

Written and Unwritten Constitutions – Judicial Review in Nigeria and the United Kingdom: are there Lessons for Nigeria?

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Abstract

Public authorities, bodies and institutions are established by statutory legislations and must therefore carry out their functions and operations in accordance with those prescribed statutory provisions. At any point those public authorities act outside those statutes, the general public should have unrestricted access to courts in order to checkmate those exegesis. The courts therefore have supervisory jurisdiction on public bodies and institutions under the realm of judicial review to determine the legality or otherwise of public institutions' decisions affecting the general public or their properties. This article critically analyses the principles of judicial review in the United Kingdom and in Nigeria to see if there is anything the latter can learn from the former.

Keywords: judicial review, administrative action, ultra vires, illegality, unconstitutional.

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INTRODUCTION

The most fundamental issue to always appreciate is the fact that unlike the United Kingdom, Nigeria is a Federal Republic with a written constitution and the United Kingdom doesn't have a written constitution. Nigeria does not have parliament like the United Kingdom; instead it has a National Assembly comprised of the Senate and the House of Representatives. The Nigerian Constitution expressly provided that the legislative power is vested in the National Assembly to "make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List" [1]. In addition to these, the legislative power in each of the 36 states in Nigeria is vested in the House of Assembly of that state to "make laws for the peace, order and good government of the State or any part thereof with respect to...any matter included in the Concurrent Legislative List" [2]. It is also to be noted that all the 770 local government councils also have a quasi-legislative councils vested with power to make bye-laws in their respective local areas. Unlike the United Kingdom in which supremacy

belongs to the parliament, in Nigeria supremacy belongs to the constitution meaning that:

"...the Constitution is the supreme, paramount law throughout Nigeria. It is superior to all legislative and regulatory bodies. Thus, if the Federal government or a local government council enacts a statute or regulation which conflicts, in whole or in part, with the Constitution, the statute or regulation is void in so far as it conflicts with the Constitution" [3].

Fundamentally therefore, every bit of judicial review in Nigeria must be seen from its legitimacy or otherwise within the provisions of the Constitution. That is to say any act of the government or its officials and other public bodies which is a subject of a review must be subjected to a constitutional test. Having said this, it may be pointed out that since judicial review is about the individual's right to question before the court of law, and in "appropriate proceedings" [4] the validity or otherwise of the legislative or executive act, it inevitably presupposes the existence of three issues.

³ See E. M. Joye and I. Kingsley, Introduction to the 1979 Nigerian Constitution (London, The Macmillan, 1982) p. 108. See also sections 1(1) and (2) and the case of *Doherty v Balewa* (1963) 1 WLR 949.

⁴ B.O. Nwabueze, The Presidential Constitution of Nigeria (London, C. Hurst & Co., 1982) p. 309

¹ Section 4 (1) and (2) of the Nigerian Constitution, 1999.

² Section 4 (6) CFN 1999.

The first is the legislative or executive act in question [5]; the second issue is the existence of a legally capable person questioning the act; and thirdly, the appropriate avenue to determine the status of the act being questioned. The basis judicial of judicial review in the Nigerian constitution may be viewed from these three constitutional criteria. It is to be noted therefore, in respect of the first criteria the 1999 Constitution has unequivocally guaranteed every person's rights of access to court (and other tribunals) for the determination of his civil rights and obligations [6]. Specifically for example, section 46 (1) of CFRN 1999, provided that any person who alleges that any of his rights under Chapter IV dealing with fundamental rights "has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that state for redress" [7]. Further, there are many provisions of the Constitution conferring on the courts the power to review the constitutionality of either the legislative or executive acts, decisions and functions. For instance, the High Court of a state and the High Court of the Federal Capital are all conferred with unlimited jurisdiction to "hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person [8]". In addition, exclusive original jurisdiction is vested in the Supreme Court of Nigeria to hear and determine on questions as to the existence or extent of legal right arising from a dispute between states, and between the federation and state(s) [9]. Further more, the Supreme Court, Court of Appeal and the State High Courts are given exclusive jurisdiction on substantial question of law involving the interpretation and application of the Constitution [10]. However, as we shall soon find out, although the Nigerian Constitution has absolutely guaranteed person's right to access to court and confers on appropriate courts power of reviewing any unconstitutional act of legislative or executive arm of

⁵ Section 4 (8) of the CFRN subjects the exercise of legislative powers to supervisory jurisdiction of courts. And it was decided in *Orubu v Anekwe* (1997) 8 NWLR (Pt. 515) that the courts have supervisory jurisdiction over the exercise of legislative powers by legislature.

