THE IMPACT OF JUDICIAL REVIEW OF ADMINISTRATION ON THE APPLICATION OF HUMAN RIGHTS AND THE RULE OF LAW IN NIGERIA

Angela E Obidimma

Abstract
Judicial review is an important aspect of administrative law employed in checking the activities of the executive/administrative and legislative arms of government. This is to ensure that the exercise of their functions is in line with the purpose of administrative law which is that powers are kept within their legal bounds, so as to protect the citizens against their abuse. With particular reference to the executive/administrative arm of government, in modern governance they are concerned with both administrative functions as well as quasi-legislative and quasi-judicial functions. As a result there are increased chances of their becoming arbitrary and interfering unduly with the human rights (also known as fundamental rights) of the citizens and the rule of law. There is therefore need to ensure the effectiveness of this very important organ of control of administration. This paper examines the law and practice of judicial review in Nigeria to ascertain its impact in the performance of the function of effective control of the administrative organs to ensure that there is proper safeguard of the fundamental rights of the citizens as well as upholding the doctrine of rule of law. While the exercise of judicial review by the judiciary in Nigeria is commendable, there are some aspects of the operation of the concept that hampers its achieving the purpose for which it is set. Furthermore, the practice of judicial review in Nigeria is faced with a lot of obstacles which limit its effectiveness. To enhance the operation of judicial review in Nigeria there is need for a review of the application of the doctrine to incorporate certain improvements that have been made on the operation of the doctrine in other jurisdictions such as the US and the U.K. There is also need to improve the judicial system in Nigeria and ensure the independence of the judiciary in order to enhance the effectiveness of judicial review and ensure that it achieves the purpose of effectively checking the actions of the government and its agencies.

Key Words: Judicial Review, Government, Administration, Human Rights, Citizens.

1. Introduction
In modern governance administrative process cuts across the traditional role of administration and combines into one, all the powers traditionally exercised by the three arms of government. Thus the executive performs variegated functions, viz. to investigate, to prosecute, to prepare and adopt schemes, to issue and cancel licenses, etc.(Administrative); to adjudicate on disputes, to impose fine and penalty, etc (Judicial); to make rules, regulations and bye laws, to fix prices etc. (Legislative). With this all encompassing powers of administration there is an increase in the degree of interaction
with the citizens and a correlative increase in the interference with the rights of the citizens as well as breach of the rule of law.

The 1999 Constitution of the Federal Republic of Nigeria (as amended) safeguards against such possible interference by providing mechanisms for checking and restraining the exercise of executive and other powers of government. Such provisions include separation of powers limitation on governmental powers, human rights, rule of law and other democratic principles, many of which are aimed at limiting political abuse and ensuring that the powers of the state are constrained so that the state cannot act capacious to ensure adherence to the rule of law and protection of human rights.

The Constitution in this vein vests in the judicial arm of government; the courts, the power of judicial review to check and restrain arbitrary exercise of executive and legislative power to ensure protection of the rights of the citizen and to uphold the rule of law.

This paper focuses on the examination of judicial review and its effectiveness in safeguarding the fundamental rights of the citizen and ensuring the upholding of the doctrine of rule of law in Nigeria, noting the limitations in the law and practice of judicial review which include loopholes inherent in the doctrine itself as well as the problems arising from the application of judicial review which is generally the problems facing the judiciary in Nigeria, such as lack of independence, corruption, inadequate financing etc.

The paper concludes with suggestions that will advance the law and practice of judicial review in Nigeria.

2. Judicial Review

Judicial review is a specialized remedy in public law by which the court exercises supervisory jurisdiction over the acts of the executive and legislative arms of government. The term judicial review means a court’s power to review actions of other branches or levels of government, especially the court’s power to invalidate legislative and executive actions as unconstitutional. It also means a court’s review of lower courts or administrative body’s factual or legal findings.

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2 Hereinafter referred to as the 1999 Constitution
3 The phrases, human rights and fundamental rights are used interchangeably in this work as having the same meaning.
5 Attorney General of the Federation v Abule (2005)11 NWLR (Pt 936) 369. The emphasis of this paper however is on judicial review of the activities of the executive.
According to Nwabueze\(^6\) it is the power of the court in appropriate proceedings before it to declare a governmental measure either contrary or in accordance with the constitution or other governing law, with the effect of rendering the measure invalid or void or vindicating its validity…

In the case of \textit{Abdulkarin v Incar Nigeria Ltd}\(^7\) the Supreme Court of Nigeria highlighted the scope of judicial review within the Nigerian constitutional jurisprudence thus:

In Nigeria, which has a written presidential constitution, judicial review entails three different processes; namely:

(i) The courts particularly the Supreme Court, ensuring that every arm of government plays its role in the true spirit of the principles of separation of powers as provided for in the constitution.

(ii) That every public functionary performs his functions according to law, including the Constitution; and

(iii) For the Supreme Court, that it reviews court decisions including its own, when the need arises in order to ensure that the country does not suffer under the same regime of absolute or wrong decisions.

