RECONCILING THE CONSTITUTION AND COMMON LAW: A CALL TO TRANSFORM JUDICIAL REVIEW IN KENYA

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ABSTRACT

The Constitution of Kenya 2010 ushered in an era of transformation by presenting a paradigm shift in the manner courts should approach judicial review. However, this shift has not been appreciated or has been resisted by many in the Judiciary who still follow the old common law doctrines that limit judicial review to matters of procedure while shying off merits. This is evident in jurisprudence from the High Court where judges have declined to acknowledge this fundamental shift in approach to judicial review.[i] *Whereas Articles 23(1), 47 and 165(3) and the Fair Administrative Act 2015 have revised the principles that guide judicial review in Kenya, the judiciary has failed to grasp this shift and is still steeped in common law jurisprudence.*

The first part of this paper discusses the various bases of judicial review in the constitution of Kenya 2010.The second part explores Kenyan case law to illustrate resistance by showing that definitive features of common law judicial review remain untouched with concern being restricted to procedure as opposed to merits of the decision. The third part explores case law to illustrate that even tentative but progressive shift of judicial review as contemplated by the Constitution is appreciated by an insignificant minority and largely faces resistance from those schooled under common law doctrines.

INTRODUCTION

The Constitution of Kenya 2010 ushered in an era of transformation by presenting a paradigm shift in the manner courts should approach judicial review. The shift was defined largely by a move from a common law to rights based practice. However this shift has not been appreciated or has been resisted by many in the Judiciary who still follow the old common law doctrines that limit judicial review to matters of procedure while shying off merits. This is evident in jurisprudence from the High Court where judges have declined or have been slow to acknowledge this fundamental shift in approach to judicial review.[ii]Whereas Articles 23(1), 47 and 165(3) and the Fair Administrative Act 2015 have revised the principles that guide judicial review in Kenya, the judiciary has failed to grasp this shift and is still steeped in common law jurisprudence.

SOURCES OF AUTHORITY FOR JUDICIAL REVIEW IN THE CONSTITUTION

The doctrine of judicial review has numerous bases in the Constitution of Kenya 2010. Article 165(3) (d) sets out the express constitutional underpinning for judicial review of legislation,[iii] executive conduct[iv] and conduct of state organs in respect of counties.[v]Article 165(b) also empowers the High Court to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.[vi]All these are constitutional provisions that expressly empower the judiciary to review legislation, executive conduct and matters bearing on devolution of government.

Judicial review authority also has a strong basis and can be construed from the text of the Constitution. First, Article 2 (1) the Supremacy Clause expressly states that a form of judicial review exists:

> This Constitution is the supreme *law* [emphasis] of the Republic and binds all persons and all State organs at both levels of government.

The Constitution by proclaiming itself law, invites and suggests that judges should interpret it. Second, the Constitution provides at article 2(4) that:

> Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

That suggests that only statutes consistent with the Constitution are law. Since judges have a role in determining that a statute conflicted with the constitution (as opposed to the alternative possibility that the parliament would have the exclusive power to make that determination), this provision although open to other interpretations, more significantly suggests that courts can review legislation to determine constitutionality.

Third are other openings for constitutional judicial review but which have not been the source of extensive analysis in Articles 22 and 258 of the Constitution.

In terms of Article 22 (1) "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." Such person may be acting in his own or in the interests of others or an association. In furtherance of this, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 have been enacted.

In terms of Article 258 (1) "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." Such proceedings may be instituted by a person acting in his own or in the interest of others.

The three provisions confer on the High Court the jurisdiction to undertake judicial review of executive and legislative action by the government and its officers— it confers jurisdiction in respect of any matter arising under the Constitution or involving its interpretation and arising under the laws made by the Parliament and in particular, to ensure that such action is carried out within limits imposed by the Constitution and any valid statute.

KENYAN CASE LAW TO ILLUSTRATE POST 2010 RESISTANCE TO CONSTITUTIONAL REVIEW

Kenyan courts still largely view judicial review as a common law prerogative whose aim is to ensure that public bodies act within limits of legislation passed by Parliament. This has its origins in the case of *Associated Provincial Picture Houses v Wednesbury Corporation*[vii] where

the Court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that: in making the decision, the defendant took into account factors that ought not to have been taken into account, or the defendant failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable authority would ever consider imposing it. The court held that the decision did not fall under any of these categories and the claim failed. Kenyan courts in enforcing *Wednesbury* have failed to appreciate that the case was premised on the notion of parliamentary supremacy, separation of powers and institutional competence which is not the case under the Constitution of Kenya 2010.