⁶ for instance see section 36 (1) of CFRN 1999

⁷ Unlike the 1963 Constitution, now a "mere likelihood of contravention of a guaranteed right confers a right of access to the court". See Nwabueze, n. 4 above, p. 320

⁸ Section 272 (1) of CFRN 1999; see also section 257 (1) of CFRN 1999.

⁹ See section 232 (1) of the CFRN 1999. See also *Attorney-General, Eastern Nigeria v Attorney-General of the Federation* (1964) 1 All NLR 224

¹⁰ See sections 241 (1) (c); section 233 (2) (b) of CFRN 1999.

government, it does not in any way make either of these courts "a general reviewing forum, a second or third legislative chamber, in which anyone defeated in the lower chamber could try to rally fresh support in an attempt to get the measure reversed" [11]. Thus, with all these guarantees just like in the UK, none of these courts is "standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support [12]".

In Nigeria, in terms of practice and procedure provisions are made both under the conventional high court rules and special rules like the Fundamental Rights (Enforcement Procedure) Rules 2009 prescribing the steps to be followed to file and enforce any judicial review action.

Judicial Review and the United Kingdom Constitution:

Unlike Nigeria, the United Kingdom has a working unwritten constitution which "has evolved in a pragmatic and gradual manner over the centuries [13]" and has not been conveniently compiled within any one document [14]" as in the case of Nigeria or the US for instance. It is the various statutes, the fundamental principles in the case law, the constitutional conventions and other "non-legal conventional rules which surround and give meaning to the legal rules [15]" that that give rise to the United Kingdom's constitution. Since the UK does not have a written supreme constitution, this is replaced with the supremacy of parliament. This practically and plainly means firstly, that the UK parliament "can legally enact legislation dealing with any subject matter whatever"; and secondly that it can legislate for all persons and all places [16]" Thus, in the United Kingdom, the "central objective of judicial review is to give judges power to ensure that public authorities act within the limits of the powers conferred on them directly or indirectly by the UK parliament" [17].

Judicial review in the UK is designed "to ensure that executive bodies remain within the limits of the powers that the legislature has granted, or which are recognized by the courts as existing at common law"

¹¹ Nwabueze, n. 4 above, p. 314

¹² Nwabueze, n. 4 above; quoting Wechsler, 'Towards Neutral Principles of Constitutional Law', in *Selected Essays on Constitutional Law*, ed. Assn. of American Law Schools (1963), p. 466; reprinted from *Harv. L. Rev.*, 73 (1959), I.

¹³ H. Barnett, *Constitutional and Administrative Law* (London, Cavendish, 2002), p. 16

¹⁴ *Ibid*; p. 17

¹⁵ *Ibid*;

¹⁶ *ibid* p. 194; quoting Jennings, *The Law and the Constitution*, (1959)

¹⁷ A. LeSueur, J. Herberg and R. English *Principles of Public Law* (London, Cavendish, 1999) p. 225

[¹⁸]. This is quite different from the position under the Nigerian law in which judicial review is intended to make sure all arms of government including the legislature remain within the powers granted to them by the constitution. And the constitutionality of the legislation made by the parliament can validly be challenged in an action for judicial review. In the UK the legality of an Act of the parliament which is validly passed cannot be questioned in an action for judicial review. It is even stated that “what the Parliament doth, no authority on earth can undo” [¹⁹].

One of the controversial questions on judicial review in the United Kingdom, one of the oldest monarchical democracies has been: “[to] what extent is it legitimate for a non-elected judiciary to intervene to correct the administrative process which is controlled through the powers granted by the democratically elected parliament?” [²⁰] Thus, since there is no written constitution in the UK, from where do the courts derive their power of review executive actions? Well theoretically, many explanations have traditionally been prepared and the question led to many academic debates. One of such explanations is that, the court’s power is derived from its *inherent jurisdiction*. That is to say because the “society generally accepts that the courts possess this role because the courts have always had [such power], or because we continually consent to their having it, or because judges have the power to enforce it” [²¹]. Another explanation is that the court has power of review under its *supervisory jurisdiction*. In that it only supervises the exercise of the powers conferred on public bodies by the Parliament since the power was conferred on the public bodies by the Parliament to be lawfully exercised. The theory goes, by reviewing the decision of a public body, the courts do not substitute the public body’s decision with their own decisions [²²]. The courts are only concerned with the legality or otherwise of the decision of the public body and not the merit of that decision. By doing this, the court “can make such bodies do their work and stop them from doing things which they do not have power to do” [²³]. It should however be noted that the court cannot order a public authority to exercise its discretion in a particular way although it can require that that discretion be lawfully exercised. However, it may be pointed out all these are but theoretical justification of

