



BABYSITTING GOVERNMENT

How courts in South Africa
remedy the failings of the state

In recent years the courts in South Africa have become more and more the last resort to defend democratic standards and to check on a government that is more and more directed by the self interests of those dominating the executive.

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FEPS

JUNE
2017

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For President Trump it came probably as a surprise when the courts stopped his travel ban for citizens from certain countries. For quite some time his colleague President Zuma in South Africa has already made this experience that courts stop his actions. This has made it difficult for the Zuma administration to pursue its political agenda which is more and more directed by vested interests and corruption. Out of the three pillars of democracy, the legislature, the executive, and the judiciary, the latter has become the last resort in South Africa when the principles of a democratic state needed to be defended.

About a year ago the Constitutional Court ruled that President Zuma “had failed to uphold, defend and respect the constitution” because he did not comply with the remedial action of the Public Protector (Ombudsman) to pay for the upgrading of his personal homestead Nkandla. The President finally paid.

In March the High Court in Pretoria ruled that the appointment of the head of the country’s elite policing unit, the Hawks, by the Police Minister be set aside because the appointed person made false statements under oath and lacked honour and integrity, obviously key personal characteristics for a high office in the police.

In the “social grant crisis” the Constitutional Court found that the Minister of Social Development is solely responsible for the crisis. The minister ignored a previous court order to re-organise the payment of social grants through a private company to 17 million recipients because the contract was unlawful. The court in a “structural interdict” now ordered the minister to submit regularly progress reports on the matter.

In February the North Gauteng High Court held that the withdrawal from the International Criminal Court (ICC) was unconstitutional and invalid because it was not approved by parliament. A bill repealing South Africa’s adherence to the Rome Statute of the ICC was withdrawn from parliament and at the moment it is unclear what South Africa’s position is on the ICC. This is a situation which would not have occurred without the intervention of the court.

One of the key projects of the Zuma government is the building of six nuclear power stations with the assistance of the Russians in the range of 1 trillion Rand (71.4 billion Euros). It is alleged that the removal of Finance Minister Gordhan is related to this deal because he blocked it. Two NGOs challenged the actions of the government and the judge of the Cape High Court ruled that five decisions which were taken in the procurement process were illegal. The court did not state which source of power would be best for the country but that a deal of this dimension needed more public participation. If the government adheres to the verdict of the court then the entire procurement process has to start from the beginning which means that the president will not be able to bring the deal to the final stage before his term of president ends in 2019. An alleged source for corruption would break away.

A Pretoria High Court order received controversial responses. The opposition party DA (Democratic Alliance) applied to have the recent firing of Finance Minister Gordhan and his deputy reviewed and declared unconstitutional and set aside. Zuma’s legal papers claim that the president can appoint whomever he wants as long as the exercise of such powers is rational. When the judge ordered

¹ Ralph Matheka: *When the courts have to babysit government* in news24.com, 08.05.2017

President Zuma to provide the record and reasons for replacing his former finance minister and his deputy, Zuma supporters claim that the judge violated the separation of powers. The DA called the judgement a victory for transparency but the President maintains that the people and the DA have a right to his reasoning but not to his written records. The case is pending.

South Africa's constitution which turned 21 this year has been attacked for quite some time. Critics claim that the constitution was a compromise and has tied the hands of the democratic post-1994 government from pursuing a more radical approach to transforming the society and the economy. The student protest movement claim that the constitution is a neo-colonial construct imposed on South Africa. Especially section 25 is cited as an example which allegedly enacts a "willing buyer, willing seller" obligation and prevents the government from redistributing land to the original owners of the land, the poor black population. In fact, the constitution provides for government-led expropriation in the public interest subject to compensation on a "just and equitable" basis².

Critics overlook that the constitution and decisions of the courts have contributed to protect vulnerable people. In 2002 the courts ended President Mbeki administration's irrational approach to HIV-AIDS treatment and ordered the government to provide antiretrovirals to HIV victims. And in the so called "Grootboom" case the courts ordered to provide emergency shelter to homeless people who were caught in the cold Cape winter. Since then every sphere of government provides in their budgets emergency funds, the "Grootboom line item".