In *Republic V Commissioner of Customs Services Ex-Parte Africa K-Link International Limited*[viii]C.W. GITHUA J held in 2012 the High Court stated that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. It reiterated that once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since that would substitute its own decision with that of the Respondent. The judge said:

the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates…

Six years into the 2010 Constitution Anyara Emukule J held in *Republic v Kenya Revenue Authority Ex Parte Abdalla Brek t/a Al Amry Distributors and 4 Others*[ix]that:

To start with, I wish to state that the purpose of a judicial review court is not to look at the merits of the decision being challenged but at the process through which the decision was made.

In 2015, Odunga J in *Republic v Secretary County Public Board & another Ex parte Hulbai Gedi Abdille*[x] quoting a 2001 case still held that:

…At this stage it is important to revisit the parameters of judicial review jurisdiction. The said parameters were set out by the Court of Appeal in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal №185 of 2001 in which it was held that: "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

As recently as 2016, Judge Odunga stated in *Kokebe Kevin Odhiambo &12 others v Council of Legal Education & 4 others*[xi]*:*

It is my view that the decision by the School and the Council to require the petitioners to undertake remedial programme cannot be termed unreasonable. It must be remembered that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness

In 2015, Olao J in the case of *Virginia Wangari Njenga (Suing as administratix of the Estate of Charles Njenga Mukuna) v Land Registrar, Murang'a & 2 others*[xii] quoted the same case when he stated "judicial review is concerned with the decision making process and not with the merits of the decision itself—[Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd Civil Appeal No. 185 of 2001…]"

In the year 2015 also, Korir J in *Republic v Kenyatta University, Vice Chancellor—Kenyatta University & 5 others Ex-Parte Elena Doudolado v Korir*[xiii]while quoting a pre 2010 case *Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300* held that:

The purpose of judicial review is to ensure fairness to those who appear before public authorities. Judicial review is different from an appeal as an appellate court looks into the merits of a decision whereas judicial review is only interested in the legality, rationality and propriety of the process through which the decision was reached.

The same judge in again in *Kenya Power & Lighting Company Ltd & another* stated:

It is clear that a judicial review court does not consider the merits of the decision of a tribunal or public body. Any person dissatisfied with the merits of the decision of a tribunal or public body ought to file an appeal where an appeal is provided for.

The above cases are all evidence that Kenyan judges schooled in common law doctrine have so far not been able to appreciate the impact which constitutionalization of judicial review in Articles 23, 47 and 165 has come to have on judicial review and continue to apply the discredited principles of *Wednesbury*. Given that Wednesbury operates in a parliamentary supremacy regime, courts are unlikely to challenge the substantive provisions of a statute and will regularly, citing separation of powers and institutional competence give way to the executive in matters of national security. The approach fails to appreciate that under the Constitution of Kenya 2010 the courts are now enjoined to operate in a constitutional supremacy regime.

KENYAN CASE LAW TO ILLUSTRATE TENTATIVE BUT PROGRESSIVE CHANGE

Under Articles 23, 47 and 165 (b)(d) judicial review should be guided by constitutional principles and not common law. These articles suggest that a court is to look at the merits of a decision by considering its compliance with substantive constitutional principles including the Bill of Rights because the basis of judicial review under the Constitution is now protection of Human Rights and freedoms which demands consideration of the merits of a decision by the executive.

In terms of Article 19(3), the public-private dichotomy in judicial review is erased so that courts are, unlike the position in Wednesbury, empowered to horizontally review action in the private sphere. This is the implication of the provision that rights and fundamental freedoms in the Bill of Rights 'belong to each individual and are not granted by the State;'.

In terms of Article 23, judicial review is a remedy for violations of the Bill of Rights including violations by private persons as contemplated by Article 47. The power of review is extended to supervision by the High Court of subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.[xiv] These articles of the Constitution incorporate provisions of a Bill of Rights that apply vertically as against the state and horizontally as against individuals.

A few emerging authorities that follow have made tentative steps towards appreciating the demise of *Wednesbury* and the central role which the Constitution now has in all judicial review matters.

