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Op-ed

South African courts: Are they guilty of judicial overreach or merely upholding the rule of law?
by Advocate Wendy Andrew-Befeld

Allegations of judicial overreach against South African courts are certainly not new. The courts have long been accused of exceeding their mandate and straying into the realm of the legislative and executive branches of government, thereby breaching the separation of powers principle so crucial to the health and wellbeing of any sound democracy.

The separation of powers principle is based on the assumption that power corrupts and that a separation of powers between the executive, judicial and legislative branches of government, is therefore essential to the preservation of democracy. It is the most ancient and enduring element of constitutionalism and it is at the epicentre of our constitutional democracy, as is the rule of law and a strong, independent judiciary.

Our Constitution expressly safeguards judicial independence and provides that judicial authority is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The courts are given the power to ensure that Parliament fulfils its constitutional obligations; and to declare any law or conduct that is inconsistent with the Constitution invalid, to the extent of its inconsistency, thereby giving the courts the power of judicial review.

Whilst judicial review is essential for the enforcement of the separation of powers, it inevitably gives rise to a tension between the judiciary, on one hand, and the legislature and the executive on the other. The tension arises because the judiciary is empowered to decide on the legality of the conduct of the other two branches of government - and nobody likes to be second-guessed, least of all those in positions of power. Then again, that is precisely the point of judicial review. The judges peering over the shoulders of the executive and the legislature are the very means by which they are held to account and the rule of law is upheld.

Furthermore, not only is judicial review a routine part of a constitutional democracy, but section 172 (1)(a) of our Constitution specifically empowers the courts to act as guardian in respect of the protection and promotion of our constitutional values and principles against ALL who may violate them. And if history has shown us anything, it appears to be this very concept that the rule of law applies to ALL, without exception, that has caused so much consternation!

As to whether the conduct of our courts in recent years has constituted judicial review or judicial overreach, it appears to depend, in large part, on who you ask and quite often, the political space they occupy. Many commentators point out that if it seems as though the courts have increasingly been called upon to regulate and check the exercise of power by the other branches of government, this is simply because they have failed to act lawfully and fulfil their constitutional obligations, thereby necessitating the very judicial intervention they then label as judicial interference or overreach.

The so-called Nkandla case, arising as a result of Parliament's failure to hold then State President, Jacob Zuma, to account for refusing to comply with the remedial action prescribed by the Public Protector, is an excellent case in point. In this case, the Constitutional Court grappled with the issue of judicial review as never before. Ultimately, the apex court held that our courts are the ultimate guardian of our supreme Constitution and its values; that the Constitution is binding on all branches of government; and that the courts are constitutionally mandated to ensure that all branches of government act in accordance with the law and fulfil their constitutional duties and obligations.

On the other side of the ideological divide, there are those who accuse the Bench of supporting opposition party politics and special interests in a new brand of "law-fare". That being said, the stark reality is that those levelling accusations of judicial overreach would do well to remember the not-so-distant past, prior to the advent of constitutional democracy in South Africa, when the judiciary was effectively crippled by the Westminster system of Parliamentary sovereignty. Our courts were bereft of any powers of judicial review and were confined to interpret and enforce legislation based on procedural issues alone. They were precluded from considering substantive questions of legality, merit or morality and as such, they were reduced to the role of powerless spectator, expected to rubber stamp the injustices they saw playing out before them.

Today, the rule of law in South Africa is legitimately exercised and where this is not the case, the judiciary is not only empowered, but specifically directed, by the carefully crafted provisions of a supreme Constitution, to deal with contraventions of law. This, our courts have done. They have dealt with everything from signal jamming at the State of the Nation address; to the forcible removal of MP's from Parliament; to an unauthorised withdrawal from the Rome Statute of the International Criminal Court; to a bitter fight between government and the TAC over antiretrovirals, in what would come to be dubbed "the judgement that saved a million lives".

Most recently, the judiciary refused to blink when it came to holding former President Jacob Zuma to account for refusing to appear before the Zondo Commission into State Capture, and subsequently threatening to resist the custodial sentence handed down to him for contempt of court. Despite the civil unrest that followed, the court's refusal to back down in the face of unlawful conduct, is a resounding victory for the rule of law in South Africa…

…and in the final analysis, the common thread running through all of these rule of law cases is that when all else fails, the Judiciary has not. This does not make them guilty of judicial overreach. Rather, they are to be lauded for stepping into the breach and for doing exactly what they were intended to do, by constitutional design. May it be enough to keep our young democracy safe and on course.

This article is an extract from an article prepared for the Inclusive Society Institute's Journal for Inclusive Public Policy by Advocate Wendy Andrew-Befeld.