the court’s power of review and have been subjected to so many academic challenges. For instance, does it mean that the court only intervenes in all cases only to preserve the presumed intention of the Parliament? Well, there are cases in which the court does intervene even though it may not be practically possible to see a presumed intention of the Parliament to preserve, like in the cases of breach of natural justice [²⁴]. Nevertheless, theoretically aside, procedurally, it was pointed out that “[the] basis for review today lies in section 31 of the Supreme Court Act 1981 and the Civil Procedure Rules 1998” [²⁵].

Generally speaking, the fundamental objectives of judicial review in the United Kingdom are to ensure:

- “(a) that Acts of Parliament have been correctly interpreted;
- (b) that discretion conferred by statute has been lawfully exercised; and
- (c) that the decision maker has acted fairly;
- (d) that the exercise of power by a public body does not violate human rights” [²⁶].

Nevertheless, judicial review should always be differentiated from an appeal. A court can reconsider an appeal and change the lower court’s decision with its own decision. Under judicial review the court does not reconsider the public authority’s decision, and it does not change the decision of such public authority with its own. It only checks the said decision to see whether the decision is made within the confines or boundaries of the law empowering the decision-maker so to decide and whether in arriving the decision prescribed stipulations and procedures are followed by the decision-maker [²⁷]. The public authority that took the initial decision is usually directed by the court to reconsider the case by following the right procedure.

Matters of governmental policy, “short of the extremes of bad faith, improper motive manifest absurdity” [²⁸] are not amenable to judicial review; because they are “matters of political judgment” not within the reach of the judiciary. Also courts have always been reluctant to review matters pertaining to national security.

Further, in order to set a balance between the claimant’s right of access to court to challenge an unlawful act in an action for judicial review on the one hand and the need to allow the public authorities to

¹⁸ I. Loveland, *Constitutional Law, Administrative Law and Human Rights: A critical Introduction* (London, LexisNexis, 2003) p. 64

¹⁹ H. Barnett, n. 1 above, p. 209, quoting Blackstone’s *Commentaries on the Laws of England* (1765-69), Vol. I

²⁰ Ibid; p. 838

²¹ Ibid; p. 230

²² A. LeSueur, n. 5 above.

²³ G. Aldous and J. Alder, *Applications for Judicial Review: Law and Practice* (London, Butterworths, 1985) p. 5

²⁴ A. LeSueur, n. 5 above, pp. 232-234

²⁵ H. Barnett, p. 851

²⁶ H. Barnett, *Constitutional and Administrative Law* (London, Cavendish, 2003) p. 839

²⁷ See for instance *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR

²⁸ Per Lord Bridge, in *Hammersmith and Fulham London Borough Council v Department of the Environment* (1991)

carry out their duties confidently, the law provides certain safeguards against abuse of the claimant's right to apply for redress. The first is the requirement of standing, and the second is the fact that the legislation may stipulate a time limit within which application for judicial review must be made to court [29].

It should also be noted that judicial review is not about why a decision is made, but it is about whether it is lawfully made or not. Simply put, "judicial review is concerned not with the decision, but with the decision making process" [30]

Grounds for judicial Review in the UK [31]

"[Grounds] for judicial review are deliberately not 'tightly drawn formulae' and the manner in which they operate in any given case will depend on the surrounding circumstances" [32].

If for instance a public body makes an unlawful decision, a decision which it does not have power to make, what are the points that a claimant should raise before the court of law in order to get that decision declared unlawful? These are simply the grounds for judicial review. A claimant applies to the court to review the public authority's decision because it falls within one or more of the grounds to be mentioned here. However, it should be pointed out that these grounds are those upon which the courts in the UK "have traditionally been prepared to conclude that a government action may be unlawful" [33]; as such they can be categorized in a variety of ways with "different chapter headings and subheadings" [34] and "to certain extent, the differences are merely terminological and organizational" [35]. It should be noted that, in the recent past, courts in the UK have developed some common law rules which can conveniently fit into whether a decision is made within the confine of the powers conferred, or whether the lawful procedure has

been followed; for instance whether a decision is reasonable or not, or whether it is rational or not. The joining by the UK of European community also has the consequence that the courts evolve what seems to be another ground of review which can also fit into the content of the decision or the manner in which it is carried out; for instance whether a decision is proportionate or not. The passing of the Human Rights Act 1998 also has tremendous impact not only on the attitude of courts to judicial review claims, but also may possibly lead to other potential grounds of review to come up.

