

## Hart on Formalism in Legal Reasoning: Implication for Judicial Review

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### Abstract

This article articulates the implication of Herbert Lionel Adolphus Hart's views on formalism for judicial review. Formalism in legal reasoning, being adverse to a court's exercise of discretionary power, defeats the objective of legal reasoning, which is the attainment of justice. The traditional conception of judicial review, which restricts it to the role of the court in establishing the legality of governmental acts, makes legal reasoning formalistic. Hart argues that legal formalism, which means strict adherence to laid-down rules, ought not to be a feature of any aspect of legal reasoning. Thus, legal reasoning in judicial review, if restricted to only establishing the legality of governmental actions and inactions, robs the court of its function in considering both legal and substantive justice. Consequently, this article maintains that the objective of judicial review should also include examining the merit and wisdom of governmental actions and inactions in the light of the principle of substantive justice. Any legal system inclined to realize the principle of substantive justice necessarily deviates from the traditional conception of judicial review. It is sad that even in a country like Nigeria, where recent developments in terms of formulations of fundamental human rights rules and environmental laws point to a change in the traditional conception of judicial review, the Supreme Court still insists on adhering to that conception. The approach adopted by the Nigerian Appeal court in cases of judicial review, which portray a shift from the traditional conception, is commendable and is recommended by this article for every legal system.

**Keywords:** Discretionary power; Formalism; Judicial Review; Legal Formalism; Legal Reasoning.

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### Introduction

The traditional notion of judicial review is restricted to only validating or voiding the legality of governmental activities on which the review is carried out. Thus, the judiciary's only reason to establish whether the activities of the government comply with the established and extant laws of the land. It is taken for granted that judicial review does not focus on the question of the merits or wisdom of governmental actions or inaction. The importance of this question cannot be overemphasized. Attention to the question of the merit or wisdom of a governmental act or policy shows consideration of the principle of substantive justice. The idea of justice prevalent among members of society (substantive justice) in certain circumstances conflicts with legal justice (justice according to law) (Abakare, 2020). Thus, governmental policies may be in line with the enabling laws and fulfill the requirements of legality or legal justice, but fail with respect to substantive justice. Restricting the object of judicial review to only establishing the legality of a given governmental act without considering the question of the merit and wisdom of the act implies that where that question is substantial and the court, in carrying out judicial review, neglects it, there is legal formalism. The question this paper seeks to answer is whether it is not desirable in certain circumstances to extend the powers of judicial review to consideration of the merits of a target activity so as to avoid formalism in the application of the rules on judicial review.

This paper will rely on H. L. A. Hart's position on legal formalism to advocate for an expansion of the target of judicial review to include consideration of not only the legality or technicality of governmental acts but also consideration of the merits and wisdom of such acts that impinge on the idea of substantive justice. Such an expansion will not only bridge the gap between judicial review and the normal adjudicatory functions of the court but also enable judicial review to fulfill the yearnings of the masses, which are mostly affected by governmental acts. The paper is divided into six sections. The ongoing introductory part serves as section one. Section two presents a brief analysis of legal reasoning. In section three, the meaning, nature, and scope of judicial review are exposed. Section four is an exposition of Hart's position on legal formalism. In section five, the implications of Hart's position on judicial review will be examined. What follows is the conclusion of the paper, which serves as section six.

### **Materials and Methods**

The form of this research is humanities based paper that part of pilosophy of law. The approach method used is the statutory regulation approach, which is carried out by examining laws and regulations related to legal issues (Marzuki, 2005). The data used in this study, namely secondary data that was not obtained directly from the field but through the process of searching for library materials, and in the form of secondary legal materials in the form of theories taken from various literatures (Arrizal, 2020).

### **Results and Discussion**

#### **Legal Reasoning**

Legal reasoning, like the law itself, is difficult to define (Perelman 2012). Its meaning could be understood from the point of view of its aim or purpose. The general aim of legal reasoning is to help the courts administer justice. However, we can discern seemingly different aims in the way judges, text-writers, solicitors, barristers, and advocates reason about the law. The reasoning of judges is conceived to aim at justifying a particular conduct, whether it is right or wrong, based on how that conduct impacts on an established rule of the law. This is because they engage in determining why a particular legal decision is the right decision for a particular case. Text-writers and advocates are said to aim at prediction and persuasion in their reasoning about the law. They engage in theorizing about what the outcome of a legal decision should be. While text-writers consider all sides of the question about what legal solutions should be, advocates consider only those aspects of the questions that favour their clients by persuading the courts to make awards or render verdicts in their favour.