Judicial review is important as an effective means of securing the legal control of the administrative process. It is a great and effective deterrent to administrative excesses and abuses. In man’s unending quest for liberty and freedom, judicial review is evolved as a means of effectively holding the government and its functionaries in check and stopping them from unduly trampling on the rights of the individual. The role of the judiciary in protecting the citizen against the excesses of the public officials has become even more important with the increase in the powers and discretion of public officials in the modern welfare state. Administrative law is concerned with the system of constitutional authority down to the lowliest placed administrative agency. The system therefore ensures that legitimacy of Constitution is transmitted and imparted to various grades or levels of agencies and their acts. While carrying on the government business by law, the administration itself is placed under the law, subjected to the basic principles of the law. The court through judicial review examines the legality of the officials’ acts and thereby safeguards the fundamental and other essential rights of the citizens. The underlying object being to ensure that the authority does not abuse its power and that the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion, which is correct in the eyes of law. Judicial review is thus an effective means of imposing and enforcing the demands of the rule of law on the administration and safeguarding the fundamental and other essential rights of the citizens. It clearly underscores the relevance of the theory of Montesquieu that if the liberty of the individuals is to become a reality,


\(^7\) (1992)7 NWLR (Pt 251) 1
power should be made to check power, and an arm of government like the judiciary, and not an individual, should be set to oppose and check another arm of government.

Judicial review has statutory effect on the liberty of the individual because it curbs the pride and arrogance of the overzealous official who has to fear the possibility of being called upon to explain and justify his action in an open court. He must therefore pay attention to details and minute provisions of the enabling statute, he must seek to be balanced, just and fair in judgment; he must be thoughtful, reasonable and dispassionate. In the absence of any judicial review, he is likely to be haughty, arbitrary and reckless in action; he may even take to excesses and pay little or no attention to public opinion and the demand of the law. Judicial review therefore operates like brakes on the wheels of the administrative machinery, compelling the administration occasionally to stop and take stock as well as move cautiously so as to avoid provoking challenges to the legality of their actions.

Judicial review in Nigeria has constitutional recognition. Firstly in granting legislative powers in section 4(8) of the 1999 Constitution the constitution provides ‘… that the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of the courts of law…’ Secondly in granting judicial powers, the constitution provides that the judicial powers granted to the superior courts in Nigeria shall extend to all inherent powers and sanctions of a court of law. Thirdly the constitution grants supervisory jurisdiction to the State High Courts which they exercise by judicial review as stated by the S.C. in A.C.B. Plc v Nwaigwe thus: ‘Judicial review is the supervisory jurisdiction of the High Court exercised in review of the proceedings, decisions and act of inferior courts and tribunals and acts of governmental bodies.’

By giving the power of judicial review to the courts, the 1999 Constitution ensures obedience to its provisions by all persons and authorities since the courts are alert to declare any violation of its provisions an illegality. Judicial review is perhaps the most important development in the field of public law in the second half of this century, acting as a great weapon in the hands of judges.

3. The Application of Judicial Review

Judicial review is different from normal adjudicatory proceeding or an appeal. In the exercise of its normal adjudication such as first instance hearing and determination of issues of law and fact in a controversy, the judiciary exercises its normal constitutional function of adjudication. It has to entertain all actions, make all necessary determinations involving, law and facts and see that all parties get their due according to the law of the

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8 S. 6 (6) [a]
9 S. 272 (2)
10 (2011) 7 NWLR (Pt 1246) 380
In the case of an appeal, the court may have to go into the merits of the case and the weight of evidence sustaining a decision, it may have to rehear all or some aspects of the case and find support or justification for the decision given below; it may have to quash a decision appealed against and replace it with its own decision or do whatever the justice of the case demands – for while an appeal process delves into the value of the decision under scrutiny judicial review deals with the legality of the decision under the examination of the court.

In reviewing the High Court exercises its inherent supervisory jurisdiction over inferior courts, tribunals and administrative agencies whereas in dealing with a case de novo the court relies on sections 6 (6), 36(1) and 272 of the 1999 Constitution. In review cases the court is concerned with keeping the administration within bounds of legality by ensuring that it does not do what in law it ought not to do. The court in other words, is not concerned with the merits of either the case or the decision thereon.  

In judicial review the courts generally do recognize that the statutory responsibility for performing a given function has been given to the administrative agency concerned and that no other person or authority is competent under the law to exercise that function. Therefore, the courts can only review the actions taken by the agency solely for the purpose of determining whether or not the agency has acted within the limits prescribed by the enabling statute. The courts cannot go into the matter de novo or set aside the agency’s decision merely because the courts would have come to a different conclusion or decision.  

In Military Governor of Imo State v. Nwauwa the Supreme Court expounded the principles governing the exercise of judicial review. In that case, the respondent challenged the exercise of power by the Military Governor of Imo State to remove him as a traditional ruler of Izombe following series of petitions and an inquiry set up by the Governor.

The Supreme Court held that the court of Appeal exceeded its jurisdiction in trying to substitute its own opinion or views for the views of the panel of inquiry. According to the Supreme Court:

(a) Judicial review is not an appeal
(b) The court must not substitute its judgment for that of the public body whose decision is being reviewed.
(c) The correct focus is not upon the decision but on the manner in which it was reached.

13 (1997)2 NWLR (Pt 490) 675
What matters is legality and not correctness of the decision.

The reviewing court is not concerned with the merits of a target activity.

In a judicial review, the court must not stray into the realms of appellate jurisdiction for that would involve the court in a wrongful usurpation of power.

What the court is concerned with is the manner by which the decision being impugned was reached. It is legality, not its wisdom that the court has to look into for the jurisdiction being exercised by the court is not an appellate jurisdiction but rather a supervisory one.