Two questions have always been inevitable in an action for judicial review. The first one is: does the public body have the power to make the decision? The second question is: has it followed the due procedure before it carries out the decision? The first question relates to the content of the decision, while the second has to do with ways in which the decision is carried out. A public body that acts within its powers upon following all the legal procedures may not get its decision declared unlawful "even if the decision was in some respect wrong [36]". Or that a decision was reached by the public authority following a wrong procedure although the claimant did not suffer any injustice. The decision of the House of Lords in *Council of Civil Service Unions v Minister of State for Civil Service* is a locus classicus on grounds of judicial review generally. In that case the House of Lords stated that there are mainly three grounds of review i.e. illegality, irrationality and procedural impropriety; and accepted that there might be still be proportionality as an emerging ground of review. In line of this decision and as it may be hard to come up with a watertight list of grounds of judicial review and for the purpose of this study, the grounds for judicial review in the UK are divided into two general headings [37]:

1. Substantive Grounds.
2. Procedural Grounds.

Under the substantive head the court is concerned "with the content or outcome of the decision made" [38] rather than the way in which the decision is made. A decision may be substantially unlawful because of variety of reasons that "might often merge and overlap" [39]; for instance it may be because the public authority generally acted illegally in respect of that decision by exceeding the power granted to it by the Parliament; or because the decision is irrational or because it is not proportionate. It as well be because the decision is illegal.

²⁹ See *R v Secretary of States for the Environment ex parte Ostler* (1976)

³⁰ Per Lord Brightman in *Chief Constable of the North Wales Police v Evans* (1982) 1 WLR 1155, at 1173

³¹ It has to be pointed out as observed above, that the question as what are the exact headings of grounds for judicial review has led to many debates. There is "by no means watertight and discrete" categorisation of these grounds. Any heading given here is just for guidance.

³² H. Delany, *Judicial Review of Administrative Actions: A Comparative Analysis* (Dublin, Sweet & Maxwell, 2001) p. 6, while paraphrasing Fordham, 'Surveying the grounds: Key themes in judicial intervention' in Leyland and Woods (eds.), *Administrative Law Facing the Future* (1997), p. 194

³³ I. Loveland, *Constitutional Law, Administrative Law and Human Rights*, (London, LexisNexis, 2003) p.426

³⁴ A. LeSueur, para 11.2, p. 226

³⁵ *Ibid*;

³⁶ H. Barnett, p. 837

³⁷ Bearing in mind the nature of this study it seems convenient to follow how I. Loveland generally divided them. See I. Loveland, pp. 426-490

³⁸ I. Loveland, p 426

³⁹ *Ibid*;

“By ‘illegality’ as a ground for judicial review, it means that the decision maker must understand correctly the law that regulates his decision making power and give effect to it [40]”.

It should be noted that, practically speaking, “illegality is by far the most common ground of review [41]”. A public authority’s decision may be illegal because of varieties of reasons.

A decision may be illegal for want or excess of power. This may happen for instance where a public authority embark on doing that which it is not empowered to do, or it goes doing that which it is empowered to do beyond the limit of its statutory authority. A public authority which is empowered to maintain feeder roads may be found in want of authority if it embarks on building houses; and possibly in excess of its power if it starts a project of constructing new high ways. A decision of this nature is *ultra vires* and is subject to review in a court of law [42]. A public authority may wrongly construe that it has incidental powers to make a particular decision, which decision can be made illegal under this ground if it is found out that is not expressly or impliedly incidental to the powers granted to it by the Act of Parliament [43].

A decision may also be unlawful if the power so delegated was unlawful, not as prescribed in the empowering legislation. A power may be granted to a public authority by the Act of Parliament for many reasons; for instance because of its expertise or as a matter of representation. The courts are usually reluctant to hold as lawful a decision reached by a sub delegate not the original power holder. This may be for many reasons; for instance the danger in frustrating the intention of the Parliament. Logically put, “[if] Parliament had wanted that other person to exercise the discretion, it would have conferred the power on [the sub delegate] in the first place”. However, it should be noted that, in the case of *Lavender v Minister of Housing and Local Government* [44] the House of Lords held that listening to other person’s opinion before taking a decision may not be unlawful provided that the taking of the decision is not turned over to that person. It should also be noted that, where a statute expressly requires the decision maker to delegate powers to specified persons, his decision to delegate it to some other persons may be unlawful [45]. The court in

Allingham v Minister of Agriculture and Fisheries [46] held that a delegatee is not allowed to sub delegate except if permitted by the delegating statute.