The function of the reasoning of solicitors and barristers is seen as a prediction. According to J. W. Harris (1997), "They give reasons for thinking that the other side is (or is not) likely to sue, defend, or settle a claim; and reasons for thinking that a particular judge would (would not) be likely to decide in your favour" (p. 211). These differences in the aim of legal reasoning among the legal actors considered are regarded as apparent. This is to say that the differences are contingent on the particular case being determined by the court. An objectifying factor among the different legal actors examined on the basis of reasoning about law is that the primary aim of legal reasoning is the justification of legal claims. Prediction and persuasion could be shown to be parasitic upon justification. Take, for instance, the reasoning of text-writers and advocates, in their efforts to predict what the right legal solution to a legal problem should be, equally and predominantly engage in giving reasons why a solution should be considered the right, best, or most justified legal solution. Considering these explanations, we may say that the concept of legal reasoning refers to the special way in which lawyers arrive at justifications of legal claims or decisions on matters before the court. If, for instance, a case is brought to court, say, a case of defamation, with Mrs. A claiming

that her teenage daughter, Miss A, was defamed by Mr. B, it is through legal reasoning that the court would determine whether Mr. B actually committed the crime he was accused of. Legal reasoning could involve the following:

1. The arrest of Mr. B by the Police;
2. his arraignment before the court;
3. hearing of the case in which Mr. B and Mrs. A, by themselves or by their lawyers, and in compliance with the appropriate rules of evidence, present their defences and their pleadings; and
4. The presiding judge, observing the rules of criminal procedure, such as the right to fair hearing and double jeopardy, and the presiding judge adhering to constitutional provisions and criminal procedure rules, such as the right to fair hearing, proof beyond reasonable doubt, avoidance of double jeopardy, and bringing the particular statute of criminal law on defamation to bear on the evidence before him, pronounces judgment on Mr. B. The judgment could either acquit Mr. B or convict him for the offense.

As simple as this outline seems, it is not strange to find accounts of legal reasoning that fail to accommodate all the steps. Some accounts of legal reasoning tend to portray a process more complicated than what we have presented. Also, the procedure for legal reasoning can differ based on the different roles assumed by the courts. Thus, legal reasoning in the normal adjudicatory function of the courts can differ from legal reasoning when the court performs the function of judicial review. In normal adjudicatory functions, the court is not limited to its scope in terms of utilizing judicial discretion to dispense justice. However, in judicial review, the court is only concerned with establishing that an administrative body, especially the government, has followed the prescription of the law. Thus, the court cannot alter the decision of the administrative body but can only recommend that such a decision be revisited by the body concerned if it finds out that in arriving at the decision, the administrative body has breached the law.

#### Judicial Review

Judicial Review can be viewed as a power or as a procedure. The court has the authority to regulate the operations of the executive and legislative branches of government. Judicial review is the method by which the Supreme Court exerts supervisory authority over the administrative and legislative branches of government. As a result, judicial review is a mechanism for implementing the concept of checks and balances, in accordance with the philosophy of separation of powers. According to B. O. Nwabueze (1977):

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 (p. 229).

The courts must and typically do acknowledge that the statutory obligation for accomplishing a specific administrative job belongs first and foremost to the administrative agency when exercising supervisory jurisdiction or performing the supervisory role. The court acknowledges that no other person or entity has the legal power to perform that role. As a result, the courts can only look at the agency's actions to see if they were within the enabling law's parameters. As a result, judicial review has a very limited role in the administrative process. It does not apply to all of the administration's actions and decisions. There is no automatic system of review applying generally and continuously to all acts and decisions of the administration. There is, however, a deterrent effect to judicial review that spreads across the whole range of government activities. This makes government officials think twice before making decisions or policy changes.

