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Concourt debate affects all of us

South Africans must subject proposals to searching scrutiny, write ***Karthy Govender*** *and* ***Ben Halbig***

THE ENDURING accomplishment of SA is the manner in which a perceived intractable race-based conflict was resolved through negotiations. The Constitution of the Republic of SA, the final product of these negotiations, reflects necessary compromises, but is firmly grounded in tried and tested principles that form the basis of any functional constitutional democracy.

As we celebrate Human Rights Day today, we need to understand and appreciate all the challenges that confront us as we seek to establish a culture of respect for fundamental human rights. The drafters appreciated the importance of institutional safeguards in this endeavour. There was virtual unanimity between the negotiators that the system of constitutional supremacy should replace the doctrine of parliamentary sovereignty.

This means that the constitution is the supreme law of the land in that it is a solemn compact between the people and the rulers. In terms of this compact, the rulers undertake to exercise public power within the discipline of the constitution. The Bill of Rights prohibits the government from unreasonably and unjustifiably infringing our fundamental human rights such as the freedom of expression, human dignity, equality, religion, privacy and others.

In addition, a positive duty is imposed on the government to free the potential of all people in SA and improve their quality of life by providing access to housing, health care, sufficient food and water, social security, land security and education. In constitutional democracies such as ours, it is the role of the courts to determine whether the government is discharging its public power in accordance with these constitutional obligations.

The system works best when the government formulates policy and implements it, and the courts in accordance with the constitution adjudicate on any challenge to the policy or its implementation.

Respect for human rights would be undermined if either of these institutions were inhibited in the performance of their roles. Given these responsibilities, there will be a measure of tension between the different institutions. In comparison to the legislature and executive, the courts are comparatively more vulnerable as they control neither the purse nor the sword.

As a result, there is an obligation on the legislature and executive to manage the tensions appropriately and ensure that there is no systematic undermining of either the independence or competence of the judiciary. If this were not to happen, then the entire constitutional project could be jeopardised.

Over the last 18 years, the Constitutional Court has discharged its role in a coherent, competent and independent fashion. For example, in the Treatment Action Campaign case, the court held that the government had acted unreasonably in failing to provide Nevirapine to HIV-positive indigent mothers and their newly born babies at all public hospitals.

By way of contrast, the court in the Mazibuko judgment stopped short of ordering the government to increase the minimum supply of free water to all residents, as this would unreasonably interfere with the constitutional responsibilities of the executive in formulating and implementing policy.

Far from demonstrating unbridled activism, these judgments reflect respect for the policy formulation and implementation role of the government and an ability to hold the government accountable to its constitutional responsibilities.

It appears that the government has been irritated by some recent decisions of the courts, such as the Glenister case in which the court found that the Hawks were not sufficiently independent, the DA case where the court found that the president had acted irrationally in appointing Menzi Simelane to the post of national director of public prosecutions, and the Justice Alliance of SA case, in which the court held that the president had acted unconstitutionally in extending the tenure of Chief Justice Sandile Ngcobo.

In the light of recent developments, it is a cause for concern that the government now seeks to take the drastic step of reviewing the powers of the Constitutional Court.

In his reply to questions in the National Assembly last week, President Jacob Zuma is reported to have said that the government does not intend to change the constitution on a regular basis, but that they have a sufficient majority to do so if they so desired. Any amendment to the founding provisions of the constitution, including the advancement of human rights and freedoms, the supremacy of the constitution and the rule of law requires a 75 percent majority in the National Assembly and a supporting vote of at least six provinces.

The legitimacy of a court depends on the respect it enjoys among the broader populace. Comments that weaken public confidence in the judiciary undermine the roles ascribed to the various organs of state in our constitution.

Beyond vague criticisms, no cogent case has been put forward as to why the powers of the Constitutional Court should be reviewed. Given the consequences these vaguely phrased criticisms could have on the oversight role of the courts and on its effectiveness in protecting human rights, we all have a vested interest in these debates and must subject these proposals to searching scrutiny.

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