A decision may also be illegal because it is irrational or irrationally reached.

“...a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’ [47]”.

There have been quite some arguments as to what is the content of an irrational decision. It should also be noted that, other terms like unreasonableness, *Wednesbury* unreasonable are often used to refer to irrationality; there has also been arguments over.

A decision may also be substantially unlawful under this subhead if before taking the decision, the decision maker either refuses to consider things that he ought to consider or he considers that which he ought not consider. However, this as a ground of review should be taken with caution because “from a constitutional perspective...it provides a nominally legitimate vehicle for the courts to steer themselves very close to the political / moral merits of a given decision [48]”. It is also hard to conclude, in many cases, whether or not a statute indirectly requires the decision maker to consider certain factors before arriving at a decision. It is in most cases a matter of interpretation by the court [49].

Ordinarily the Parliament grants power to public authority so that it actually exercises that power accordingly taking into consideration various choices available to it in doing that. The rule against fetter of discretion is built on the “presumption that – except in situations where a clear statutory or common law rule obliges a [public body] to reach one and only one particular decision – decision-makers must give a reasoned consideration on an individuated basis as to how a power should be exercised or a duty discharged [50]”. A public authority is not allowed to create a rigid policy the application of “which effectively means that it is truly exercising its discretion at all [51]”. Thus, individuals’ cases should be treated individually and it does not matter whether or not the policy is reasonable

⁴⁰ Per Lord Diplock in *Council of Civil Service Unions v Minister of State for Civil Service* () p. 410

⁴¹ A. LeSueur, J. Herberg and R. English, para. 12.2, p. 239

⁴² See *R v Hull University Visitor, ex parte Page* (1993)

⁴³ *R v Richmond upon Thames Council ex parte McCarthy and Stone Ltd* (1992). See also *Hazel v Hammersmith and Fulham LBC* (1992)

⁴⁴ (1970)

⁴⁵ See *Ellis v Dubowski* [1921] 3 KB 621

⁴⁶ [1948] 1 All ER 780

⁴⁷ See *Associated Provincial Picture houses Ltd v Wednesbury Corporation* (1948) p. 229

⁴⁸ I. Loveland, p. 435

⁴⁹ A. LeSueur, Herberg and English, p. 241

⁵⁰ I. Loveland, p. 440

⁵¹ H. Barnett, p. 887

[⁵²]. Thus any policy adopted by a public body prejudging applications before it without due consideration may be unlawful and could be challenged under this subhead. However, it is pointed out that, “[the] rule against the fettering of discretion does not prevent decision makers adopting such policies. It simply insists that policies shall not be applied rigidly, so as to remove any ability to depart from the policy in an appropriate case [⁵³]”.

A power is given to the public body by the Parliament in order to use or apply it appropriately for the purpose for which it is given. Discretion exercised not for the purpose for which it is given may be illegal and subject to review before a court of law. If for instance a power was given to a public authority by an Act of parliament to establish washhouses for non-commercial user, it may be unlawful for the public body to improperly use this discretion to open laundries for commercial use; an action for judicial review on this ground may be maintained. However, this does not preclude a public body from doing things reasonably incidental to the powers conferred on it by the Parliament [⁵⁴].

General speaking, it may be accepted that there may be some likelihood of bad faith in most of the decisions that are irrational or even illegal. It is hard to see otherwise. Acting in bad faith usually involves certain dishonest conducts.

Proportionality is another emerging ground for judicial review which usually within the sphere of the Community law. The concept, although seems to be emerging, is becoming at the same time complex that it is hard to define. The Human Rights Act 1998 significantly makes the application of this ground to broadly extend to cover human rights cases not necessarily cases involving European Community law or regulation. The question to be asked under this head is usually whether or not the measures taken is proportionate to the legitimate aim is pursued under an EC regulation or law or an Act of Parliament. In *Re Watson and Benjamin*, the Belgian authority’s measure to deport non-national workers from other EC countries who failed to register with local police was disproportionate by the ECJ. However, proportionality as a ground of review should be invoked with caution

⁵² See *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281

⁵³ A. LeSueur, J. Herberg and R. English para. 12.6, p. 244. However, one clash between exercising the discretion by a public authority and its contractual obligation. This was adequately treated by Prof. P.P. Craig; see P.P. Craig, *Administrative Law* (London, Sweet & Maxwell, 1999), p. 526.