The scope of judicial review is such that the court only has to validate or void the act of either the legislature or the executive without substituting its own decision for that act. In the case of *Military Governor of Imo State v. Nwauwa* [(1997) 2 NWLR (Pt.413) 292], the Supreme Court of Nigeria explained the principles regulating the practice of judicial review. In that instance, the respondent contested the Military Governor of Imo State's exercise of power to depose him as the traditional ruler of Izombe following a series of petitions and an investigation conducted by the Governor. The Supreme Court ruled that the Court of Appeal overstepped its bounds by substituting its own opinion or views for those of the inquiry panel. As a result, the Supreme Court maintains:

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.

According to the Nigerian Supreme Court's judgment, the proper emphasis of judicial review is not on the decision itself, but on the process by which it was made. The merits of a target activity are unimportant to the reviewing court. Judicial review is distinct from "appeal" or a typical adjudicatory procedure and must be separated. The judiciary's usual constitutional job of adjudication requires it to consider all activities, make all required legal and factual decisions, and ensure that all parties receive their due under the law of the land. In the case of an appeal, the court may have to consider the merits of the case and the weight of evidence supporting the decision; it may have to rehear all or some aspects of the case in order to find support or justification for the decision below; it may have to quash a decision appealed against and replace it with its own decision; or it may have to do whatever the justice of the case requires (Ogbuabor 2011).

In judicial review, on the other hand, as previously stated, courts must and generally do recognize that the statutory responsibility for performing a given administrative task belongs first and foremost to the administrative agency in question, and that no other person or authority is competent under the law to perform that function. As a result, the courts may only look at the agency's actions to see if they were within the enabling statute's parameters. The courts cannot re-examine the case or overturn the agency's judgment simply because they would have reached a different conclusion or made a different decision. In other words, the courts' views on the merits of the case should be ignored, and attention should be focused on whether the enabling statute's express and implied requirements have been met—whether the agency has acted reasonably in good faith by avoiding irrelevant and considering relevant factors, and whether it has acted within the limits of its jurisdiction, applied the proper procedure, and acted fairly on all parties involved. In summary, the courts cannot proceed any farther if the action is *intra vires* and there is no breach of the standards of natural justice or evident mistake of law on the face of the agency's record. When the foregoing prerequisites are not followed, such as when the enabling statute's provisions are disregarded, the courts can only quash or declare what has been done void, allowing the agency to reclaim the case and resume its activities.

#### Hart on Formalism in Legal Reasoning

Formalism is a concept that cuts across many disciplines. In philosophy, for instance, it is associated with the view that mathematics concerns manipulations of symbols according to prescribed structural rules (Audi 1999). The emphasis is on prescribed or laid-down rules and not on intuitionist constructs. To formalize means to construct the essentials of a subject in some formal language for which a notion of consequence is defined. Hence, formalism generally describes any position that insists on strict adherence to laid-down rules or

principles, non-adherence to which attracts certain consequences. The legal philosopher, Lon Fuller (1971), advocates for formalism in law, declaring that law is a purposeful enterprise, “the enterprise of subjecting human conduct to the governance of rules” (p. 53). Rules recognized by Fuller are rules of positive law, or laid-down (enacted) rules of a legal system. He makes no reference to the idea of a higher law for which natural law theorists argue that positive law could be found wanting and the need to adjust it for the sake of substantive justice could arise. Fuller’s idea is formulated in legal formalism. According to the Black’s Law Dictionary, legal formalism is “the theory that law is a set of rules and principles independent of other political and social institutions” (Garner 19990, p. 977). What is meant by independence from other political institutions in legal formalism is that once legal rules are enacted, considerations of activities or happenings in other political or social institutions, such as governmental agencies, schools, churches, or even families, should not interfere with the applications of the legal rules already established. Legal rules are supposed to have a set meaning, and courts can’t change them in the face of changes in the law. It is such independence that H. L. A. Hart contests in his conception of the law. He argues that the law, like other areas of human life, ought to be in tune with changing circumstances. Furthermore, he says that because legal rules are made by humans, they should be able to be interpreted in a variety of ways to fit different situations and circumstances (Hart 1961).

