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EXPANDING THE FRONTIERS OF JUDICIAL REVIEW IN NIGERIA: THE GATHERING STORM*

Abstract

This article examines the question of the scope of judicial review in Nigeria. The paper criticizes the traditional conception of judicial review which gives judicial review a strictly narrow and limited scope by limiting the concept to merely legality of an administrative or legislative action or in-action as well as the legality of decisions and actions of inferior courts and tribunal but not the merits of such an action. The paper finds that such an approach which is applied by Nigerian courts is not consistent with the current trends in administrative law in the Commonwealth. The paper therefore advocates an expansion of the scope of judicial review to the merits of an administrative action or decision. The paper prognostizes that with the coming into being of the Freedom of Information Act 2011, the National Environmental Standards and Regulation Enforcement Agency Act 2007, the Fundamental Rights Enforcement Procedure Rules 2009 and such decisions as the Court of Appeal decisions in Fawehinmi v. Abacha and Fawehinmi v. The President, Federal Republic of Nigeria & Ors, the storm towards giving judicial review an expanded scope in Nigeria has started gathering and it is only a matter of time before the traditional approach to judicial review would be swept away in favour of a liberal approach which would enable judicial review to extend to merits of a target activity in deserving cases.

I. Introduction

Judicial Review is important as an effective means of securing the legal control of our 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 trampling on the rights of the individual. Judicial control appears to be the most effective means of imposing and enforcing the demands of the

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rule of law on the administration. It clearly underscores the relevance of the theory of Montesquieu that if the liberty of the individual is to become a reality, power should be made to check power – an arm of government, like the judiciary, and not an individual should be set to oppose and check another arm of government.

Current jurisprudence on judicial review restricts the concept to the determination of the legality of a governmental measure but not the merits or wisdom of such an action or inaction. The question that arises is whether it is not desirable in certain circumstances to extend the powers of judicial review to the merits of a target activity? This paper examines that question proceeding upon the plank provided by the Court of Appeal decision in *Fawehinmi v. Abacha*.[1] In *Fawehinmi v. Abacha,* the Court of Appeal held that the power of judicial review in deserving circumstances extended to the merits of a target activity or decision. The Supreme Court disagreed with the Court of Appeal on the issue.[2] This paper finds that the Court of Appeal decision in *Fawehinmi v. Abacha* is a radical departure from traditional notions of judicial review and was nothing short of an extension of the powers of judicial review in Nigeria. The paper is of the view that the Court of Appeal posture is one worthy of sustenance and should be encouraged for the deepening of democracy and transparency in the conduct of the business of governance in Nigeria. Notwithstanding the position of the Supreme Court on the issue, it is thought that the Court of Appeal decision provides the new direction necessary for further development of judicial review in this country. The paper is also of the view that recent statutory developments are in accord with the Court of Appeal approach. Some of these developments have the effect of not only expanding the scope for judicial review by relaxing *locus standi* requirements, but also the possibility of expanding the frontiers of judicial review into the merits of target activity. The paper is divided into five parts. Part one introduces the concept of judicial review, its scope, nature as traditionally understood and relevance. Part two examines the extension of the power of judicial review in England in the case of *Padfield v. Minister of Agriculture, Food and Fisheries*.[3] Part three outlines the case of *Fawehinmi v. Abacha*, makes a case for the extension

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[1] [1996] 9 NWLR (Pt. 475) 710.

[2] See *Abacha v. Fawehinmi* [2000] 6 NWLR (Pt. 660) 228.

[3] (1968) A C 997.

of the powers of judicial review to the merits of a case in exceptional circumstances. Part four examines recent statutory developments in the field of judicial review and the impact on the existing framework for the exercise of judicial review while in part five, the paper concludes that with the Court of Appeal decisions in *Fawehinmi v. Abacha* and *Fawehinmi v. President, Federal Republic of Nigeria & Ors.*,[4] the enacting of the Freedom of Information Act 2011 (FOI Act),[5] the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (NESREA Act)[6] and the new Fundamental Rights Enforcement Procedure Rules 2009,[7] the storm has started gathering and it is only a matter of time before the traditional notions of judicial review conceived of as restricted only to legality is blown away and replaced by a more liberal conception which extends judicial review to merits of a decision in deserving cases. The paper therefore recommends an adoption of the reasoning of the Court of Appeal by the Supreme Court at the earliest opportunity and a more rigorous application of the principle established by the Court of Appeal in *Fawehinmi v. Abacha*.

