures to fulfil the broader expectations contained in the Constitution, especially in its socio-economic clauses – things like widespread service delivery collapses, the alarming number of schools without sanitation facilities, the breakdowns in water and sewerage provision and, of course, load-shedding. These can be attributed mostly to incompetence, maladministration and bad planning, and can be thought of as constitutional neglect; this paper is concerned with something worse – conscious constitutional non-compliance, or constitutional delinquency.

2. A Clear Example

One of the most blatant examples concerns the *Independent Police Investigative Directorate [IPID] Amendment Bill*, currently before Parliament. The Bill provides that the Minister of Police will be able to appoint the director of IPID without reference to Parliament, and without there being any public nomination or selection process. Only Cabinet concurrence will be needed. This flies in the face of the Constitutional Court's decision in ***McBride v Minister of Police and Another*** [2016] ZACC 30, which clearly set out the high degree of independence required in the appointment and the dismissal of the director of IPID.

When the State Law Advisor declared that it was unable to certify the Bill as constitutionally sound Minister Cele, far from rectifying it, commissioned an opinion from an 'independent constitutional expert' – who agreed with the State Law Advisor.[1] At this point, a Minister – and a Cabinet – with any respect for the Constitution would have graciously backed down and redrafted the Bill. Instead, the Minister went ahead and tabled the Bill, no doubt relying on his party's numerical dominance and the general willingness of ANC MPs to rubber-stamp legislation, to force it through.[2]

To give credit where it is due, the governing party's MPs do sometimes decline to do the Executive's bidding, as happened last year with the *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill*. The Standing Committee on Finance refused to be rushed into processing the Bill, which was tabled late and without adequate time being allowed for public input. Over and above this, though, the real constitutional issue with the Bill was that it would have forced all non-governmental and civil society organisations, down to the proverbial knitting clubs and church choirs, to register with the Department of Social Development and to disclose all sorts of personal information about their office bearers.

Concerns about rights to privacy and to freedom of association, as well as considerations of reasonableness and proportionality in the fight against organised crime – which government should be safeguarding – were simply brushed aside. In the end, the Minister of Finance backed down on some of the more egregious registration requirements; but the point remains that a government that sought to uphold constitutional rights, rather than elude them, would not have tabled such provisions in the first place.[3]

3. Malice or Stupidity?

Something very similar to the last-mentioned example is on the horizon with the draft *General Intelligence Laws Amendment Bill*, which amongst other things proposes that anyone heading an NGO or wishing to establish a church should be subject to vetting by the state security apparatus. Whether this amateurishly drafted Bill is the result of malice or of stupidity – or of both, as Prof Pierre de Vos suggests[4] – these provisions are blatantly unconstitutional. They demonstrate contempt for the rights to freedom of assembly, freedom of religion, and privacy, and reveal a government which is willfully ignorant of its duty to uphold and promote constitutional values.

The government's approach seems to be to put forward legislation that it knows, or ought to know, contains unconstitutional aspects, and then to gauge the degree of opposition. If it meets with sufficient resistance it may give in and make the necessary changes. If not, it pushes the Bill through and waits until someone – often an NGO – begins the long and expensive process of litigating against the law. This approach is calculated to evade, rather than to uphold, the state's responsibility to "respect, protect, promote and fulfil" constitutional rights.

A further current example is found in the *National Prosecuting Authority Amendment Bill*, which purports to set up an 'independent' Investigative Directorate against Corruption within the NPA. At present, there is such a Directorate, but it was established by presidential decree and thus has no permanence or independence. Government argues that giving the Directorate a statutory basis will provide it with sufficient independence to place it beyond political interference, but critics have pointed out that the former Directorate of Special Operations, commonly known as the Scorpions, had a statutory basis; and that did not prevent its being swiftly shut down when its investigations started to embarrass senior echelons of the governing party.

Litigation in the wake of the Scorpions' shutdown (the 'Glenister' cases) clearly established a constitutional requirement for a properly independent anti-corruption agency. No less an authority than Judge Richard Goldstone, a former Justice of the Constitutional Court, recently took the unusual step for a retired judge of publicly expressing a view on this matter:

> "There is currently an unfortunate and unnecessary debate on whether the Constitutional Court has ordered the establishment of a completely independent corruption investigating body. It did so in clear terms. The government refused to set up such an institution that is independent of a simple majority in Parliament. Whether constitutionally required or not, the government has failed to provide any reason, let alone a convincing one, for not establishing such a body under Chapter 9 of the Constitution …"[5]

The NPA Amendment Bill fails to provide either the head of the envisaged Directorate, or its staff, with security of tenure, a prerequisite for true independence from the executive branch. He or she will be appointed, and will be susceptible to removal from office, by the President, and will fall under the operational control of the National Director of Public Prosecutions.