Hart identifies the various problems that arise from the fact of the indeterminacy of legal rules as formalism and rule-scepticism as positions that misinterpret legal reasoning. Hart also identifies theories that attempt to describe and prescribe the method of legal reasoning in terms of deduction and induction as misguided. In addition, he examines the view that even in clear cases, judges exercise choice in decision making. Hart sees legal formalism as an attitude toward verbally formulated rules that seeks to disguise and minimize the need for further exercise of choice in the application of general rules to particular cases. The attitude, according to Hart, manifests in two ways. He sees one of the ways as the formulation of rules in such a way that their general terms must have the same meaning in every case where their application is in question. Hart observes that to secure this way, we may fasten on certain features, and present such features as necessary and sufficient to bring any case in which they occur. In other words, other features of the case are seen as irrelevant so long as they could not be brought within the scope of the rule. Likewise, the social consequences of applying the particular rule based on the features already mapped out are of no consideration. On how such a formulation can be made possible, Hart states (1961):

To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and applying the rule in this way (p.126).

Hence, Hart sees formalism as an attitude that does not encourage exhaustive weighting of all possible consequences in terms of application or rules. In other words, once the general terms of a particular rule are frozen, they are regarded as constituting a constant to be asserted in every application of the rule. Not only are the variables concerning a case to which the rule is to be applied seen as insignificant to the determination of the outcome of the case, they are equally neglected in subsequent application of the rule to similar cases. Another way in which, according to Hart, formalism manifests in legal theory is what he identifies as the jurists’ heaven of concepts. He explains this to be the attitude of giving a general term the same meaning in every application of a singular rule as well as whenever it appears in any rule in the legal system.

According to Hart, legal systems oscillate between legal formalism and rule-scepticism owing to the indeterminacy of legal rules, what he calls the “open texture” of rules. He is saying that those who opt for formalism see it as a way of eliminating or

minimizing indeterminacy. On the other hand, the rule-sceptic sees his position as a way of dealing with indeterminacy. In other words, while the formalists see indeterminacy as something that can be done away with, the rule-sceptics see it as a characteristic of law that should be reckoned with in every application of laid-down rules. Hart himself contends that neither of the positions is an appropriate way of dealing with open texture. He says that while open texture isn't very important when it comes to statutes, it is very important when it comes to precedent.

Hart sees the attack on legal reasoning in terms of formalism as a misdirected attack. He views legal reasoning as the application of general rules (statutes) and precedents in the determination of particular cases. Hart is aware of the debate on the role logic plays in legal reasoning. As he puts it:

The claim that logic plays only a subordinate part in the decision of cases is sometimes intended as a corrective to misleading descriptions of the judicial process but sometimes it is intended as a criticism of the methods used by courts, which are stigmatized as "excessively logical", "formal", "mechanical", or "authentic" (Hart 1983, p. 103).

Hart means by misleading descriptions of the judicial process such views that tend to compare the operations of the courts with what obtains in other fields such as the natural and social sciences. We can throw more light on what Hart is saying by considering Vilhelm Aubert's statement that:

Law does not answer all questions, but it does have available answers to all the questions that it defines as relevant - that is, to all questions of law". This is not the case with the natural and the behavioural sciences. These disciplines are studied with unsolved problems that are recognized as eminently relevant (Nader 1997, p. 79).

Aubert is saying that the level of predictability in terms of conflict resolution in law is very high in that any legal suit is sure to have a definite solution. This informs the misdescription of the judicial process as that in which judges mechanically arrive at a solution to any particular case by following laid-down rules. Hart sees this kind of view as implying that too much adherence to logic characterizes the judicial process. Since, according to him, judges do not arrive at decisions on cases through such mechanical procedures, he admits that the claim that logic plays a subordinated part in the decision of cases can be a corrective to misleading descriptions of the judicial process.

Hart does not dispute the position of the critics concerning other factors not stated in the general rule that interfere in the application of the rule. He admits that there is relative indeterminacy in terms of the application of statutes and precedents. He argues:

Whichever, devise, precedent or legislation, is chosen for the communication of standards of behavior, these however smoothly they work over the great mass of ordinary case, will, at some point where their applications is in question prove indeterminate; they will have what has been termed an open texture, (Hart 1961 p. 124).