The attacks on the constitution and the claim that the courts are interfering with the prerogative of the executive are aiming to protect the present ANC government from prosecution and to allow it to pursue its self-interests unfettered. The speaker of parliament Ms Baleka Mbete recently hit out strongly against "judicial overreach" and when elaborating indirectly revealed the real problem South Africa is facing in this matter that is the lack of parliamentary control. "This business of taking Parliamentary issues, including details of internal arrangements to court is not good for us," she said³.

It is the primary responsibility of parliament to oversee the work of the executive and to check on abuse of power. But the ANC majority - spoiled by being re-elected without difficulties since 1994 - keeps quiet when the government oversteps its powers. This is related to the present electoral system which is proportional. In a country with ethnic and tribal minorities proportionality is the right approach because it secures minority representation in parliament. On the negative side it means that in such a system the electoral lists are determined by the party and in the case of the ANC by the highest party level. Factually, MPs are "at the mercy of the same executive"⁴ they are supposed to keep in check and they have no obligation towards people in a constituency. It is necessary to change the electoral system to include constituency voting. If a MP has the solid support of the people in his or her constituency and the confidence to be re-elected he or she can act in accordance with his or her consciousness and cannot be pushed around by higher ranks in the party.

A solution would be a mixed system with proportional and direct representation similar to the one in Germany. The Van-Zyl Slabbert⁵ commission looked into possible reform measures but could not come to a solution supported by all members of the commission. A change of the electoral system under the present ANC majority and ANC leadership is very unlikely because it would erode the power of those at the top of the party.

² Richard Calland: *Why South Africa's Constitution is under attack* in The Conversation, 17.03.2017

³ Cape Times, 30.05.2017

⁴ Songezo Zibi: *Keep presidents in line via the constitution, not the judiciary* in Sunday Times, 14.05.2017

⁵ *Van-Zyl Slabbert Commission Report on Electoral Reform*, 2003

In another power play the pending decision of the Constitutional Court concerning secret voting in parliament may tip the balance against the President. The constitution provides that the President is elected in parliament by secret ballot. However, in the case of a motion of no-confidence which has been brought forward by the opposition, the ANC and its speaker of parliament refuse to have the ballot in secret. Because of the growing opposition in the ANC to President Zuma the party has ordered ANC MPs to support the president and to vote against the no-confidence motion. From the intention of the constitution it is obvious that also a no-confidence vote must be held in secret. If the Constitutional Court follows this line it is expected that many ANC MPs would vote against the President.

Over the last years the courts in South Africa have proved that they are the very last line of defence when all other avenues have failed to deliver on constitutional guarantees. It is obvious that they have to walk on a very fine line not to interfere with the prerogative of the executive. And they do not have the capacity to monitor the implementation of their rulings and they have no power to make the government to obey them. The police and the prosecution authorities answer to the executive. The Sunday Times writes: "Our courts rule, but does Zuma care?"⁶ The moral authority of the judiciary is high and the present administration cannot just ignore its rulings. But it is obvious that all available legal recourses are used to delay proceedings and court decisions costing the government and therewith the tax payer millions. But the courts cannot remove a delinquent government; this can only be done through elections or the parliament.

Ironically the success story of the judiciary in South Africa could also be the death knell for its independence. The ANC runs the government, has the majority in parliament and through various changes in persons and institutions made large parts of the prosecution authority to act one sided for the government. Being in control of the executive and the legislative, it does not come as a surprise that the judiciary now comes under attack. The ANC wants to reassess the appointment criteria used by the Judicial Service Commission to appoint judges. According to a policy document from the beginning of this year the government party is seeking "judges with a progressive philosophy and who advance judicial activism to give effect to social transformation".⁷

⁶ Sunday Times, 19.03.2017

⁷ Quoted in: Phephelaphi Dube (Director, Centre for Constitutional Rights): How vulnerable is South Africa's judiciary in Daily Maverick, 21.03,2017