

Judicial Overreach

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The issue of judicial overreach has recently become a topic of interest in our industry, but many of the discussions are not centred around what judicial overreach actually means.

Judicial overreach has been described as when a court/ the judiciary acts beyond its jurisdiction which results in it taking on the role of the executive or legislature. This is a violation of the doctrine of the separation of powers as the court then becomes a policy maker or law maker. The separation of powers principal is borne from the assumption that power is a corrupting factor and by limiting power through the creation of separating the powers of the executive, judiciary and the legislature, it will curb corruption. This makes having different branches of government vital to the preservation of democracy.

The judiciary's job involves determining the lawful limits of the Constitution and the regulation of public power. Its power lies in its ability to determine whether law, policy or conduct is consistent with the Constitution. It does not have the power to change those laws and policies nor execute them. It is important for the judiciary to be independent from other branches of government and subject only to the Constitution in order to uphold the law and be able to apply it in an impartial and without favour fashion.

While the courts today have the power to find a law or regulation unconstitutional, this power is limited in the sense that they cannot actually change the law. They do, however, have the power to ensure Parliament, as the legislature, fulfils its obligations and amends or abolishes laws which are inconsistent with the object, spirit and purport of the Constitution.

The courts also have the important powers of judicial review, which is essential to the enforcement of the separation of powers as it allows for the doctrine's implementation. Through judicial review, the judiciary is given the power to decide on the legality of conduct of the other branches of government.

This then allows for accountability of those branches to be upheld along with the rule of law. Section 172(1)(a) of the Constitution empowers the courts to give effect to these powers, allowing them to protect and promote constitutional values and principles.

With the above in mind, how is it possible to distinguish when our courts exercise their powers of judicial review or fall foul to judicial overreach?

The views on this vary. Some say that in recent years it has been difficult to distinguish between the two as the judiciary has been called on many times to take action against government branches who have not been fulfilling their constitutional obligations and judicial intervention has been necessary to uphold the law.

One of the most well-known and controversial case is the Economic Freedom Fighters and Others v Speaker of the National Assembly and Another, or the "Nkandla" case, in which the dissenting and majority judgment differ in how far their judicial powers could reach. The matter was brought on the accusations that Parliament had failed to hold former President Jacob Zuma accountable for his failure to follow through with the remedial actions prescribed by the Public Protector in its report. The parties demanding judicial intervention sought an order which declared that the National Assembly had failed to hold Zuma accountable through various measures and processes. This accusation included the National Assembly's failure to implement the report. They sought an order which could compel the National Assembly to establish a committee which would assess the impeachability of the former President's conduct per section 89 of the Constitution.

The majority judgment found that the National Assembly was duty bound to place proper rules governing section 89 of the Constitution, that in their failure to properly evaluate and scrutinise Zuma's breach of section 89(1) constituted a breach of section 43(3) of the Constitution, which governs the legislative authority of the Republic. They ordered the National Assembly to implement the new rules in terms of section 89.

The dissenting judgement, however, found that the majority judgment was a typical case of judicial overreach as it intruded on the exclusive domain of Parliament. This was a matter under review, which bares importance as judicial overreach indicates unaccountable judicial power, however, judicial review is well within a court's right and power.

Tinashe Kondo finds this case particularly note-worthy in his analysis of judicial overreach, as he opines that "there is a need to develop jurisprudence on just and equitable orders in cases of breach of rights. This is because, where an order is made, as in this case, that seems far-fetched relative to what the norm is, it is then viewed as an overreach by the courts, rather than as an exceptional remedy to an extraordinary circumstance".

There are two main arguments that are put forward where it concerns judicial overreach. First, if political decisions are made by the courts, it encroaches on the powers of other government organs and the separation of powers in ineffective. And second, the judiciary has the exercisable power to call for legislative action where it does not align with the Constitution. While the above judgement continues to split opinions, it is clear that the judiciary is ultimately the guardian and protector of the Constitution and its values, and as it is binding on all branches of government, they must act in accordance and uphold their constitutional duties.



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