⁵⁴ See *Westminster corporation v London and Northern Western Railway Company* (1905) and

because it is very near to permitting the courts to substitute public body’s decision with their own decision, or reviewing cases before them on their merit which is not the purpose of judicial review [⁵⁵].

Procedural Grounds of Review:

“It is difficult to define precisely what is meant by the word ‘procedure’ in this context, but, in essence, it concerns the way in which the decision is reached rather than the actual decision itself... [⁵⁶]”.

A public body’s decision may be subject of review under this head not necessarily because it is made in excess or want of power or not even because it is unreasonable or irrational or illegal; but because, although made *intra vires*, the lawful procedures were not followed. This ground is derived from the old common law rule of natural justice built upon two Latin maxims of *audi alterem partem* and *nemo dat in causa sua*. Two central questions under this head may be: to what extent the person to be affected by the public body’s decision be afforded an opportunity to present his case; and “to what extent it is permissible for a decision-maker to have – or to be suspected to have – a personal bias in respect of a decision she has made [⁵⁷]”. However, it should be noted that, while “[at] one extreme, almost all decision makers are required not to be biased when taking decisions [⁵⁸]” on the other hand, it is not a requirement of law that in every decision the public authority must orally hear all the persons to be affected before it makes the decision except if [⁵⁹] there is a statutory requirement to that effect [⁶⁰]. It should be pointed out that in most cases the attitude of courts is usually in favour of giving an opportunity of hearing to the applicant before an administrative decision a decision is taken against him when the decision could adversely affect his right or interest, or his refutation or means of livelihood - except in cases of a proposed legislation, or where there is good reason that the applicant need not be heard in that particular situation. Thus, whether or not a hearing is required is a question of fact and it all depends on the circumstance in each case. An action for review may be maintained under this head where the ‘decision maker’ is bias, for instance has a financial interest in the out come of the case before him [⁶¹]; or he was previously involved in

⁵⁵ See for instance the House of Lords’ decision in *R v Secretary of State for Home Department, ex p. Brind* (1991) 1 All ER 720.

⁵⁶ A. LeSueur, J. Herberg and R. English, para. 13.1, p. 257

⁵⁷ I. Love land, p. 457

⁵⁸ A. LeSueur, J. Herberg and R. English, para. 13.1, p. 257

⁵⁹ *Ibid*; see generally pp. 257 - 276

⁶⁰ *Ibid*;

⁶¹ See for instance *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759

the case which he now presides over [62]. However, it should be noted that, in cases involving bias of the decision maker what legally matters is not the existence of the bias, but whether it is sufficient enough to justify an action for review [63].

Another emerging ground of review under this head is *legitimate expectation* which basically arise as a result of the public body's conduct or an express promise. A public authority that conducts itself in respect of a benefit or advantage being enjoyed by the applicant in such a way that he reasonably and legitimately expects that he would continue to enjoy that benefit, may be challenged under this head if it subsequently decides to change its decision without communicating to the applicant "some rational grounds for withdrawing [the benefit] [64]" and permitting him to comment [65]. So also if a representation or promise is made to the applicant that by a public authority that something will or will not be done to him, it may be unlawful for the public authority to go back on its promise even though not formally made as it created an expectation in the applicant that really something is going to be or not be done to him – unless if the decision maker gives to the applicant an opportunity to be heard why it should not go back on its promise.

Judicial Review in Nigeria:

"...judicial review in Nigeria occupies a position between the two extremes: namely, the parliamentary supremacy as practised in Great Britain at the one extreme and the judicial supremacy as practised in the United States at the other [66]".

In the Nigerian context, where there is a written supreme grand num, judicial review may be defined as:

"...the power of the court, in appropriate proceedings before it, to declare a *legislative or executive act either contrary to, or in accordance with, the Constitution*, with the effect of rendering the act

invalid or vindicating its validity and so putting it beyond challenge in future [67]".

While Act of Parliament cannot be questioned in an action for judicial review in the UK, in Nigeria a legislation of the National or State Assembly may be declared unlawful in an action for judicial review if it contradicts the provisions of the Nigerian Constitution. The Supreme Court of Nigeria re-emphasise on this principle in the case of *Lekwot v Judicial Tribunal* [68], and the apex court held that:

"The right of access to approach the courts for redress against any legislative act or law is guaranteed by section 4(8) of the 1979 Constitution. Thus, the courts have supervisory jurisdiction over the exercise of legislative powers by the legislature [69]".