4. Policy Matters

It is not only in matters of legislation that the government plays fast and loose with constitutionality. In the realm of policy the much contested project of cadre deployment is a case in point. It is perfectly clear from the provisions of Chapter 10 of the Constitution, covering Public Administration, that appointing people to public positions primarily, or even partially, on the basis of their party-political affiliations is unconstitutional. Section 195(1)(i) says that public sector employment and personnel practices must be "based on ability, objectivity, fairness and the need to redress the imbalances of the past"; and Section 197(3) provides that no public service employee "may be favoured or prejudiced only because that person supports a particular political party or cause".

If this were not enough, the Zondo Commission of Enquiry into State Capture unambiguously declared cadre deployment to be unconstitutional since it was contrary to the values of impartiality, fairness, equity and objectivity.[6] Admittedly, the Commission was not a court of law, and Judge Zondo was not writing in a curial capacity, but this is to split hairs. When, after such a thorough and far-reaching enquiry, a country's Chief Justice declares a policy to be unconstitutional, the proper response from its government is to amend the policy – bearing in mind that it is bound by the special duty of respecting, protecting and promoting constitutional rights and governance.

Instead, the government has doubled-down on cadre deployment. When the Democratic Alliance introduced a private member's Bill aimed at outlawing the practice, an ideal opportunity presented itself for a proper public debate, including parliamentary hearings and public submissions. But the ANC used its majority to block the Bill from proceeding, one of its MPs going so far as to say "our cadre deployment policy is a critical instrument to ensure that the organisation applies itself to the type of public servants and representatives that the ANC will support…"[7]

Another area in which government often acts unconstitutionally is in its policies regarding foreigners. Earlier this year, for example, a full bench of the High Court declared the termination of the Zimbabwe Exemption Permit programme "unlawful, unconstitutional and invalid". The Court noted in its judgement that the Minister of Home Affairs's answering affidavit evinced "a notable disdain for the value of public participation… while the views of civil society and the public are deemed unnecessary altogether."[8]

Even wealthy foreigners receive unconstitutional treatment from Home Affairs, and are compelled to approach the courts for relief.[9] This does not only affect the individuals concerned, it is also immensely harmful to the economy and to prospects for job creation,[10] on top of which such treatment violates a number of the values set out in the Constitution's Public Administration chapter, and ignores people's right to just administrative action.

5. Insufficient Consultation

As noted regarding the Zimbabwe Exemption Permits, the High Court found that there had been a lack of proper public consultation; this is by no means the only example of this problem. Over the years a number of Acts have been suspended or declared unconstitutional due to such failure, most recently the *Traditional and Khoi-San Leadership Act*.[11] Although, in this particular case, it was Parliament and not a government ministry that bore the brunt of the Constitutional Court's criticism, given the governing party's complete dominance of Parliament's offices and procedures the distinction is little more than nominal. The attitude – that public consultation is at best optional – is where the problem lies, and it is concerning that 17 years after the seminal *Doctors for Life* case,[12] which stressed the crucial constitutional role of such consultation, its importance is still regularly overlooked.

Often, Parliament is put under huge pressure to process Bills that have sat with the Executive branch for months, if not years. This was the case with the *Electoral Amendment Act* – in June 2020 the Constitutional Court ordered certain amendments to the Electoral Act and gave Parliament the usual 24 months to complete them. However, it was only in January 2022 that the Minister of Home Affairs finally tabled a Bill in the National Assembly – leaving far too little time for it to be dealt with, including appropriate public consultation. In this case, Parliament had to approach the Constitutional Court twice to ask for extensions of the deadline. Such tardiness on the part of government ministries undermines the provisions of sections 59 and 72 of the Constitution, which require the two chambers of Parliament to "facilitate public involvement" in the legislative process.