However, in practice it may be difficult to make a clear distinction between judicial review properly so called and normal adjudicatory proceeding in Nigeria. This may be attributed to the fact that in Nigeria judicial review is of common law origin, and also in addition to other judicial proceedings is traceable to the constitution. This is unlike in England where the power of judicial review is almost entirely of common law origin. In Nigeria Section 6 of the 1999 Constitution of Nigeria vest all judicial powers in the court, thus we find that it is the same courts that exercise judicial review that also conduct normal adjudicatory proceedings such as first instance trial, and sometimes even appeal. Furthermore in contemporary adjudication in Nigeria, emphasis has shifted from dwelling on technicalities to doing substantial justice. As a result the High Courts may not follow strictly the provisions of the High Court Rules relating to the commencement of proceedings for judicial review, making it difficult to distinguish actions coming to the court on judicial review from actions before the court in its exercise of normal adjudicatory process.

For the commencement of proceedings for judicial review the High Court Rules of the various states in Nigeria provide for a two phased applications, the first is for a leave to apply for judicial review brought ex parte, and the second is the substantive application by way of summons or motion on notice. However, cases of judicial review are known to have commenced by way of writ of summons, which is a procedure for commencement of proceedings before the court on their normal adjudicatory process. For instance the case of Military Governor of Imo State v Nwauwa, a notable case on judicial review was commenced by way of writ of summons. The courts’ attitude is based on the reasoning that the mere fact that a case is brought to court under a wrong law or procedure should not be allowed to defeat the action, provided that the court has jurisdiction to take cognizance of such cases.

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15 Supra
Consequently, today we have cases in which the court is exercising normal judicial proceedings but in substance they are judicial review proceedings because what is in issue before the court is entirely the legality or otherwise of an administrative agency’s action or inaction. The result is that in Nigeria today, in order to determine whether a given proceeding is a judicial review proceeding or not, we have to look, not at the form of proceedings but on the substance of the proceedings.\textsuperscript{16} If a review of the substance of a case reveals that what is in issue is the legality or legal validity or otherwise of an administrative action, then it is a matter of a judicial review notwithstanding the form of the action.

In an appropriate case for judicial review, in order to win the sympathy and support of the court the applicant must prove either or all these three grounds thus:

- That the agency acted without or in excess of its jurisdiction; that is, that it acted \textit{ultra vires}, which may be either procedural or substantive.
- That the agency violated or disregarded the rules of natural justice in a situation appropriate for their application; or
- That the agency committed an error of law which is quite apparent or glaring on the face of the record of a given proceedings.

4. Remedies in Judicial Review

Generally, an applicant for judicial review must have an eye on a specific remedy, depending on the nature of the power being challenged and the form of grievances he has. If there is a statutory remedy he must go for it, particularly where it is exclusive. Even where such a relief is not exclusive an applicant for review may be compelled to exhaust all available statutory remedies (such as an appeal to a higher administrative officer, a tribunal or a minister) before resorting to any prerogative and other alternatives.

Remedies available to the aggrieved party in judicial review cases are mainly prerogative in nature and include the orders of certiorari, prohibition and mandamus. Other remedies include the equitable remedies of injunction and declaration as well as the common law remedy of damages/restitution.

\textbf{Certiorari} - is an order available for an individual who seeks annulment of an administrative decision. The order of certiorari is the most sought after of the prerogative remedies in judicial review proceedings, and will often be the only remedy which is required. Historically certiorari and prohibition were originally the means by which the court of King’s Bench in both England and Ireland restrained inferior courts from

exceeding their jurisdiction; and both are still used for that purpose by the High Court today. However, their scope has been extended beyond this.

Certiorari is an order which enables a superior tribunal to call upon an inferior tribunal to bring up the record upon which the inferior court or administrative tribunal based its decision of a judicial or quasi-judicial nature for review, and if bad to be quashed. It enables the superior tribunal to review that record with a view to ascertaining the legality of the decision based on it. Thus where consequent upon the decision the superior court establishes that there is a want or excess of jurisdiction, or denial of natural justice or error of law on the face of the record the order of certiorari will lie.

In *Garba v University of Maiduguri*\(^\text{17}\) the Supreme Court held that the University disciplinary panel had exceeded its jurisdiction and invoked the remedy of certiorari to quash the panel’s decision. The panel had been set up to investigate alleged acts of looting and arson against demonstrating students. The students were found guilty and several amongst them Garba, were rusticated. They file this action seeking their reinstatement.

**Prohibition** - The order of prohibition issues to prevent an inferior court or tribunal from exceeding or continuing to exceed its jurisdiction or infringing the rules of natural justice or acting in error of law.

Prohibition is governed by similar principles as certiorari, except that it does not lie when once a final decision has been given. In other words, the difference between certiorari and prohibition is essentially one of timing. Prohibition issues to restrain the making of a decision in excess of jurisdiction etc, certiorari to quash such a decision where it had already been made. Both followed the same course of development, being extended to cover administrative bodies insofar as these resembled courts. Consequently, a person or body amenable to certiorari would also be subject to prohibition, and vice versa.

In *Gani Fawehinmi v Legal Practitioners Disciplinary Committee*,\(^\text{18}\) a High Court issued an order prohibiting the disciplinary committee from sitting over charges preferred against the applicant. The applicant contended that the body as constituted could not give him a fair hearing. The Attorney General was prosecuting through one of his subordinates, and was also statutorily the chairman of the disciplinary committee.

**Mandamus** – The order of mandamus is the classical means of compelling the performance by a public body of a duty imposed on it by law, as a first resort where no other order is available. The court can also make the order of mandamus as a consequential order in any deserving case before it. Mandamus is flexible compared to

\(^{17}\) (1986) 1 NWLR (Pt 18)550
\(^{18}\) (1985) 2 NWLR (Pt 7) 300
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certiorari; it will issue to a wider range of persons and bodies and the form of the order is capable of variation. It may be used in conjunction with another remedy (it may not however be sought in conjunction with damages).