A. Meaning, Nature and Scope of Judicial Review

Judicial Review can be looked upon either as a power or a process. It is the power of the court or the process by which the court exercises a supervisory jurisdiction over the acts of the executive and legislative arms of government. According to Professor Nwabueze, judicial review 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…".[8]

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[4] [2007] 14 NWLR (Pt. 1054) 275.

[5] Act No. 5 of 2011. Assented to by President Goodluck Jonathan on 28 May, 2011. See Revenue Watch Institute, "Nigeria's Freedom of Information Act, 2011," available at http://www.revenuewatch.org/training/resource _center/nigerias-freedom-information-act-2011 last accessed 29 October 2012.

[6] Act No. 25 of 2007.

[7] The Rules which took effect on 1st December, 2009 were made on the 11th day of November 2009 by the then Chief Justice of Nigeria, Idris Legbo Kutigi, GCON.

[8] B. O. Nwabueze, *Judicialism in Commonwealth Africa* (London: C. Hurst & Co. Ltd., 1977) p. 229.

In general terms, judicial review refers to judicial control of the other arms of government. In a technical sense, it refers to the judicial control by superior courts of record typified by the High Court,[9] of both executive and legislative exercise of powers extending to exercise of powers by inferior courts and tribunals, such powers being exercised by the superior courts in their supervisory role. The supervisory jurisdiction of the court is not limited to the executive branch of government. It extends to the legislative arm of government. Thus, the Court of Appeal held in *Oruobu v. Anekwe & Ors*[10] that "by virtue of s. 4(8) of the 1979 Constitution, the Courts have a supervisory jurisdiction over the exercise of legislative powers by the legislature and the National Assembly or a House of Assembly shall not enact any law that ousts or purports to oust the jurisdiction of the courts."

By supervisory jurisdiction or supervisory role, we mean, that the courts must and generally do recognize that the statutory responsibility for performing a given administrative task belongs first and foremost to the administrative agency (or legislative house as the case may be) and that no other person or authority is competent under the law to exercise that function. Therefore, the courts can only review the action 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. That is, the essence of the supervision. Judicial review therefore, has a strictly limited role in the administrative process. It does not apply to every act and decision of the administration. There is no automatic system of review applying generally and continuously to all acts of and decisions of the administration. Therefore, judicial review is often said to be peripheral and occasional, but its deterrent effect is spread like net over the whole length and breadth of governmental activities, compelling officials to think twice before taking one step forward.

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[9] Such a power is also to some extent vested on the Customary Court of Appeal being a superior court of record of first instance. See *R v. Northumberland Compensation Appeal Tribunal, ex Parte Shaw* (1952) 1 KB 338 on court with power of judicial review. In the case of the Court of Appeal and the Supreme Court, they also exercise powers of judicial review in an appellate capacity. Here, they do not exercise general powers but limit themselves to the legality of the questions raised.

[10] (1997) 5 NWLR (Pt. 506) 618 at 634-635.

In *Military Governor of Imo State v. Nwauwa,*[11] 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 the 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;
d) What matters is legality and not correctness of the decision.
e) The reviewing court is not concerned with the merits of a target activity;
f) 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;
g) 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.

B. Judicial Review Distinguished from other Court Procedures

Judicial review is quite different and must be distinguished from "appeal" or a normal adjudicatory proceeding. In the exercise of its normal constitutional function of adjudication, the judiciary has to entertain all actions, make all necessary determinations involving law and facts, and see that all parties get each his due according to the law of the land. In the case of an appeal, the courts may have to go into the merits of the case and the weight of evidence sustaining the 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

[11] (1997) 2 NWLR (Pt. 490) 675; see also *Governor of Oyo State v. Folayan* (1995) 8 NWLR (Pt. 413) 292.

against and replace it with its own decision or do whatever the justice of the case demands.

In judicial review, on the other hand, as already stated, the courts must and generally do recognize that the statutory responsibility for performing a given administrative task belongs first and foremost 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 action 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 other words, the courts' view on the merits of the case should be disregarded and attention focused on whether the express and implied requirements of the enabling statute have been met – whether the agency has kept within the limits of its jurisdiction, whether it has applied the proper procedure and acted fairly on all concerned, whether it has acted reasonably in good faith by avoiding irrelevant, and considering relevant factors. In short, if the thing done is *intra vires* and, in a proper case, there is no violation of the rules of natural justice and no error of law apparent on the face of the agency's record, the courts cannot go any further. Where the above requirements are not met as where the requirements of the enabling statute have been disregarded, the courts can only quash what has been done or proclaim it invalid and leave the agency free to take back the case and exercise the functions once again.