Nevertheless, it should be noted that, even though in Nigeria the constitutionality of an of National Assembly may be questioned in the court of law, it does not mean that it may be challenged on the ground that its enactment by the legislature does not serve the purposes prescribed by the constitution. This is a political question, which, as in UK is not amenable to judicial review.

The doctrine of separation of powers is expressly stated to exist in the Nigerian constitution [70]. In that in addition to the fact that the Nigerian Constitution expressly "gives each branch of government the means of checking the power of the other branches in certain circumstances" [71], it on the other hand requires all the three organs to exercise their powers within the provisions of the Constitution. This position was emphasised in the case of *Senator B.C. Okwu v Senator Wayas and Others* [72] when the court held that:

"The law [in Nigeria] is that a court of law has no power to interfere in any matter within the internal affairs of of the other arms of Government, that is, the Executive and the Legislature. Each organ is to that

⁶² R v Sussex Justices, exp McCarthy [1924] 1 KB 256. See also the interesting case of R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte [1999] 1 All ER 577

⁶³ See for instance R v Barnsley Licensing Justices, ex p Barnsley and District Lisenced Victuallers' Association [1960] 2 All ER 703, CA. See also Franklin v Minister of Town and Country Planning [1948] AC 87, HL

⁶⁴ See Council of Civil Service Unions v Minister for the Civil Service (1985) p???????????

⁶⁵ See Lvrepool Corporations ex p Liverpool Taxi Operators' Association [1972]

⁶⁶ E. Machael Joye and K. Igweike, Introduction to the 1979 nigerian Constituion (London, Macmillan Press, 1982) p.290

⁶⁷ B. O. Nwabueze, The Presidential Constitution of Nigeria (London, C. Hurst & co., 1982) p.309 (emphasis added). The distinction between judicial review in UK and in Nigeria is that, while the courts in the UK are striving towards contrueing the act of public body to see its compliance with the Act of Parliament, in Nigeria, the yard stick of measuring the legality of the conduct of a decision-maker is the Constitution. Another important difference is that, in the UK courts cannot challenge the validity of an Act of Parliament, while in Nigeria any legislation may be challenged in an action for judicial review be it of the National or State Assemblies.

⁶⁸ (1997) 8 NWLR (Pt. 515)

⁶⁹ at 22

⁷⁰ See sections 4, 5 and 6 of the CFRN, 1999

⁷¹ E. Machael Joye and K. Igweike, n. above, p. 134.

⁷² (1981) 1 NCLR 522

extent independent within its own domain and no one organ has any supervisory powers or control over the conduct of the affairs of the other unless there has been a violation of the provisions of the Constitution” [73].

As it has been stated above, judicial review in Nigeria generally centres around “the power of judges in cases coming before them to declare unconstitutional and void any executive or legislative action that violates the Constitution”. Ordinarily, will appear to be a less complicated exercise due to the fact that the parameters of what is legal or illegal are defined by the Constitution, and an illegal executive or legislative act can be easily picked up. However, could this have the possibility of tiding down the Nigerian courts’ attitude to judicial review claims to a predefined boundary limited only to what is literally within or outside the provisions of the constitution? Or in other words could the dimensions of judicial review in Nigeria and the structure of Nigerian Constitution have the tendency of affecting judicial activism of ‘liberal’ judges in actions for judicial review claims before them? Theoretically, the answer seems to be no as we are told by B.O. Nwabueze that “[the] approach of the Nigerian judiciary to the interpretation of the Constitution is one of liberalism [74]”. And in the celebrated case of *Nafiu Rabi v The State* [75], the Supreme Court of Nigeria stated that:

“My Lords, it is my the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism...I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends [76]”.

We will soon find out that there have been some inconstant liberalism in the interpretation of Nigerian Constitution on some controversial questions in judicial review claims before e the courts in Nigeria, like on the issued of standing.

What are the Grounds of Judicial Review in Nigeria?

Grounds of judicial review in Nigeria may geenrally be divided into two:

1. The ‘Omnibus Ground’ [77]
2. Other Grounds of review

⁷³ *ibid*;

⁷⁴ B. O. Nwabueze *nigeria’s Presidential Constitution 1979 – 83: The Second Experiment in Constitutional Democracy* (New York: Longman, 1985) p.327

⁷⁵ (1980) 8 – 11 SC 130

⁷⁶ at 148 - 149

⁷⁷ See B. O. Nwabueze, *The Presidentila Constitution of Nigeria*, p.310

The Omnibus ground is an umbrella ground based upon the fact the Nigerian Constitution is supreme and is the yardstick of measuring the legality or otherwise of any act of the executive or of legislation of National or State Assembly. The question the Nigerian courts usually ask under this head is whether or not the executive act or the legislation being challenged is inconsistent or contrary to the provisions of the constitution or it contradicts the principles of the Nigerian federalism.