In Architects Registration Council of Nigeria (in re Majorah) v Prof. M.A. Fasasi,19 the Supreme Court made an order compelling the Architects Registration Council of Nigeria to register the appellant who’s right to be registered had been upheld by the court four years earlier.20

**Injunction** – This is an order issued by the court in its equitable jurisdiction requiring a party to either do a particular thing (a mandatory injunction) or to refrain from doing a particular thing (a prohibitory injunction). In its scope injunction appears to be virtually infinite for it is both a private and public law remedy. It is a familiar remedy in many areas of private law, such as contract, tort, and family law. Its role in public law seems to be more circumscribed as a result of the existence of prohibition. Yet even in public law it performs an essential function since it may be granted against bodies whose function contains no judicial element.

Under the English legal system, for centuries the decree of injunction was awarded solely by the chancery court. This is so, because for a considerable length of time (up till the 19th century) under the English legal system, law and equity were administered in separate courts. However in Nigeria the courts since independence are enjoined by statutes to administer law and equity concurrently.21 Thus the courts have wide jurisdiction to award the equitable remedy of injunction.

**Declaration** - This is a conclusive statement by a court of the pre-existing rights of the parties; a court’s declaration or statement resolving a dispute as to the meaning or; application of the law applicable to a situation in which the applicant has a sufficient interest. Technically, the order of declaration has almost no mandatory or restraining effect. Declarations are often accompanied by consequential relief ordering or restraining certain conducts; a mere declaration cannot be executed or enforced.

Declaration operates both in private and public law

5. **The Impact of Judicial Review on Administrative Actions Affecting Human Rights and the Rule of Law**

Judicial review safeguards against abusive acts by public authorities and helps to secure the rights of the citizen as well as maintain the rule of law. In fact the essence of judicial

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19 (1987) 3 NWLR (Pt 59) 42
20 See also Gani Fawehinmi v Akilu & Anor. (1987) 4 NWLR (Pt 67) 797
21 See for example, Federal Supreme Court Act 1960 s. 16(b); High Court of Lagos Ordinance s. 19.
review is to ensure the rule of law. This was buttressed in *R. (Alconbury) v Secretary of State* 22 where it was stated that “the principles of judicial review give effect to the Rule of Law.”

In every society, particularly ones with nascent democracy, there is the challenge to maintain the rule of law and safeguard against abuse of power as well as a commitment to the fundamental rights which preserve human dignity. This can only be secured with an independent judiciary and legal profession, to ensure effective review of actions of government and other public authorities, when affected citizens resort to court.

Before we go into a review of the actions of these administrative agencies that are against the rule of law and affect the rights of the citizen, there is need to take a cursory look at the terms rule of law, and human rights.

**Rule of Law** - The concept of rule of law has a generic connotation in the sense that it has no precise legal meaning. However, it can be generally understood as a legal – political regime under which law restrains the government by promoting certain liberties, creating order and predictability regarding how a country functions. 23 Rule of law is basically a system that attempts to protect the rights of the citizens from arbitrary and abusive use of government power.

This in line with the definition of the concept given by A.V. Dicey 24 which though dates back to 1959 and criticized by several authors and jurists is still very relevant in these contemporary times. Dicey gave three meanings of the concept. The first is that the rule of law means:

> the absolute supremacy or predominance of regular law as opposed to the influence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government... a man may be punished for a breach of law, but he can be punished for nothing else

Dicey’s second meaning of the concept emphasized the principle of equality before the law: that every citizen, including officials must be amenable to the jurisdiction of the ordinary courts of the land. He stated: “The rule of law means equality before the law or equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.” The third meaning of the rule of law as stated by Dicey is that:

> The rule of law may be used as a formula for expressing the fact that with us, the laws of the constitution, the rules which in foreign

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22 (2001) UKHL 23
countries naturally form part of the constitutional code, are not the source but the consequence of the rights of individuals as defined and enforced by the courts, that in short the principles of private law have with us been the actions of the courts and parliament so extended as to determine the position of the crown and its servants; thus the constitution is the result of the ordinary law of the land.

Dicey’s definition has been severally criticized by various jurists and authors. However, I am of the view that with certain exceptions and necessary qualifications to suit different legal systems the definition is still very relevant in these contemporary times. From this definition one can safely conclude that subject to some exceptions, the rule of law entails:

- The supremacy of law over arbitrary power.
- Every person is subject to the ordinary law of the land and therefore must obey the law and disobedience of the law will be on pain of sanction or punishment.
- Every person should be equal before the law. Every citizen should be subject to the jurisdiction of the courts of the land.
- The fundamental rights of the individual, which are inalienable, should not be denied him, unless as provided in the constitution.

**Human Rights** - Human rights otherwise referred to as fundamental rights are rights naturally accruable to every person by virtue of his/her existence as a human being; rights which by their nature have become fundamental to existence. They are more than mere rights. Sieghart\(^\text{25}\) distinguishes human rights from other rights in two ways: One, other rights are acquired and are created by some act or event, for example by a contract or inheritance or a tort. So, the right can be transferred, disposed of or extinguished by other acts or events. Human rights on the other hand, are not acquired and so cannot be extinguished or transferred by any act or event. Human rights are said to inhere universally in all human beings by virtue of their humanity alone and are thus inalienable. Two, that the primary correlative duties of human rights fall on states and public authorities and not on individuals.