It is likely that the same thing will happen with the lengthily-titled *Regulation of Interception of Communications and Provision of Communication-related Information Amendment Bill.* This Bill also arose from a Constitutional Court ruling, in February 2021, but the Court, recognizing the technical and complex nature of the legislation (and probably also the impact of the COVID-19 restrictions), gave Parliament 36 months to finalise the amendments. Despite this, the Bill was published only in August this year, with public comments called for on 15th September and due in by 6th October. A three-week window for comments on any Bill, let alone a complex one, can hardly be regarded as a genuine attempt to facilitate public involvement.

(Again, to give credit where it is due, we must

acknowledge that some parliamentary committees, such as the Standing Committee on Finance mentioned earlier, take public consultation seriously, even to the point of defying ministerial pressure.)

6. Attacks on Civil Society

Generally speaking, there is a healthy and mostly respectful relationship between government and civil society in our country. The former comes in for a lot of criticism from the latter, but that is in the nature of a free, democratic system. Governments and governing parties hold state power and they will always be criticized for the way they use or misuse it. Likewise, governments are free to criticize civil society groups if there is proper cause for it.

What is not acceptable is any attempt by government to undermine civil society or to deny its right to exist and to express its views. Unfortunately, we have seen a number of examples of just this recently. One of the worst offenders is Minerals & Energy Minister, Gwede Mantashe, who has on more than one occasion attacked the good reputations, and patriotism, of various NGOs and CSOs, particularly in the environmental sector. He has even gone as far as mimicking apartheid-era National Party leaders by accusing organisations of being "funded by foreign entities" including the CIA.[13]

Police Minister Bheki Cele is another who apparently fails to understand the right of civil society to criticize government, and to do so robustly. Even after Parliament's ethics committee ordered him to apologize publicly for his intemperate attack on the anti-crime activist Ian Cameron, Mr Cele refused, saying he would take the decision on review.[14]

The Home Affairs Minister, Aaron Motsoaledi, also has a hard time accepting and respecting the role of civil society. In June 2022 he released a rather prolix press statement in which he accused the Helen Suzman Foundation (which had taken him to court over the Zimbabwe Exemption Permits, see section 4 above) of "a desperate bid to blackmail the nation", of "sabotage[ing] the polycentric and policy-laden decisions taken by government", and of being "armchair critics" who, during the struggle, had "sat in the comfort of their homes because of the colour of their skin".[15] When the Helen Suzman Foundation won the court case, no apology for these intemperate and insulting remarks was issued by Dr Motsoaledi.

Even though certain other examples of this tendency could be mentioned, it would be an exaggeration to talk of a trend. However, if we add to these outbursts the various instances of legislative attempts to restrict the freedoms of CSOs mentioned earlier (including the *General Intelligence Laws Amendment Bill* and the *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill*) there is clear cause for concern about the degree to which government as a whole, and certainly some of its senior ministers, understand the role and rights of civil society.

7. Conclusion

A good Constitution, such as South Africa's, sets high standards for government and citizens alike. When things are generally going well, with the economy performing satisfactorily, the political scene stable, and the populace more or less content, it is easy enough to live up to those standards, and to demonstrate real respect for constitutional rights and values.

Arguably, we experienced just this in the first few years after the Constitution's adoption at the end of 1996. It emerged out of, and deepened, the broadly positive and optimistic spirit of the immediate post-1994 period, and much legislative energy was put into passing laws that would give effect to what were then new constitutional precepts – substantive equality, including affirmative action; administrative justice; access to information; a host of socio-economic entitlements – as well as all sorts of policies aimed at eliminating unfair discrimination. Back then, without being too credulous about it, the Constitution was seen as a signpost, or set of signposts, providing guidance and direction for the nation's journey towards democracy and freedom.

We are no longer in that place. We are facing enormous social and economic challenges, many of which ought to have been far more effectively dealt with, and could have been were it not for various failures and deviances within government and the wider state apparatus caused by their gradual drift away from adherence to constitutional values. Our political scene is far from stable, and next year's election will probably result in further instability as the long-dominant ANC loses its grip on majority power. And the

population is perhaps less content than it has been at any time since 1994.

Under these circumstances there is a risk that the Constitution will increasingly come to be seen as a hindrance to the retention and exploitation of political power, rather than a guide to its proper exercise and limits. The examples described in this paper are indicative of this, and it is a development that will need to be monitored closely. We cannot simply take it for granted that the Constitution will look after itself.

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