According to Hart, open texture makes it necessary that the outcome of an application of a particular legal rule may not continually be the same. However, he does not agree that this feature of legal rules implies that legal rules are not and should not be applied deductively and that when they are so applied, what results is formalism. Here, we see that Hart alludes to Max Weber's notion of "substantive rationality" in law (Sable, 2018). Weber made a distinction between rationality and irrationality in law. According to him, there is formal and substantive irrationality, as well as formal and substantive rationality. He describes formal irrationality as what occurs in such practices as trial by ordeal. On the other hand, Weber describes substantive irrationality as the act of deciding cases based only on the peculiarities

of individual cases. Formal rationality, according to Weber, occurs when cases are determined strictly on the basis of laid-down rules. He holds that substantive rationality when factors extraneous to the law, such as religion and natural justice, are involved in the determination of cases. It is obvious that Weber's notion of formal rationality is similar to Hart's idea of formalism. Also, Hart's idea of a broad conception of deductive reasoning ties with Weber's idea of substantive rationality in law. Thus, Hart sees a description of deductive reasoning strictly in terms of the syllogism of formal logic as restrictive. According to him, such a restrictive definition of deductive reasoning can only succeed in excluding from valid deductive arguments not only legal rules but also commands and other sentential forms that are susceptible to valid deductive arguments. He says that there are broad definitions of deductive reasoning that show how legal reasoning works in real life.

An account of legal reasoning based on what Hart regards as broad definitions of deductive reasoning is presented by Neil MacCormick. In describing the legal reasoning, MacCormick (2001) asserts:

The point to remember is that legal decision-making does not proceed in *Vacuo*, but always relatively well established set of rules, principles, standards and values. That being so, it follows that even in case of first impressions, cases not directly and unequivocally "covered" by some established rule, the court must nevertheless give its decision with an eye upon the surrounding framework of rules and principles within which the new decision is to be located, (p. 1477).

In this statement, MacCormick (2001) is saying that the determination of cases, both in terms of clear cases and in terms of indeterminacy, follows essentially the same procedure. The procedure that entails proceeding against a background is what Hart refers to as deduction.

#### Implications for Judicial Review

The idea that judicial review only aims at validating or invalidating acts of the executive and legislative arms of government without seeking to determine the merits and wisdom of such decisions showcases legal formalism. This idea points to the strict application of the constitutional rules on judicial review. The 1999 Constitution of Nigeria, for instance, stipulates in Section 4(8) that the courts' exercise of legislative powers by the National Assembly or by a house of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by the law. Likewise, executive powers are subject to judicial review, as are the jurisdictions of lower courts, which are subject to review by higher courts. As a result, the High Courts in Nigeria have inherent jurisdiction to oversee the proceedings and judgments of lesser courts or tribunals, as well as those of a person or group of people tasked with performing a public function. This supervisory authority is exerted through judicial review of administrative action. The Constitution of the United States, on the other hand, vests the whole judicial authority in one Supreme Court and such lesser courts as Congress may prescribe and establish from time to time (Rossum and Tarr 1995; Rossum 2021). In 1977, Order 53, Rules of the Supreme Court of England, established a unified, flexible, and comprehensive system of procedure for judicial review. Following that, the Nigerian Federal High Court and numerous state high courts adopted extensive procedural codes that are quite similar to those in Order 53, R.S.C. (now Order 54, R.S.C).

In Nigeria, Order 34 (1) Federal High Court Rules 2009 and Order 40 (1) High Court of Lagos State Civil Procedure Rules 2012, which deal with judicial review applications, are in *pari materia* with Section 31 (1) and (2) of the Senior Courts Act, U.K., 1981 and Order 54 (2) and (3) R.S.C. England. Judicial review was created in the United States of America in the famous Supreme Court case of *Marbury v. Madison*, 5 U.S. (1 Cranch). Chief Justice John Marshall remarked in his decision that:

It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each.

