An overview of judicial review in parts of Africa

July 2017

The mechanism of judicial review has become known as somewhat of a champion in our country. In our post-1994 constitutional democracy, the utilisation of judicial review proceedings to challenge administrative conduct (that ordinarily would not be capable of challenge pre-1994) has allowed our prestigious apex court to showcase its revolutionary prowess. However, the use and development of judicial review in other parts of Africa has not been as noticeable.

It would appear that our Constitutional Court (and to a greater extent, our Constitution) has gained tremendous popularity on the continent and in other parts of the world. This may be due to its progressive nature, which stands in stark contrast to the legal regime that existed before the rightful demise of apartheid in 1994, but also because of the robust way in which our Constitutional Court has dealt with certain legal challenges – many of these having been brought before the Constitutional Court by way of judicial review proceedings. In doing so, our Constitutional Court has developed our constitutional and administrative law jurisprudence in an extraordinary way.

Judicial review proceedings

Judicial review is a court process used to enforce the principle of legality under the rule of law (section 1(c) of the Constitution) and the right to just administrative action (section 33 of the Constitution, given effect to by the Promotion of Administrative Justice Act, 2000 (PAJA)). The process has been used many times since the advent of our constitutional dispensation and has been a relatively effective means for holding public bodies accountable. Judicial review is seen as the guardian of the rule of law and it has been regarded by some as the rule of law in motion (Michael Fordham). In 1992, Lord Browne-Wilkinson said that judicial review had become one of the most socially important and legally fertile areas of law. It has become known as a useful and effective instrument in many constitutional democracies.

Judicial review is a very powerful and popular tool in the procurement space for example, where disgruntled unsuccessful tenderers can challenge the awards made by the decision makers
A challenge of this nature can have a calamitous impact on a particular project or service offering, firstly because the judicial review application is usually accompanied by an interdict of some urgent kind that seeks to prohibit the implementation of the awarded tender pending the outcome of the review. Secondly, in the event that the award of the tender is reviewed and set aside, the implementation of the project may be delayed if the court orders the administrative body to start the tender process *de novo*.

Judicial review can be used in an array of circumstances, from challenges in relation to small projects administered by local municipalities to massive multi-billion rand contracts awarded by state departments. A memorable example of the latter was when an unsuccessful tenderer challenged the award of the contract that regulated the administration of our country’s entire social assistance scheme in *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as amici curiae)* 2014 (1) BCLR 1 (CC). The consequences that a successful review application of this nature can have on an entire country are remarkable. *Allpay* highlights the importance of the remedial component of judicial review challenges.

According to a report published by the International Institute for Democracy and Electoral Assistance in 2016 entitled, *Judicial Review Systems in West Africa*, of the constitutions of 194 countries, 80 percent included a formal review mechanism (see page 17). In our view, constitutional recognition of a judicial review mechanism theoretically signals a progressive government, interested in accountability.

**The colonial influence on judicial review**

Africa is an interesting conglomerate of countries, because for a significant part of its history it has been subjected to the laws of its colonisers and generally adhered to the model of parliamentary sovereignty. However, post-colonial Africa seems to be interested in constitutional democratisation by recognising (in theory, at least) the doctrine of separation of powers, constitutional supremacy and the need for checks and balances. Judicial review can be used to enforce these principles, so with constitutionalism, came the empowerment of our continent’s judiciaries.

While judicial review is not a new concept on the continent, its character, foundation and vigour has transmogrified in certain African countries. Historically, most African countries are associated with either the common law (English influence) or civil law (which includes the French influence) legal regimes. Both systems recognised some form of judicial review, although the French model was considered to be more timid and limited than the common law one.
The so-called common law countries in Africa (including Ghana, Nigeria and Gambia) generally recognise a supreme court model with lifetime tenure for appointed judges. The former French colonies in Africa (including Senegal and Côte d'Ivoire) on the other hand, have constitutional councils that operate outside of the ordinary court hierarchy and judges are appointed for a relatively short period (see: Judicial Review Systems in West Africa at page 23). These two models are fairly different and will somewhat inform the degree of independence that the judiciary enjoys, which in turn impacts on the court's ability and power to review. Under the French model, the constitutional councils operate in parallel with the ordinary judicial system so issues around jurisdiction, res judicata, access, control and enforcement of orders have been problematic in the past. However, these common law/civil law models were not intended for use in a government that recognises constitutional supremacy.

The constitutional era

The advent of the constitutional era in parts of Africa (including South Africa) has not solved all the legal, political and socio-economic woes in the relevant countries. At best, we can say that it is a work in progress. Some countries, including heads of state and even judges, have revolted against the idea that the executive and legislature do not enjoy absolute power. For example:

- The Ghanaian courts' interpretation of its 1960s Constitution left the president and the legislature unrestrained in their exercise of power. A Ghanaian court held that the remedy for an alleged breach of a fundamental right was through the ballot box and not through judicial challenge.