Sometimes, it is difficult to draw a clear line between judicial review properly so called and a normal adjudicatory proceeding or even appeal. Such difficulties may be traced to the fact that unlike in England, where the power of judicial review is almost entirely of common law origin, in Nigeria, quite apart from its common law origin, the power of judicial review as well as all other judicial powers are traceable to the Constitution (the basic law of the land) which in section 6 vests all judicial powers in the courts. So, we find a situation where it is the same courts that exercise judicial review that also conduct normal adjudicatory proceedings as well as appeal in some matters. Again, the attitude of the Nigerian courts which show a shift away from technicality

to doing substantial justice[12] has compounded the situation. The result is that the courts do not follow strictly the provisions of the various High Court Rules relating to the commencement of proceedings for judicial review. While the various High Court Rules provide for a two-phased applications (the first one is for leave to apply for judicial review brought *ex parte* while the second one is the substantive application by way of summons or motion on notice), cases of judicial review are known to have been commenced by way of writ of summons, which is usually used to commence proceedings coming before the courts in the exercise of their normal adjudicatory process. A case in point is the case of the *Military Governor of Imo State v. Nwauwa*[13] which was commenced by way of writ of summons. The reasoning of the court in such cases as evidenced in such cases as *Falobi v. Falobi*[14] is 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. Consequently, today, we have cases in which the court is exercising normal judicial proceedings but in substance is a 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 proceedings or not, we have to look, not at the form of proceedings but the substance of such proceedings. If looking at the substance of the proceeding, it is the legality or legal validity or otherwise of an administrative action that is in issue, then it is a matter of a judicial review notwithstanding the form of action.

II. Judicial Review Extended in England

In *Padfield v. Minister of Agriculture, Fisheries and Food*,[15]the Agricultural Marketing Act, 1958, provided that, "if the Minister in any case so directs" a committee of investigation should investigate any dispute arising under the milk marketing scheme established under the Act. Milk producers from within and

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[12] See *Long-John v. Black* (1998) 6 NWLR (Pt. 555) 524 at 531; *Abiegbe v. Ugbodume* (1973) 1 SC 133; *Consortium M. C v. NEPA* (1992) 6 NWLR (Pt. 246) 132; *NALSA & Team Associates v. NNPC* (1991) 8 NWLR (Pt. 212) 652; *Nneji v. Chukwu* (1988) 3 NWLR (Pt. 81) 184; *Nduba v. Appio* (1993) 5 NWLR (Pt. 292) 201.

[13] *Supra*.

[14] (1976) 9-10 SC 1.

[15] (1968) A. C. 997.

around London complained that the price fixed for milk from outlying provinces did not take full account of the cost of transport from those provinces. Because the complainants were in the minority in the board, and any change in the price already affixed would affect the majority group adversely, the board refused to change the price. Although, the minister could, after an investigation by the committee, order modification in the price so as to take full account of the variable factors, he did not take any action; he said he did not want to interfere with the normal democratic machinery" of the scheme. In an action by the complainant, mandamus was issued to compel the Minister to set the machinery in motion to investigate the complaint as required by the Act, as otherwise, the protection provided by the Act for the minority on the board would become useless. In doing this, the court rejected the contention of the Minister that his power under the Act was absolute and unfettered. It maintained that the Minister had no power to thwart the policy or objects of the Act. As Lord Reid said, in such a situation, "our law would be very defective if persons aggrieved were not entitled to the protection of the court." Their Lordships maintained that every statute conferring authority on an agency has some policy or objects in view, and it is for the courts 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, namely, that in exercising their powers the latter must act lawfully, and where he acts lawfully, he can take a decision "which cannot be controlled by the courts; it is unfettered." It is for the courts to determine whether and when his action is lawful.

The above decision fortified Lord Denning, M. R., in the view he expressed in *Breene v. Amalgamated Engineering Union*[16] where according to his Lordship:

> The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decisions 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. That is

[16] (1971) 2 Q.B. 75

> established by *Padfield v. Minister of Agriculture, Fisheries and Food* which is a landmark in modern Administrative Law.[17]

Padfield is a landmark in modern administrative law because it established that even when the statute says that an administrative agency shall act if is satisfied, the courts may inquire into the factual situation to see if there are facts to support his finding of satisfaction and if there are none, to void his decision taken without the necessary factual support. By taking such a stand, the court in Padfield was threading on tracks uncharted before and what it succeeded in doing was nothing short of expanding the powers of judicial review in England.