The decision for judicial review implies that the Supreme Court's ability to declare an act of the legislative or executive branches to be in violation of the Constitution via judicial review is not included in the Constitution's language. However, in every country that practices judicial review, the rules on judicial review are written so that the power of the court in carrying out such review is restricted to establishing the legality of administrative actions and inactions of governmental bodies. In line with this restriction, the Supreme Court of Nigeria in *Fawehinmi v. Abacha* [(1996) 9 NWLA (Pt. 475) 710] rejected the Court of Appeal's radical departure from the traditional conception of judicial review.

Looking at Hart's contention with legal formalism, applying the provisions of the Nigerian constitution to every instance of judicial review would amount to formalism and, as such, may occasion injustice. That the court, in performing its function of judicial review, should only focus on the legality of an act of an arm of government implies that the court is not concerned with verifying whether the act in question, in doing legal justice, results in injustice in terms of the idea of substantive justice. It is pertinent to note that the idea of substantive justice is behind Hart's detestation of legal formalism. It is also the consideration of this idea that makes a crucial distinction between legal reasoning in the normal adjudicatory functions of the court and judicial review. There are two things to think about now: can or should judicial review include the idea of substantive justice?

It could be seen that in any legal system disposed to the idea of substantive justice, it is difficult to draw a clear line between judicial review, properly so called, and a normal adjudicatory proceeding or even an appeal. Where the power of judicial review as well as all other judicial powers are traceable to the Constitution (the basic law of the land or grundnorm), it is the same courts that exercise judicial review that also conduct normal adjudicatory proceedings as well as appeal in some matters. It would therefore be difficult for the court to focus strictly on legality in its function of judicial review. Such is the case with the Nigerian legal system, which shows a shift away from technicality to doing substantial justice. The result is that the courts do not strictly follow 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 two-phased applications (the first one is for leave to apply for judicial review, 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 (Onuoha 2012).

In the case of the *Military Governor of Imo State v. Nwauwa*, which was commenced by way of a writ of summons, the reasoning of the court was that the mere fact that a case is brought to court under the 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, these are judicial review proceedings because what is at issue before the court is entirely the legality or otherwise of an administrative agency's action or inaction. However, the question is, if judicial review is carried out like the normal adjudicatory function of the court, should the reasoning in judicial review substantially differ from the reasoning in the normal adjudicatory function of the court? Hart's position on legal formalism is that formalism is never a feature of any form of legal reasoning. In Nigeria today, it is claimed that 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 the substance of such proceedings. If, looking at the



substance of the proceeding, it is the legality, legal validity, or otherwise of an administrative action that is at issue, then it is a matter of judicial review notwithstanding the form of the action.

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.* These statutes and decisions have the effect of demolishing the debilitating effects of *locus standi* in many aspects of public law, fundamental rights proceedings, and environmental proceedings, respectively. In *Fawehinmi v. President, Federal Republic of Nigeria & Ors.*, [(2007) 14 NWLR (Pt. 1054) 273, two former Ministers were paid in foreign currency in excess of what the law allowed, namely the Certain Political and Judicial Office Holders (Salaries and Allowances, etc.) Act No. 6 of 2003. Gani Fawehinmi took the payments to court to dispute their legality. The respondents filed an objection, claiming, among other things, that Fawehinmi lacked *locus standi* to commence the case. He possessed *locus standi*, according to the Court of Appeal. The lead judgment was delivered by Aboki JCA, with Muhammad and Uwa JCA concurring. The Supreme Court has strayed from the prior restricted approach in *Adesanya's* case and subsequent judgements on the subject of *locus standi*, according to His Lordship, Aboki JCA. The revised Fundamental Rights Enforcement Procedure Rules, on the other hand, state in item 3 (e) of the Preamble to the Rules:

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.