In *Saude v Abdulah*\(^\text{26}\) the Nigeria Supreme Court declared of them thus: “fundamental rights are important and they are not just mere rights. They are fundamental. They belong to the citizen. These rights have always existed even before orderliness prescribed rules for the manner they are to be sought.” It was further described in *Ransome Kuti & Ors v A.G. of the Federation & Ors*\(^\text{27}\) as rights which stand above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to

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\(^{26}\) (1989)4 NWLR (Pt 116) 387 at 419

\(^{27}\) (1985)2 NWLR (Pt 211) 230
a civilized existence.” The 1999 Constitution guarantees and provides for these rights under Chapter IV as fundamental rights, which are accorded to all Nigerians.

The constitution and other laws in democratic settings enjoin that the government authorities and other administrative agencies should in their governance and other interactions with each other as well as the citizenry observe the rule of law and respect the fundamental rights of the people. However, it is not unusual to find that a lot of activities of the government, its agencies and other administrative agencies fall short of the directives of the laws and do interfere with the fundamental rights of the people, as well as breach the rule of law. By means of judicial review, the judicial organ of government exercises a measure of control and checks the executive and even the legislators to prevent such abuses and so safeguard the rights of the citizens and ensure that there is observance of the rule of law. It is said that elaborate provisions on the constitution on the rights of the citizens are not in themselves enough to guarantee their implementation or enforcement. It requires judicial enforcement to give effect and life to those provisions.

Similarly, a constitutional guarantee of a right may be inadequate, but in expounding the provisions through judicial review or enforcement, the courts may inject life into them.

The courts in Nigeria do play a significant role in safeguarding the fundamental rights of persons through effective intervention in cases where it is shown that such rights have been or are being threatened. In Attorney General of the Federation v Abule the Court of Appeal stated inter alia thus:

It is trite that the constitution being the organic law of the country declares in a formal, emphatic and binding principles the rights, liberties, responsibilities etc of the people including the government and it is the duty of the authorities, which include the judiciary, to ensure its observance. Fundamental rights are regarded as part of human rights and are protected to enhance human dignity and liberty. The position of the court is therefore very important for the purpose of safeguarding the fundamental rights of persons through effective intervention whenever it is shown that such rights have been or are being threatened to be violated.

In a plethora of cases the Nigerian courts have made judicial pronouncements reinforcing the desire of the Nigerian Constitution to safeguard the human rights of the citizens and uphold the rule law. In fact judicial review is the principal means by which the people challenge the legality of action taken by public authorities. As such, it is an important tool for providing redress and holding government to account. The rule of law demands

\[28(2005)11NWLR(Pt936)369\]
that a public authority should only make a decision or adopt a course of conduct if it can find positive law to justify it.

In *A.G. Bendel State v Aideyan* the appellant State Government purportedly acquired the Plaintiff’s building. Not being satisfied, the Respondent sued the State Government. On appeal the Supreme Court of Nigeria held that the Respondent was entitled to his buildings. The court stated, per Nnaemeka – J.S.C. thus:

The right to property in Nigeria is entrenched under section 40 of the 1979 Constitution. That right is inviolable and such property or any right attendant thereto can only be taken possession of or compulsorily acquired by or under the provisions of a law. Further, such law must provide for the payment of adequate compensation to the owner… It follows therefore that any purported acquisition which is not according to a law containing the above provisions is no acquisition at all in the eyes of the Constitution.

In *Okogie v A.G. Lagos State* the Lagos State Government abolished private ownership of primary schools by issuing Government circular dated 26th March 1980, by which no private primary school will be allowed to operate in the state with effect from 1st September 1980. The Plaintiff contended that the action of the Lagos State Government was in breach of the right to freedom of expression and press under the Constitution. It was held that the Lagos State Government had no power under the relevant laws to abolish private ownership of primary schools in Lagos, and that the right of the Plaintiff to own and operate schools under the Constitution must be protected.

In *All Nigerian Peoples Party & Ors v Benue State Independent Electoral Commission & Ors* the Appellants had sponsored candidates for election into the offices of the chairman and vice chairman of the Kwande Local Government Council of Benue State. After the elections, the results were collated and the officials of the Respondents on 28/04/2004 declared the results of the poll and gave copies of the certificate of return to agent of the Appellants, the police and other agents present at the collation centre. Instead of the 1st Respondent publishing the result and declaring same in the Gazette, as required by law, they announced the following day, over the state radio that the election had been postponed indefinitely. In an action challenging the legality of the action of the Benue State Independent Electoral Commission, it was held inter alia that the Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything should be done according to law.
In Attorney General of Benue State v Umar & Ors, the court declared the actions of the Benue State Governor in dissolving the Local Government Councils in that state as unconstitutional, null and void. The law made by the State House of Assembly which authorized the Governor to impede the smooth running of the Local Government Councils was declared to be unconstitutional, null and void.

In A.G. Lagos State v Eko Hotels Ltd the question was inter alia whether a State is competent to set up a tribunal to enquire into the transfer of shares of a company. In that case, Eko Hotels Ltd was incorporated in 1972 as a private limited liability company with the Appellant, the Lagos State government owning the majority shareholding of 51%, while the second Respondent, Oha Limited owned 49%. In 1997 the Appellant represented by Military Governor of Lagos State and the Secretary to the Military Government, by a Share Purchase Agreement disposed of 26% of the total number of shares owned by the Appellant in Eko Hotels Ltd by sale to Oha Limited. By that sale the Appellant, Lagos State became the minority share holder. However, in August 1999 Lagos State government published a Lagos State Legal Notice No. 10 of 1999 setting up a Standing Tribunal of Inquiry into the Sale and Acquisition of Shares of Eko Hotels in 1997, to determine inter alia the regularity or otherwise of the procedure of sale of the shares.