III. The Case of *Fawehinmi v. Abacha*[18]

In *Fawehinmi v. Abacha*, the Court of Appeal considered the exercise of discretionary powers by the Inspector-General of Police 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 came to the conclusion that the powers of the IGP were not unfettered powers. The Court of Appeal held that the Court could inquire into the factual basis for the exercise of discretion and would normally accept the opinion of the officer but if the opinion was one which no reasonable officer could in the circumstances reasonably hold, then, the Court would nullify the exercise of discretion and make an appropriate order. The Supreme Court disagreed with the Court of Appeal on this and held that the Decree vested an unfettered power on the IGP. What happened was that the appellant, Chief Gani Fawehinmi, was arrested on Tuesday, 30th January, 1996 at about 5.15 am at his residence in Ikeja, lagos by a horde of policemen and State Security Service (SSS) officers fully armed with guns. Without presenting any warrant of arrest or giving any reasons therefor, they arrested the appellant and took him away to SSS Lagos office at Shangisha, Lagos and detained him for about a week without allowing anybody to see him. Thereafter, he was secretly transferred to Bauchi prisons where he was further detained. As a

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17 At. p. 190.

18 Reported in the Court of Appeal as *Chief Gani Fawehinmi v. General Sani Abacha, A-G Federation, State Security Service & Inspector General of Police* [1996] 9 NWLR (pt. 475) 710; and in the Supreme Court as *General Sani Abacha, A-G Federation, State Security Service & Inspector General of Police v. Chief Gani Fawehinmi* [2000] 6 NWLR (Pt. 660) 228.

result of the foregoing, an application for the enforcement of the appellant's fundamental rights was filed at the Federal high Court Lagos on his behalf seeking declarations to the effect that his arrest and detention were illegal, an order of mandatory injunction for his release, an injunction restraining the respondents from further infringement of his fundamental rights, and damages to the tune of ₦10,000,000.00 (ten million naira).

After leave was granted and service of the appropriate processes effected on the respondents, they filed a preliminary objection to the action challenging the competence of the suit on the grounds that the respondents/applicants are immune to any legal liabilities for any action done pursuant to the Decree No. 2 of 1984 (as amended) and that the court lacked jurisdiction by virtue of the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994 and the Constitution (Suspension and Modification) Decree No. 107 of 1993 which oust the jurisdiction of the Honourable Court to entertain any civil proceedings that arise from anything done pursuant to the provisions of the Decree. At the hearing of the preliminary objection, the respondents contended that the appellant was detained pursuant to a detention order made by the IGP under the provisions of the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended) and consequently, the court has no jurisdiction to hear the action in that its jurisdiction was ousted by the Decree. However, the respondent's counsel merely produced the said detention order in court but did not in any way tender it in evidence. The said detention order which was made on and dated 3rd February 1996 stated *inter alia*, the place of detention of the appellant as Bauchi Prison. The appellant counsel on the other hand contended that the IGP has no powers to issue the detention order in that Decree No. 11 of 1994 which sought to vest him with that power was otiose and that, the provisions of the said Decree No. 2 of 1984 are inferior to and cannot override the provisions of the African Charter on Human and Peoples' Rights under which the appellant was seeking the afore-stated reliefs and also that the said detention order did not cover the period between 30th of January to 2nd of February 1996 of the appellant's period of detention. The learned trial Judge , after hearing arguments on the objection, upheld the objection and struck out the suit whereupon the appellant appealed to the Court of Appeal. After a consideration of the relevant laws including the State Security (Detention of Persons) Decree No. 2 of 1984 (as amended), the African Charter on Human and Peoples' Rights

(Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990, and the 1979 Constitution, the Court of Appeal allowed the appeal and held *inter alia*, that:

> By virtue of section 1 of decree No. 2 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.**[19]

According to Pats – Acholonu, JCA (as he then was):

> Another point I wish to discuss is that the Detention of persons State Security to be appreciated by the people on whose behalf it is made, it is to be understood that the done as well as the detaining authority should be able to show how the appellant is a security risk to the State. By this I mean he is accountable to the public whose duty it is to discern whether the detention order was made in good faith. **The new trend in this area of law now imposes on the detaining authority the duty he owes to Nigerian citizens to be ready to explain his actions, if not, an order of mandamus might lie. In such a case he should be precluded from taking any protection under the ouster clause,**

[19]At p. 760. Emphasis added.