Anyone acting in his or her own self-interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of, a group or class of people; anyone acting in the public interest; and an association acting in the interest of its members, other individuals, or groups are all examples of applicants in human rights cases. "An application for the enforcement of the basic right may be brought by any originating procedure approved by the court which shall, subject to the provisions of these rules, lie without leave of court," according to Order 2 Rule 2 of the new regulations. Order 2 Rule 2 has the effect of alleviating any complications or conflicts about the manner of start of proceedings, whereas item 3(e) of the new Rules' Preamble destroyed the impassable wall of *locus standi*. The dispute over whether the Fundamental Rights Enforcement Procedure Rules are the only mechanism to bring a complaint alleging a breach of a fundamental right has thus been put to rest. The opinion of Bello CJN in *Ogugu v State* that the provisions of Section 42 of the Constitution for the enforcement of Fundamental Rights embodied in Chapter IV of the Constitution are merely permitted and do not represent a monopoly for the enforcement of those rights are now codified. The 2009 Fundamental Rights Enforcement Procedure Rules, according to Onuoha (2012), are both groundbreaking and breath-taking. It not only liberalized the question of *locus standi* in connection to fundamental rights enforcement action in Nigeria, but it also instilled in the conduct of fundamental rights enforcement litigation in Nigeria a strong feeling of urgency.

The Freedom of Information Act (FOI Act) has a big impact on Nigeria's judicial review process. Section 1 of the FOI Act has delivered a devastating blow to the concept of *locus standi* in Nigeria. It gives citizens the power to take public bodies to court to force them to comply with the Act's obligations. The following is spelled out in the document:

- (1) Every individual, regardless of the nature of the information, has the right to access or request information kept by any public official, agency, or institution, notwithstanding any other Act, Law, or regulation.
- (2) It is not necessary for an applicant to demonstrate a specific interest in the information requested under this Act.
- (3) Anyone having a right to information under this Act has the right to file a lawsuit in order to compel any public entity to comply with the Act's obligations.

As the requirements of Section 1 of the FOI Act make clear, public entities can no longer argue that an application for judicial review lacks locus standi if the applicant is challenging the non-release of material covered by the Act. The National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 mandates the agency to enforce environmental laws, guidelines, policies, and standards, as well as the provisions of international environmental agreements, protocols, conventions, and treaties, such as climate change, biodiversity conservation, desertification, and foresight.

Section 7 of the Act, on the other hand, gives the agency the authority to, among other things, prohibit processes and the use of equipment or technology that harm the environment; conduct field follow-up compliance with set standards and take legal action against any violator; conduct public investigations into pollution and the degradation of natural resources, with the exception of investigations into oil spills; and so on. Sections 7 and 8 of the NESREA Act have the potential to cause friction between the agency and other agencies, as well as between the agency and people. The issues are also such that, in the case of a contradictory conclusion based on scientific data, the courts may readily rule on their merits. Because of the nature of many of the issues, the courts are in a similar situation to the agency in the case of a disagreement. In the case of a disagreement, there is no legal reason why the courts cannot rule on the merits of the target activity. More crucially, the Minister has issued additional rules (eleven in 2009) under section 34 of the Act, which have the effect of easing locus standi restrictions in environmental problems. Regulation 10 of the National Environmental (Noise Standards and Control) Regulations 2009, for example, states that:

1. Anyone who believes that the noise levels being emitted, or likely to be released, are greater than the allowable noise levels under these regulations, or have reached troubling proportions, may file a written complaint with the agency.
2. It is not essential for the complainant to establish or prove personal damage, harm, or pain caused by the emission of the claimed noise in any such complaint under sub-regulation (1) of this rule.

The Agricultural Marketing Act, 1958, stated in the British case of *Padfield v. Minister of Agriculture, Fisheries and Food*, [(1968) A. C. 997], that "if the Minister in any case so orders," a committee of investigation should investigate any disagreement arising under the Act's milk marketing plan. Milk producers from within and 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 on 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 a 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” [(1968) A. C. 998]. Their Lordships maintained that every statute conferring authority on an agency has some policy or object 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 has 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 (Amaucheazi 2008). It is for the courts to determine whether their action was lawful. The Agricultural Marketing Act, 1958, stated in the British case of *Padfield v. Minister of Agriculture, Fisheries and Food*, [(1968) A. C. 997] that “if the Minister in any case so orders,” a committee of investigation should investigate any disagreement arising under the Act's milk marketing plan.