In an action by Eko Hotels Ltd and Oha Ltd questioning the competence of the tribunal at the Federal High Court the court granted them the relief of prohibition and injunction sought. When the appeal got to the Supreme Court it stated inter alia that:

… the desire to enthrone accountability must not be at the expense of the rule of law. This country operates a Constitution which has defined the powers and limits of each constituting organ of the State and it is desirable, nay compellable that each operates within the sphere allotted by the Constitution which is the supreme law of the land.

6. Limitations of Judicial Review in Nigeria
The concept of judicial review is perhaps the most important development in the field of public law in the second half of this century, and is of very great significance in the modern society where the administration can and do interfere with the liberty of the people in many ways. However, many factors hinder the operation of the concept resulting in its failure to maximally benefit the citizenry, particularly in Nigeria where the law is not developing rapidly enough to meet with the needs of the people. Some of

32 (2008)1 NWLR (Pt 1068) 311 see also Attorney General, Plateau State v Goyol and Ors (2007)12 NWLR (Pt 1059) 57
the factors that limit the effective operation of the doctrine of judicial review are discussed as follows:

Narrow/Limited Scope of Judicial Review - A major limitation to the operation of judicial review in Nigeria is the continued application of the strictly narrow and limited scope of judicial review. This approach restricts the operation of the concept to the determination of the legality of governmental measures but not merits or wisdom of such actions or inactions.

It is our belief however that the operation of judicial review will be more effective if in certain circumstances the scope of the concept is extended to dealing with the merits of a target activity. This position was adopted by the Court of Appeal in the case of Fawehinmi v Abacha where the court held that the power of judicial review in deserving circumstances should be extended to the merit of the target activity or decision.

In that case, the Court of Appeal considered the discretionary powers of the Inspector-General of Police (IGP) under the State Securities (Detention of Persons) Act, Cap 414, Laws of the Federation of Nigeria 1990 as amended by the State Security (Detention of Persons) (Amendment) Decree No. 11 of 1990, and surmised that the powers of the IGP were not unfettered powers. It was reiterated inter alia that:

By virtue of section 1 of Decree No. 20 of 1984 (as amended) if the Inspector-General of Police is satisfied that any person is or recently has been concerned in acts prejudicial to state security or has contributed to the economic adversity of the nation or in the preparation or instigation of such act, and by reason thereof it is necessary to exercise control over him he may by order in writing direct that person to be detained in a civil prison or police station or other places specified by him.

From the above, the considerations that inform the satisfaction of the Inspector-General of Police to issue detention order is rooted on empirical facts which he ought to come to dutifully and honestly and not by mere fanciful or wishful thinking. It imparts on him elements of discretion founded on hard core reasoning and endurable and unadulterated facts. Because the Inspector-General of Police is discharging the duty on behalf of the public, they, it must be conceded, are entitled to know the situational premise on which the Inspector-General appears to have acted. The court held that the court could inquire into the factual basis for the exercise of the discretion and under normal circumstances would accept the opinion of the officer, but if the opinion was one which no reasonable officer would reasonably hold in the circumstance, the court would nullify the exercise of discretion and make an appropriate order.

34 (1996) 9 NWLR (Pt 475) 710.
Though the Supreme Court disagreed with the Court of Appeal on this and held that the Decree vested an unfettered power on the IGP, the decision of the Court of Appeal is more in tune with the intents of the concept of rule of law. The decision of the Supreme Court tends to confer on an administrative agency unfettered discretion which is an anathema to the rule of law.

Furthermore, the decision of the Court of Appeal is in line with the current trends in administrative law in the Commonwealth – expanding the powers of judicial review. In this vein the court in England, as far back as in 1968 had held that the discretion of a statutory body is never unfettered; that it is a discretion that is to be exercised according to law. In the case of Padfield v Minister of Agriculture, Fisheries and Food in interpreting the phrase ‘if the minister in any case so directs’ which was used by the Agricultural Marketing Act 1958 in granting the minister certain powers, the court rejected the connotation of the minister that his power under the Act was absolute and unfettered. The court maintained that every statute conferring authority on an agency has some policy or objects in view, and it is for the court to determine the said policy or object by construing the statute. Even where an unfettered discretion is granted to a minister by a statute, that in itself ‘can do nothing to fetter the control which the judiciary have over the executive…’ It is for the courts to determine whether and when the executive action is lawful.

The above decision was followed in Breene v Amalgamated Engineering Union where it was stated inter alia that:

The discretion of a statutory body is never unfettered. It is a discretion which means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside.