> **if it is found that the detention order is not in compliance with the statute.**[20]

In the words of Musdapher JCA (as he then was):

> The courts have evolved mechanisms of interpreting discretionary powers restrictively. In this way, courts have been able to preserve the rule of law. In matters involving ordinary laws, the courts in Nigeria have the jurisdiction to examine in appropriate cases how discretionary powers are exercised. It is part of the Administrative law which frowns at abuse or misuse of power.[21]

The respondents were not satisfied with the decision of the Court of Appeal, hence they appealed to the Supreme Court. The appellant also cross-appealed. The Supreme Court while agreeing with the Court of Appeal on the status of the African Charter on Human and People's Rights however disagreed with the Court of Appeal's position or decision on the extent of powers of judicial review of the actions of the Inspector General of the Police. According to Achike JSC (of the blessed memory):

> **The authority conferred with the power to issue detention orders under the State Security (Detention of Persons) Decree No. 2 of 1984 is vested with expansive power which is both discretionary and subjective. There is no obligation in him to disclose reasons in the way and manner he exercises his subjective discretion… . Now, let me return to the case in hand. It is quite clear that the provisions under section 1 (1) of Decree No. 11 of 1994 give the Inspector General of police a free and unfettered power to reach his conclusion, relying on such data and information that he may deem fit in being satisfied that any particular person's act is prejudicial to state security. No reasons are given by the detaining authority to anyone as to how a detainee is or constitutes himself in acts detrimental to state security. Put tersely but frankly, it is manifest that the power vested in the detaining authority can be wielded arbitrarily and capriciously without any remedy or right to seek a review of the decisions of the detaining authority…learned cross-appellant's counsel has urged that the phrase "if the Chief of Staff is satisfied" should be interpreted to mean "if the chief of staff has adequate reasons in fact to be satisfied".**

[20] *Ibid*. Emphasis added.
[21] At p. 749.

> **With utmost respect to counsel, I am unable to accept this; it is an unwarranted encrustment on the plain and unambiguous provisions of the statute… . It is pertinent to remember that the relevant time of the operation of these Decrees was during the military regime, a time that the provisions of the 1979 Constitution had been substantially suspended and when judicial powers of the state had been radically eroded and inclusion of ouster of the jurisdiction of courts of law in statutes became the rule rather than the exception. It is against this background that the plenitude of subjective discretionary power conferred on the detaining authority could be better appreciated.**[22]

The Supreme Court decision in *Abacha v. Fawehinmi* was delivered on 28th April, 2000 after the country had been returned to democratic rule in 1999 following several years of military interregnum. One would have thought that the decision would have been influenced more by democratic ideals rather than justifications for aberrations and atrocity perpetrated by military dictators. The views as expressed by Achike JSC above can be properly taken to be the view of the Supreme Court on the issue since it was not challenged by any other Justice of the Court. This in our humble view is rather unfortunate. This is because, the decision as it were, confers on an administrative agency unfettered discretion which is an anathema to the rule of law. This cannot be right because even the military government itself usually proclaims that it is operating the rule of law. A close reflection on the case of *Padfield v. Minister of Agriculture, Food and Fisheries* would reveal that in our Administrative Law, there is no such thing as unfettered power. Thus, even if a statute purports to vest power or discretion on an authority in absolute terms such as the Minister or some other body to take action if he is satisfied, the courts have ruled that he must be satisfied upon reasonable grounds. If there are no reasonable grounds to support his finding, it must be reviewed. As rightly observed by Lord Denning MR in *Breen v. Amalgamated Union*, Padfield is a landmark in modern administrative law.[23] That was why His Lordship, Pats – Acholonu remarked that the trend they were adopting in the Court of Appeal is the current trend in this area of the law.

It is true that *stricto sensu*, judicial review is limited to pronouncing on the legality but not on the merits or wisdom of an

[22] At p. 329 – 330. Emphasis mine.
[23] *Supra.*

administrative decision, action or inaction. The principle is founded upon the doctrine of separation of powers which assign functions to the different arms of government. Thus, in judicial review, the reviewing court proceeds from the premise that the task at hand is one that belongs to a different arm of government and its role is limited to determining whether that arm of government has properly exercised the power within the ambits of the law. Where the concerned arm of government has not exercised the task within the law, it can only declare it illegal but it cannot impose its views or interpose its own decision for that of the agency concerned for that would also amount to a wrongful usurpation of authority. These principles were recently restated by the Supreme Court in *Egharevba v. Eribo*.[24]

The principles as stated by the Supreme Court are no doubt correct. But they are not foolproof. In the first instance, it is recognized today that the principles of separation of powers are not as water-tight as originally conceived by Montesquieu. This has also led to recognition of the principle of delegation of powers by the courts even in the face of hostile constitutional principles. The executive today exercise not only executive functions qua executive functions but also judicial and legislative function. Dealing specifically with review of administrative actions, the truth is that in many cases, where the boundary between legality and merits is to be drawn is often impossible. Some cases may be clear and pose no problem. But in some others, the issues of legality may be so intertwined with the merits that there can be no way of pronouncing on the one without expressly or impliedly pronouncing on the other. Such situations are comparable to cases where the courts are called upon to pronounce on their jurisdiction *in limine* but the court finds that it cannot make such a 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 at the end of the day make a pronouncement.[25] This principle could be extended to the exercise of powers of judicial review so that in cases where legality is tied up with the merits, the court can pronounce on the merits. On the other hand, since delegation has already been accepted by our courts, the principle could be developed that a court faced with a situation where the legality is so intertwined with the merits as to