The Supreme Court has in the case of *CCK v Royal Media Services Ltd* [xv] recognized that the power of any judicial review is now found in the constitution. The control of public power by the courts through judicial review is now a constitutional matter. To that extent, the High Court in *Margaret Nyaruai Theuri v National Police Service Commission* appreciated that Articles 22 and 23 guarantee any person the right to seek judicial review orders without need for parties seeking judicial review to do so in the name of the Republic as was the case under the old constitution.[xvi]

Ongaya J in *Peter Muchai Muhura v Teachers Service Commission*[xvii] appreciated the superiority of constitutional principles in judicial review when he held that 'in judicial review proceedings under the current constitutional dispensation 'the court (in such proceedings) is entitled to delve into both procedural and substantive or merit issues'.

The change was also appreciated by Muriithi J in Khadhka Tarpa Urmila v Cabinet Secretary Ministry of Interior and Coordination of National Government[xviii] where the court held that the matter before the court being a constitutional petition for the enforcement of Rights, Order 53 of Civil Procedure Rules did not apply and the court was entitled to examine the merits of a decision.[xix]

In *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board*[xx] Justice Onguto signified a shift but without solid recommendation for change when he observed as follows:

It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a "reasonable" administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.

Another case which raised the matter of constitutionalization of judicial review and its consequences for *Wednesbury* was *Masai Mara (SOPA) Limited v Narok County Government*[xxi]wherein the court stated at para 54:

I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of Rights, to grant by way of relief an order for judicial review…

The effect of constitutionalization of judicial review has also caught the attention of the eminent Kenyan academic James Thuo Gathii who advises against parallel approaches to judicial review [common law and constitutional] but rather adoption of the model conceived by the Constitution:

The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.[xxii]

The Supreme Court in *Speaker of the Senate v Attorney General* [xxiii] pointed out that Parliament had to function under the Constitution and that the 'English tradition of Parliamentary supremacy' did not fit in well with constitutional supremacy as is the case in Kenya. The import of this for judicial review was that constitutional principles superseded common law and legislation with the consequence that Wednesbury principles developed by common law had of necessity to give way.

CONCLUSION

In conclusion, it is apparent that the Constitution sets out the objectives, values and principles that should inform Kenyan laws, and such values should, without doubt override common law principles applicable to judicial review. Article 20 (3) of the Constitution also demands that judges develop the law to give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The import of this Article is that the Constitution takes centre-stage in application of statutory or common law rules in adjudication of disputes. In principle therefor, where common law rules in judicial review fall short of constitutional principles, the latter should prevail and courts are called upon to develop them to the extent of the shortfall.

In view of the arguments advanced in the cases above, the provisions of the Constitution and the inconsistent decisions, there is need to transform the practice of judicial review in Kenya to align it with the Constitution. This would reduce some of the confusion that has defined court decisions.

REFERENCES

[i] For example in the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex-Parte Seven Seas Technologies Limited*, Misc.Civil Application no 168 of 2014 and *Kevin K.Mwiti & Others v Kenya School of Law & 2 Others*, Petition 377, 395 & JR of 2015. In the two decisions, the courts have insisted that Judicial Review should limit itself to procedure and nothing more.

[ii] For example in the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex-Parte Seven Seas Technologies Limited*, Misc.Civil Application no 168 of 2014 and *Kevin K.Mwiti & Others v Kenya School of Law & 2 Others*, Petition 377, 395 & JR of 2015. In the two decisions, the courts have insisted that Judicial Review should limit itself to procedure and nothing more.

[iii]Article 165 (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution;
[iv] Article 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
[v] Article 165(d) (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;…
[vi] (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
[vii] [1948] 1 KB 223, [1947] EWCA Civ1.
[viii] [2012] eKLR.
[ix] [2016] eKLR.
[x] [2015] eKLR Para 34.
[xi] [2016] eKLR.
[xii] [2015] eKLR.
[xiii] [2015] eKLR Paras 26–27s.
[xiv] Article 165(6).
[xv] Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR at para 359 "This principle is enshrined in our Constitution (Articles 23(3)(d) and 165(3)(d))."
[xvi] [2016] eKLR
[xvii] [2015] eKLR
[xviii] [2016] eKLR
[xix] *ibid*
[xx] [2016] eKLR.
[xxi] [2016] eKLR.
[xxii] "The Incomplete Transformation of Judicial Review," A Paper presented at the Annual Judges' Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014.
[xxiii] [2013] eKLR.