The decision in Padfield v Minister of Agriculture, Fisheries and Food indeed is a landmark in modern administrative law, and the Court of Appeal in Abacha v Fawenhinmi remarked that they were adopting the current trend in this area of law. The principle of limiting the court in matters of judicial review to pronouncing only on the legality of an administrative decision is founded upon the doctrine of separation of powers which assign functions to the different arms of government. To that effect it

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35 1968 A.C. 997
36 (1971)2 Q.B. 75
37 Supra
38 Supra
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requires that in judicial review the reviewing court is to proceed from the premise that the task at hand is one that belongs to a different arm of government, and thus recognize that its role is limited to determining whether that arm of government has properly exercised the power according to the requirements of the law, and not to interpose its views for that of the agency concerned. However, it must be noted that in modern governance the principles of separation of power are not as water-tight as originally conceived by Montesquieu. Furthermore, the executive in modern governance, by the nature of their power now go out of that traditional function of execution and maintenance of the constitution and other laws, and exercise both legislative and judicial functions. In line with this trend one discovers that in review of administrative actions one finds instances where to discover the boundary between legality and merits is impossible to draw. Though some cases may be clear and pose no problem, in some others the issues of legality and merits may be so intertwined that there is no way of pronouncing on one without expressly or impliedly pronouncing on the other. Such situation can be compared to cases where the courts are called to pronounce on their jurisdiction in limine but the court finds that it cannot make such pronouncement without going into the merits of the case. In such cases, the courts have held that it is entitled to go into the merits of the case, take evidence and make pronouncement. This principle it is argued could be extended to the exercise of the powers of judicial review, so that in cases where legality is held up with the merits, the court can pronounce on the merits. Furthermore, since delegation is accepted by our courts, the principle could be developed that a court faced with a situation where legality is so inseparably intertwined with the merits, would be deemed to have through delegation been given the power to act for the agency or other administrative body, thereby effectively dealing with the issue of usurpation and separation of powers.

The above argument is not far removed from what actually applies in the normal court procedures for instance, where statutorily an appeal lies from the decision of an administrative body to a court of law, such as the High Court, the court is placed in the same position as the administrative body and could interpose its decision for that of the administrative body. It therefore seems paradoxical that the same court exercising powers of judicial review could not in deserving cases interpose its decision for that of the agency.

Lack of Judicial Independence - The judiciary is the last hope of the common man particularly with regards to protecting the human rights and enforcing the rule of law. It is indeed a truth; universally acknowledged that judicial independence is one of the principle building blocks of the rule of law. In this vein the 1999 Constitution has adequately empowered them to among other things inquire into the legality of the acts of

39 See Inakoju v Adeleke (2007)4 NWLR (Pt 1025) 423
40 CA Ogbuabor op. cit.
the executive and the legislature. In order for the judiciary to perform their function effectively, the independence of the judiciary is a pre-condition. It is commonly agreed that there are three characteristics of a truly independence judiciary:

First, it is impartial - judicial decisions are not influenced by a judge’s personal interest in the outcome of a case…Second, judicial decisions, once rendered are respected…Third, the judiciary is free from interference. Parties to a case, or others with an interest in its outcome, cannot influence the judge’s decision.41

The 1999 Constitution,42 by allocating the judicial function to the courts secured the independence of the judiciary from the other branches. In furtherance to this, section 36(1)43 by imposing an obligation to determine legal issues before an independent and impartial tribunal, reinforces the independence of the judiciary. There are also other constitutional safeguards for the independence of the judiciary especially as it relates to appointment, removal, security of tenure and salaries of judicial officers. On the basis of the constitutional provisions on the independence of the judiciary there is an obligation on government and other institutions to respect and observe the independence. However, the constitutional provisions may not by themselves ensure the independence of the judiciary, as judicial independence means more than absence of interference from the other organs of government.

Judicial independence also means that:

the deciding officers shall be independent in the full sense, from external direction by any political and administrative superiors in the dispensation of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; thirdly, that day to day decisions shall be reasoned, rationally justified in terms that take account of both of the demands of general principles and the demands of the particular situation.44

Given the above mentioned attributes of judicial independence, one can rightly say that in Nigeria judicial independence is not yet a reality. The Nigerian judiciary has been widely accused of complicity in political and social malady that has afflicted the country. It has been accused, for example, by aggrieved politicians of favoring their political

42 Constitution of The Federal Republic of Nigeria 1999 (as amended) Section 6(1) and (2)
43 supra
opponents in the ruling party in the handling of election petition cases.\(^{45}\) Presently in Nigeria several judicial officers have been arrested and are under investigation by security agencies across the country for alleged corrupt practices and fraud linked to the performance of their duties as judicial officers.

The appointment and removal of judges which are controlled by the executive are not removed from political and other external considerations. The manner of removal of the President of the Court of Appeal in 2011 is an indication of this undue influence by the executive.

The 1999 Constitution also has detailed provisions safeguarding the financial independence of the judiciary in Nigeria.\(^{46}\) However these provisions are not adequately complied with both at the federal and state levels.

**Problem of Locus Standi** - The problem of *locus standi* affects the full utilization of the judicial processes to secure the human rights of the citizenry and ensure that the rule of law is upheld. The phrase *locus standi* denotes the legal capacity to institute proceeding in a court of law or tribunal. The courts have from time immemorial insisted that a person must have *locus standi* in order to be qualified to institute an action in court, i.e. that he should have sufficient interest in the action which he requires the court or tribunal to adjudicate on. The Nigerian Supreme Court case of *Adesanya v President of the Federal Republic of Nigeria*\(^{47}\) is the *locus classicus* on this issue, and in the subsequent case of *Attorney General of Kaduna State v Hassan*\(^{48}\) the Supreme Court further reiterated the reason for this doctrine thus; “The legal concept of standing or locus is predicated on the assumption that no court is obliged to provide a remedy for a claim in which the applicant has a remote, hypothetical or no interest.”\(^{49}\)

However in recent times through legislations and judicial decisions there has been a shift from the strict rule expounded by the case if *Adesanya v President of the Federal Republic of Nigeria*.\(^{50}\) For instance the Fundamental Rights (Enforcement Procedure) Rules 2009 in item 3(e) of the preamble to the rules provides that: ‘The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*…”