[24] *Egharevba v. Eribo* [2010] 9 NWLR (pt.1199) 411
[25] See for instance *Inakoju v. Adeleke* [2007] 4 NWLR (Pt. 1025) 423 SC at 622 and 699.

be inseparable, the court would be deemed to have been delegated with the power to act for the agency or other administrative body. That way, the issue of usurpation and separation of powers would have been effectively dealt with.

The views expressed above are strongly supported by the fact that 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 exactly the same position as the administrative body and the court could interpose its decision for that of the administrative body. It is a paradox that while the High Court exercising powers of appeal over the decision of an administrative agency could interpose its decision for that of the agency, the same court exercising powers of judicial review could not do so. It does not appear to stand to reason to continue to make this distinction especially in view of the fact that the High Court except in so far as the Constitution has provided otherwise remains a court of general jurisdiction. The essence of the general nature of the jurisdiction of the High Court is to enable it to do justice as between the warring parties. Where the circumstances so 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. After all, that is the essence of power being check against power. If there are facts at the disposal of the agency which it may not find expedient to disclose to the aggrieved citizen, then, the agency should be under obligation to disclose the same to the court in privileged circumstances so as to enable the court reach a decision that meets the justice of the case. The effect of the traditional notions of judicial review as expounded by the Supreme Court is to curb the unlimited jurisdiction of the High Court but we think this should not be so. That unlimited jurisdiction should extend to making any decision as the justice of a case demands even in a judicial review proceedings.

VI. Recent Developments

Some landmark developments have occurred recently to further propel and intensify the move towards giving judicial review an expanded scope in Nigeria. These are the enactment of the Freedom of Information Act, the new Fundamental Rights (Enforcement Procedure) Rules 2009, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (the NESREA Act) and the decision of the Court of Appeal in *Fawehinmi v. President, Federal Republic of Nigeria &*

Ors.[26] These statutes and decision have the effect of demolishing the debilitating effects of *locus standi* in many aspects of public law, fundamental rights proceedings and environmental proceedings respectively.[27] In *Fawehinmi v. President, Federal Republic of Nigeria & Ors.,* two former Ministers were paid remuneration for their office in foreign currency and far in excess of what was provided for in the law, i.e. the Certain Political and Judicial Office Holders (Salaries and Allowances, etc) Act No. 6 of 2003. Chief Gani Fawehinmi went to court to challenge the legal validity of those payments. An objection was taken on behalf of the respondents on grounds *inter alia* that Chief Fawehinmi did not have *locus standi* to bring the action. The Court of Appeal, held that he had *locus standi*. Aboki JCA delivered the lead judgment with which Muhammad and Uwa JJCA concurred. According to His Lordship, Aboki JCA, the Supreme Court has departed from the former narrow approach in *Adesanya's Case* and subsequent decisions on the issue of *locus standi.* On the other hand, the new Fundamental Rights Enforcement Procedure Rules 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*. In particular, human rights activists, advocates, or groups as well as any non – governmental organizations may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
>
> i. Anyone acting in his own interest;
> ii. anyone acting on behalf of another person;
> iii. anyone acting as a member of, or in the interest of a
> iv. group or class of persons;
> v. anyone acting in the public interest ; and
> vi. association acting in the interest of its members or other individuals or groups.

[26] [2007] 14 NWLR (Pt. 1054) 275.

[27] See O. D. Amucheazi, "The Arbitration Alternative to the Settlement of Environmental Disputes," in O. D. Amucheazi & C. A. Ogbuabor (eds.) *Thematic Issues in Nigerian Arbitration Law & Practice* (Onitsha: Varsity Press Ltd, 2008) pp. 68-87 at 74-80.