- In 1966, the Prime Minister of Uganda unilaterally abolished the Constitution applicable at the time and decided to assume total power in honour of national stability. He had engineered a coup d'état against the constitutional order. Even more shocking is the fact that his actions were approved by the High Court in Uganda v Commissioner of Prisons (Ex parte Matovu) [1966] E.A.L.R. 514.

- When the President of Zambia intended to turn the country into a one-party state, the Zambian Court of Appeal dismissed the legal challenge that alleged that the President's plan had threatened certain constitutional guarantees. The court said that, "it is unthinkable to suggest that the government of a country elected to run an ordered society is not permitted to impose whatever constitutional restrictions on individual liberties..." See: Nkumbula v Attorney-General (1972) Z.LR. 204, 215 (Zambia).

(See: Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa).

Egypt is another example of a country that went through significant legal changes, including the adoption of a new Constitution in 2014. Egypt's Constitution
acknowledges the judicial oversight of administrative decisions. Theoretically, it is possible to judicially review an administrative decision by petitioning the State Council. This area of law requires quite a bit of development in Egypt and an act giving effect to this right is yet to be the promulgated. However, due to the state of emergency, relief via judicial review is limited. One of the biggest hurdles in enforcing the rule of law in Egypt (aside from the political unrest) is the absence of an independent and effective judiciary. In addition, the military's influence over the government has not been outlawed and an Emergency State Security Court is still in operation and its decisions are final. See: the British Institute of International of Comparative Law Report, dated June 2016, entitled, *Protecting Education in the Middle East and North Africa Region*.

On a more inspiring note, Kenya's Constitution was enacted in 2010 and, like South Africa, the government transformed from parliamentary sovereignty to constitutional supremacy. Kenyan judicial review went from being a common law principle to a constitutional one. Like section 33 of our Constitution, Kenya's Constitution recognises the right to fair administrative action. Article 47 of Kenya's Constitution states that, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair". Expediency and efficiency are two criteria that do not appear in section 33, so it will be interesting to see how the Kenyan courts apply these requirements in practice. The Fair Administrative Action Act (2015), which gives effect to Article 47, is Kenya's version of PAJA. Unlike PAJA, the definition of administrative action in the Fair Administrative Action Act is not exhaustive, so there appears to be much room for debate by interested parties who bring judicial review proceedings in respect of purported administrative decisions.

**When politics override the law**

Challenging parliament's legislation by way of judicial review on the basis that it does not accord with certain constitutional prescripts has been another point of contention in certain African countries. There are a number of countries in the world where courts are not permitted to strike down laws or declare statutes (or sections thereof) unconstitutional. Switzerland and the Netherlands are two such countries. Until 1991 in Guinea-Bissau, the Constitution entrusted constitutional
review to parliament. The Ethiopian Constitution has a similar arrangement in place, where the judiciary is excluded from the constitutional review system and a political body has been entrusted with this duty. See: *Judicial Review Systems in West Africa*, page 21.

Beyond a traditional constitutional review, where conduct or an Act infringes or threatens a fundamental right in the Constitution, many African countries are yet to develop the law that regulates the challenging of administrative acts on the basis of other grounds of review (for example, that the administrative decision was taken arbitrarily). Currently, in a number of African countries, judicial review is mainly used within the context of political elections. Thus, administrative law (and the judicial review procedure) is still relatively rudimentary in most African countries.

**Judicial independence**

Judicial independence is crucial to the existence of the rule of law. A competent and independent judiciary can assist with asserting accountability within government through a party's use of certain legal processes, including judicial review. However, having access to an effective judicial arena is not the panacea to all qualms that a country may be experiencing. Judicial review is a reactive mechanism that requires interested (usually private) parties to know their rights or have the resources to be advised of their rights and to have the finances and stamina to litigate a judicial review application to finality, which ordinarily will be in a court of appeal. These issues are compounded in some African countries where legal literacy levels are relatively low, access to resources is limited and there is a stigma against suing the government.

The result is that judicial review mechanisms are generally under-utilised in Africa and consequently, the law that judicial review proceedings seek to enforce is underdeveloped. In comparison to our sister-countries, South Africa is far more progressive and is leading the way with its arsenal of administrative (and constitutional) law jurisprudence. If the current developments are anything to go by, the jurisprudence will continue to positively develop and at a greater pace, which will strengthen the hand of aggrieved parties to challenge unfair and unfavourable administrative decisions.
Contacts

Waseeqah Makadam
Senior Associate

SJ Thema
Partner

> Read the full article online