



This is an extraordinary book which should be read by every politically conscious person. It deals in the most fascinating and readable way with the interface between the judiciary and the political system in South Africa. In doing so it overcomes many of our preconceptions and prejudices about judges and the courts while endorsing their vital role in sustaining our system of a rights-based constitutional democracy.

The book opens with a sustained account of how courageous lawyers used every opening in the law to lighten the oppressive measures of the apartheid regime. They built on every element of rights which exists in our common law, and even in some other laws, to force concessions from recalcitrant judges who were themselves sometimes trapped in considerations of jurisprudence. It is quite fascinating how even judges known for right-wing views were obliged to make concessions which undermined the most severe apartheid legislation, causing acute embarrassment to the regime. All this is dealt with by way of recounting actual cases as they were taken through the courts.

The same methodology is used to take us through a series of actual cases in the post-apartheid period. It is quite remarkable how obscure legal issues

Lawfare, judging SA politics

Michelle le Roux and Dennis Davis

Publisher: Jonathan Ball. South Africa. 2019. 368 pgs.

Review by Ben Turok

are presented in ordinary language understandable by those without legal training.

By examining a series of critical cases the authors elaborate on the continuing tussle between the judiciary and the democratic government about which arm is supreme. The issue is partly resolved by the common understanding that the Constitution is the supreme law of the land and that the Constitutional Court is the custodian of the Constitution.

But the matter cannot rest there. Since the Constitution stands for a democratic and equal society in which rights are held to be paramount, what is the actual role of the Constitutional Court in enforcing this? The Court has no police force nor any actual instruments of enforcement. So how can it exercise its powers? If at all.

This problem is highlighted with an account of how Zuma undermined the rule of law by manipulating the personnel in charge of other state institutions, notably the prosecution authority, police and other arms of the state. Even Parliament became totally compliant, and failed both to pass necessary legislation and to hold the executive to account. Thus while the judiciary remained relatively unscathed, its powers to sustain the democratic culture so strongly aspired to in 1994 were badly eroded.

So what is the role of the courts vis a vis the political system? Here we encounter the term judicial overreach whereby courts lay down actual

requirements for government action which would normally fall to the executive. Under this heading we might also include applications to court by political parties dealing with some infringement or other. This falls under the heading of lawfare though there are many other instances which also fall under this term. On the whole, the authors caution against these tendencies.

The authors deal with the separation of powers between the judiciary, legislature and executive and the dangers of excesses of intrusion by any of these institutions.

However, what remains is the special supremacy role of the Constitutional Court which means that the executive must at all times act within the law. There is of course the difficulty that the executive holds that, unlike the judiciary, it emerges through an election of the people and is therefore directly accountable. This at times leads to tensions over the role of each within an appropriate constitutional balance.

This tension comes to the fore with respect to socioeconomic rights in the Constitution and how the limitation clauses are interpreted. There is a tension between reasonable measures and available resources.

To conclude, the book stresses that although the "Constitution is a powerful tool for the building of accountable and meaningful participative democracy," it nevertheless requires a "supportive politics and vigilant citizenry striving to realize its vision". **NA**