Order 2 rule 2 of the new Rules then went ahead to provide that "an application for the enforcement of the Fundamental Right may be made by any originating process accepted by the court which shall subject to the provision of these Rules, lie without leave of Court". While item 3(e) of the Preamble to the new Rules dismantled the impervious wall of *locus standi*, Order 2 rule 2 has the effect of relaxing any complexities or controversies as to the mode of commencement of proceedings. Order 2 rule 2 has thus laid to rest the argument whether the Fundamental Rights Enforcement Procedure Rules is the only way to commence an action complaining of an infraction of fundamental right. The dictum of Bello CJN in *Ogugu v State*[28] to the effect that the provisions of section 42 of the Constitution for the enforcement of Fundamental Rights enshrined in Chapter IV of the Constitution are only permissible and do not constitute a monopoly for the enforcement of those rights which was confirmed in *Abacha v. Fawehinmi* has now been codified. According to Onuoha, and we agree with him, the 2009 Fundamental Rights Enforcement Procedure Rules is as revolutionary as it is breath-taking. It not only liberalized the issue of *locus standi* in relation to fundamental rights enforcement litigation in Nigeria, it also infused a great sense of urgency in the conduct of fundamental rights enforcement litigation in Nigeria.[29]

The Freedom of Information Act (FOI Act) has very serious impact on the availability of judicial review in Nigeria. Section 1 of the FOI Act deals a very deadly blow on the doctrine of *locus standi* in Nigeria. It expressly gives the right of access to court to citizens to compel public authorities to furnish information under the Act. It provides as follows:

> (1) Notwithstanding anything contained in any other Act, Law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.

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[28] (2000) 2 CLRN 14 at 17. On this controversy, see generally Joshua E Alobo, *Exposition and Notable Principles on Fundamental Rights Enforcement Procedure Rules 2009* (Abuja: Diamondreal Resources Consult, 2010) 32 – 42.

[29] See G. A. Onuoha, "Special Jurisdiction of the High Court and the Fundamental Rights Enforcement Procedure Rules 2009," *Journal of Nigerian & Comparative Law*, Vol. 1 [2012] pp. 100-106 at 106.

(2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.

(3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.

As evident from the provisions of section 1 of the FOI Act, it is no longer open to public agencies to argue that applicant for judicial review does not have *locus standi* where such an applicant challenges the non-release of information covered under the Act.[30] The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 by section 7 of the Act imposes an imperative public duty on the agency to *inter alia* enforce compliance with laws, guidelines, policies and standards on environmental matters; enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment including climate change, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may from time to time come into force; and enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement. On the other hand, by section 7 of the Act, the agency shall have power to *inter alia* prohibit processes and use of equipment or technology that undermine the environmental quality; conduct field follow-up compliance with set standards and take procedures prescribed by law against any violator; conduct public investigations on pollution and the degradation of

[30] For a critical review of the Act, see Open Society Initiative, "Freedom of Information Act Signals Consolidation of Nigeria's Democracy," available at http://www.opensocietyfoundations.org/press-releases/freedom-information -act-signals-consolidation-nigeria-s-democracy last accessed 29 October 2012. See also Elijah Ogbuokiri, "Nigeria: The Limits of Freedom of Information," available at http://allafrica.com/stories /201110110632.html accessed 29 October 2012 last accessed 29 October 2012; Ayuba A. Aminu, Yahaya Y. Malgwi, Bulama Kagu & Ibrahim Danjuma, "Nigeria Freedom of Information Act 2011 and it's Implication for Records and Office Security Management," 2011 International Conference on Information and Finance IPEDR vol. 21 (2011) pp. 78-84, available at http://www.ipedr.com/vol21/16-ICIF2011-F10011.pdf last accessed 29 October 2012.

natural resources, except investigations on oil spillage; etc. The provisions of sections 7 and 8 of the NESREA Act could easily lead to conflicts between the agency and other agencies as well as between the agency and individuals. The matters are also such that the courts could easily pronounce upon the merits in the event of a conflicting opinion based on empirical evidence. The nature of many of the matters places the courts in as good a position if not better than the agency in the event of conflict. There is therefore no valid reason why the courts cannot pronounce upon the merits of the target activity in the event of a dispute. More importantly, the Minister under the Act pursuant to section 34 of the Act has made several regulations (eleven of them in 2009)[31] which have the effect of relaxing *locus standi* requirements in environmental matters. For instance, under Regulation 10 of the National Environmental (Noise Standards and Control) Regulations 2009:

> 1. Any person may complain to the agency in writing if such a person considers that the noise levels being emitted, or likely to be emitted, may be higher than the permissible noise levels under these regulations or reaching disturbing proportions.
> 2. In any such complaint under sub – regulation (1) of this regulation, it is not necessary for the complainant to show or prove personal loss or injury or discomfort caused by the emission of the alleged noise.