Milk producers in and around London protested because the price set for milk from outlying provinces did not include the cost of transportation from those regions. The board declined to adjust the pricing because the complainants were in the minority on the board, and any modification to the price currently in place would harm the majority group. Despite the fact that the minister could, following a committee examination, mandate a price revision to take full account of the variable elements, he did not do so, claiming that he did not want to interfere with the scheme's usual democratic mechanism. *Mandamus* was given in an action brought by the complainant to compel the Minister to put the machinery in motion to investigate the complaint as required by the Act, since failing to do so would render the Act's protection for the minority on the board ineffective. The court thus rejected the Minister's claim that his power under the Act was total and unrestricted. It claimed that the Minister lacked the authority to obstruct the Act's policy or objectives. “Our law would be terribly deficient if those aggrieved were not entitled to the protection of the court,” Lord Reid stated in this scenario [(1968) A. C. 998]. Their Lordships argued that every act granting authority to an agency has a purpose or goal in mind, and it is up to the courts to decide what that goal or objective is by interpreting the statute. Even if a minister is given unrestricted discretion by a statute, this “can do nothing to fetter the control which the judiciary has over the executive; namely, that the latter must act lawfully in exercising their powers, and where he acts lawfully, he can take a decision which cannot be controlled by the courts; it is unfettered” (Amaucheazi 2008). It is up to the courts to decide whether or not their actions were legal.

In line with the above decision Lord M. R. Denning in *Breene v. Amalgamated Engineering Union*, [(1971) 2 Q. B. 75], argued that:

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

*Padfield* is a watershed moment in modern administrative law because it establishes that even when a statute states that an administrative agency must act if it is satisfied, the courts may investigate the facts to see if there are facts to support the claim of satisfaction, and if there aren't, the decision may be void. As a result, the court in *Padfield* was treading unknown territory, contributing to the expansion of judicial review powers in England.

The importance of the Nigerian Appeal court's approach to judicial review is that it demonstrates the fact that judicial review is not pigeon-holed and should not be given a highly restricted definition. Of course, Hart never subscribes to the argument of core or hard positivists like Jeremy Bentham and John Austin, who insist that courts, in line with the doctrine of separation of powers, can perform any function devoid of consideration of substantive justice. As a result, judicial review would be free of formalism as soon as it is conceived in accordance with what Hart refers to as a broad conception of deductive reasoning, giving the court the power to scrutinize and even discretionarily direct the actions and inactions of the government. The new rules broadening the scope of judicial review in Nigeria are significant because they emphasize the importance of access to justice.

The majority of judicial review cases would concern basic rights and freedoms, such as the right to a fair hearing and environmental rights. A thorough examination of the Nigerian court's approach reveals that it follows the norm in judicial review cases, which has been established in fundamental rights cases, namely, that the action may be brought by writ of summons, application for judicial review, or other originating method. These statutes, which broaden the scope of judicial review in Nigeria, are intended to improve access to justice. These statutes have considerably extended the extent of judicial review by broadening the form of action, which would inevitably include judicial review, as well as the scope or category of individuals who can come forward to make a claim. As a result of these advances, citizens who have been wronged will have increased access to judicial review, particularly in the areas of basic rights and environmental rights. As a result, the implementation of judicial review standards will no longer be formalistic.

## CONCLUSION

The traditional conception of judicial review, which restricts the role of the court in establishing the legality of governmental acts, does not reflect the true and contemporary approach to the exercise of discretionary power. Such views turn officials into leviathans. It cannot be supported. The idea of courts exercising discretionary powers even in judicial review obviously provides a better line of authority because it promotes the rule of law and not the rule of arbitrariness. It is the considered view of this paper that even though judicial review could be distinguished from the normal adjudicatory roles of the court, the target of judicial review should not be limited to validating legality, as that would mean legal formalism. A proper development of the law is achievable where every function of the court gears towards realizing the overall concept of justice. In the long run, judicial review targeted only at the legality of governmental acts becomes formalistic and can only lead to legal justice, which in the long run would conflict with the idea of substantive justice. The attitude of the Nigerian court (the Appeal Court) in considering the merits and wisdom of governmental acts during judicial review 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. It is advisable that other countries in the world, especially those countries that attempt to draw clear demarcations between judicial review and the normal adjudicatory roles of the court, consider and adopt the Nigerian Appeal Court's approach to judicial review.

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