\(^{46}\) See ss. 81(3) and 121(3)

\(^{47}\) (1981) ANLR 1

\(^{48}\) (1985)2 NWLR (Pt 8) 483

\(^{49}\) Ibid at 524-525

\(^{50}\) Supra
Furthermore in *Fawehinmi v President of the Federal Republic of Nigeria*\(^{51}\) the Court of Appeal affirmed the departure of the Nigerian courts from the former narrow approach on *locus standi* as adopted in the *Adesanya*’s case and subsequent decisions on the issue. In that case two former Ministers were paid remuneration for their office in foreign currency and in excess of what was provided for in the law – the Certain Political and Judicial Officers Holders (Salaries and Allowances, etc) Act No. 6 of 2003.

Chief Gani Fawehinmi went to court to challenge the legal validity of the payments. On an objection on behalf of the Respondents on grounds inter alia that Petitioner did not have *locus standi* to bring the action; the Court of Appeal held that it had *locus standi*. The court stated that it will definitely be a source of concern to any tax payer who watches the funds he contributed or is contributing towards the running of the affairs of the State being wasted when such funds could have been channeled into providing jobs, creating wealth and providing security to the citizens. Such an individual has sufficient interest in coming to court to enforce the law and to ensure that this tax money is utilized prudently.\(^{52}\)

**Reluctance to Seek Judicial Redress** - The system of judicial review is not automatic – ie the judiciary cannot by itself take cognizance of the excesses on the part of the administrative. The courts can only intervene on the request of someone who has been affected or likely to be affected by the administrative action or inaction. In Nigeria many persons are very reluctant to approach the court for redress even when their basic human rights are breached. This is as a result of ignorance, poverty, and lack of trust in the judicial process. People prefer to continue to put up with minor and sometimes very major injustices of administration. As a result only a negligible fraction of the cases of administrative excesses come before the judiciary.

**Slow and Cumbersome Judicial Process** - In spite of many remarkable efforts made in recent times to improve the judicial process in Nigeria, it is still slow and cumbersome. This is attributable to the sacrosanct technical processes that must be followed through initiating the process as well as in the trial. However, in addition, there is the problem of inefficiency and corruption which compounds the issue of delay in the judicial process. These ultimately result in not only delay in justice but to its eventual denial and this perpetuates the same injustice which the judiciary is meant to cure.

7. **Conclusion**
The administration in modern governance due to the exigencies of modern government combines into one all the powers traditionally exercised by the three arms of government. Therefore in order to avoid possible abuse of powers, tyranny and or oppression against

\(^{51}\) (2007)14 NWLR (Pt 1054)275

\(^{52}\) *Ibid* at 342
the doctrine of separation of powers there must be a means of checking the powerful organ of government. It is for this reason that the constitution vests in the judiciary the power of judicial review to check and restrain possible arbitrary exercise of powers. With regards to this duty of the judiciary in Nigeria with particular reference to the protection of the fundamental rights enshrined in Chapter IV of the 1999 Constitution and the doctrine of rule of law, they have made tremendous efforts to live up to their esteemed position of the defender of the constitution in a plethora of cases. However, as a result of some seeming loopholes in the general principle of judicial review as well as the peculiar problems of the Nigerian legal system and the Nigerian judiciary, judicial review has not attained its optimum usefulness in checking the actions of the infringement of the fundamental rights of the citizens and upholding the rule of law. In spite of the decision of the Nigerian Court of Appeal in Fawehinmi v Abacha that the power of judicial review in deserving circumstances should extend to the merit of the target activity or decision, the Nigerian court still upholds the ancient narrow and limited scope of the concept of judicial review to the effect that the role of the courts in judicial review is to determine the legality of government measures and not the merits or wisdom of such actions or inactions.

Therefore, for a more effective application of judicial review to safeguard the fundamental rights and uphold the doctrine of rule of law in Nigeria there is need to review the doctrine of judicial review and its application in the Nigerian judicial system so as to appropriate the gains inherent in the doctrine. In this we make the following recommendations:

i. The Nigerian courts need to adopt the modern trends in judicial review, particularly in line with the decision of the Court of Appeal in Fawehinmi v Abacha. Where the circumstances dictate the general nature of the jurisdiction of the court should enable it to make a pronouncement on the merits or wisdom of an administrative decision in line with modern trends in administrative law.

ii. The independence of the judiciary need to be enhanced by all stake holders. Members of the judiciary must ensure that they maintain the independence of the judiciary by making efforts to eschew all personal biases or prejudices in arriving at the decisions in matters before them. The National Judicial Council must be active in monitoring the conduct and performance of judicial officers. The government on its own part should avoid undue interference with the judicial officers in the performance of their functions and ensure that the constitutional provisions to secure the financial independence of the judiciary complied with.

iii. The new trend on the issue of locus standi in Nigeria is a very welcome change that will ensure the security of human rights and the rule of law in the country. However, a lot still needs to be done to ensure that the issue is put to rest. As the Court of Appeal stressed in the case of Fawehinmi v President of
In the Federal Republic of Nigeria, there is a need to amend the constitution on the issue of locus standi and access to court by specifically providing for access to court by any Nigerian in order to preserve, protect and defend the Constitution, like it operates in some other countries. Furthermore, the decision of Fawehinmi v President of the Federal Republic of Nigeria not being a Supreme Court decision has not finally settled the controversy on the issue of locus standi.