Questions may arise as to the utility and relationship of these provisions to judicial review cases. However, such questions would only arise if judicial review is pigeon-holed and given a

[31] See the Official Gazette of the Federal Republic of Nigeria Nos. 58 – 68 of 2009. They are : National Environmental (Wetlands, River Banks and Lake Shores) Regulations 2009; National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations 2009; National Environmental (Sanitation and Wastes Control) Regulations 2009; National Environmental (Permitting and Licensing System) Regulations 2009; National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations 2009; National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) regulations 2009; National Environmental (Ozone Layer Protection) Regulations 2009; National Environmental (Food, Beverages and Tobacco Sector) Regulations 2009; National Environmental (Textile, Wearing Apparel, Leather and Footwear Industry) Regulations 2009; National Environmental (Noise Standards and Control) Regulations 2009; and national Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations 2009.

highly restricted definition. But immediately judicial review is broadly defined to include the power of the court to scrutinize the actions and inactions of the government especially with a view to determining the legality or otherwise of such actions, the relevance of these new laws become apparent in that they underscore the very essence of access to justice. Most judicial review cases would essentially be cases touching on fundamental rights and freedoms including the right to fair hearing as well as environmental rights. This is apparently why under the old rules, judicial review proceedings and fundamental rights proceedings followed exactly the same procedure. A close scrutiny of the cases would reveal that it is the practice in judicial review cases that has been codified in fundamental right cases, i.e., that the action could be commenced either by writ of summons, application for judicial review or other originating process as witnessed in *Military Governor of Imo State v. Nwauwa*.[32] It is most probable that the rules relating to the commencement of judicial review proceedings would in due course be reviewed and relaxed to fall in line with the ethos of the moment as expressed in the new Fundamental Rights Enforcement Procedure Rules. The expressed intention of these laws is to increase access to justice.[33] By expanding the mode of commencement of action which would naturally include judicial review as well as expanding the scope or category of persons who can come forward to ventilate a claim, the new laws have greatly increased the scope for judicial review. The net effect of these developments is that judicial review will become more available to aggrieved citizens especially in the area of fundamental rights and environmental rights.

V. Conclusion

The Supreme Court's view, per Achike JSC in *Abacha v. Fawehinmi* on the reviewability of the powers of the IGP does not reflect the true and contemporary approach to exercise of discretionary power. Such views turn officials into leviathans. It cannot be supported. The Court of Appeal decision obviously provides a better line of authority because it promotes the rule of law and not rule of arbitrariness as supported by Achike JSC. It is the considered view of this paper that even though the Supreme Court over-ruled the Court of Appeal on this issue, the Court of

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[32] [1997] 2 NWLR (Pt. 490) 675.

[33] For a review of the NESREA Act, see M T Ladan, "Review of NESREA Act and Regulations 2007 – 2009: A New Dawn in Environmental Protection in Nigeria", *Nigerian Bar Journal*, Vol. 6, No. 1, July 2010, pp. 176 – 200.

Appeal decision has firmly laid the foundation for the proper development of the law. The attitude of the Court of Appeal is in tune with the basic philosophy informing the enactment of the FOI Act, the NESREA Act and the new Fundamental Rights Enforcement Procedure Rules 2009, which have increased access to justice. With the Court of Appeal decision and the coming into being of these new statutes, the storm has started gathering and it is only a matter of time before the views expressed above by Achike JSC would be swept away in favour of the trend established by the Court of Appeal. The Court of Appeal decision in deed provides the new direction for the development of our law on judicial review of administrative actions. For it shows not only that the courts are prepared to recognize the principle that there is nothing like unfettered power under our administrative law, but also, that, in deserving circumstances, the courts would break down the barrier between legality and merits of a claim, by going into the factual situation to determine the reasonableness or otherwise of an administrative decision in order to do justice. That judicial attitude is highly commendable and it is expected that the Supreme Court would use the earliest opportunity to take a second look at the Court of Appeal position in *Fawehinmi v. Abacha* with a view to adopting the trend canvassed therein. The challenge before the Supreme Court will be to delineate the conditions under which a court exercising powers of judicial review can go into the merits of the case. In tackling that question, it is submitted that there can be no hard and fast rule since a reviewing court must always have at the back of its mind that it is a superintending authority and that the only reason why it is called into play is to avoid a failure of justice. However, in exceptional circumstances, the court must be entitled to intervene by going further than just restricting itself to merely declaring the legality and not pronouncing on the merits. What is an exceptional circumstance must be left to be determined on the basis of each case. Finally, it is to be noted that while FOI Act, the NESREA Act and the Fundamental Rights Enforcement Procedure Rules 2009, have all relaxed *locus standi* requirements, the provisions of the FOI Act and the NESREA Act in particular have great potentials for extending judicial review to merits of a target activity.