An Act of National Assembly may be challenged if the court finds out that the purported legislation to be in excess of the power of the legislative body; being it a national, state or a local government legislature. For instance in *Lakami v Attorney General of Western Nigeria and Others* the Supreme Court held that Decree No. 45 of 1968 was “nothing short of legislative judgement, an exercise of judicial power [78]” which is invalid and ultra vires. The same principle was already upheld by the Supreme Court in *Balewa v Doherty* [79]. An Act may also be challenged in judicial review if for instance “it was not enacted in the manner or form prescribed by the Constitution [80]”. The Supreme Court emphasised this principle when it said held that where the legislature “overstepped the bound of its own authority, or if it did not fulfil certain conditions which were indispensable to give effect to its own legislation [81]” the act can be challenged in an action for judicial review. It may also be interested to note that, in Nigeria unlike in the UK, the Bill of Rights is part of the Constitution itself under Chapter IV, not as in UK where it is in a separate Act of Parliament. The chapter does not specifically require Nigerian courts to interpret legislations in a way which is compatible to the conventional rights like in the case of UK’s Human Rights Act 1998. Instead, the chapter confers on the State High Courts a special power of review whenever any person alleges that his fundamental right “has been, is being or likely to be contravened [82]” by an act of the executive or a legislation of the National or State Assemblies. All the High Courts in Nigeria are empowered by section 46 of the CFRN to have original jurisdiction in application fro judicial review pertaining to human rights violation by any arm of the government [83]. They are also empowered to “make such orders, issue such writs and give such directions [84]” they may consider appropriate in the circumstance to secure the enforcement of the applicant’s rights. This simply means that the High

⁷⁸ (1971) 1 UILR 201

⁷⁹ (1961) All NLR 604

⁸⁰ E. Michael Joye and K. Igweike, p. 281

⁸¹ *Williams v Majekudinmi* (1962) 1 All NMLR 413, at p. 422

⁸² See section 46 (1) of the CFRN 1999

⁸³ See for instance *Kalu v State* (1998) 13 NWLR (Pt. 531) 29

⁸⁴ Section 46 (2) of the CFRN

Courts are empowered to “grant any of the specific remedies which the common law has developed from the enforcement of rights generally” [85] i.e. the prerogative orders of certiorari [86] and prohibition and the writs of habeas corpus [87], injunction and quo warranto. It may be pointed out that, in Nigeria “however laudable the purpose or policy of a statute is, the courts will still declare it illegal if it contravenes the fundamental right of a citizen” [88]. One interesting aspect of section 46 as it was held in *Archbishop Okogie and Others v The Attorney General of Lagos State* is that an applicant must not necessarily await the breach of his rights by the executive or legislature before he applies to High Court for redress. It may be interesting to point out that, being Nigeria operating federalism, the courts are always ready to declare as invalid any legislation or executive action that encroaches upon or endangers the continuance of Nigeria as a federation state [89].

An act of the legislature may also be challenged if it purports to limit or oust the jurisdiction of courts. This position is categorically stated by section 4(8) of the CFRN. This was also upheld by the Supreme Court of Nigeria in *Balewa v Doherty* in which the court declared void section 3(4) of the Tribunal and Inquiries Act 1961 because it purports to limit the jurisdiction of courts. This seems to be a significant difference from the position in the UK where Parliament has power to enact a legislation limiting or ousting jurisdiction of courts on an aspect of judicial review claims. It should be noted that, even in the UK, the courts’ attitude to ouster clauses is “as restrictively as possible [90]” as it is presumed that it is not the intention of Parliament “to prevent the courts from exercising their constitutional role of scrutinising exercise of power by public bodies” [91].

CONCLUSION

As we have seen above, judicial review in the United Kingdom and in Nigeria is almost the same the differences are not prominent. The grounds for reviewing public authority’s decisions against the backdrop of the constitution are also the same, though the UK doesn’t have one written constitution like Nigeria. In Nigeria however, the law is not as settled in the UK as the citizenry is not as enlightened as those in

the UK so also the courts in Nigeria are not proactive in testing public authority’s decisions not only to the constitutional provisions but also to the reality of life as in the UK. Interestingly, in 2020 the British government launched Independent Review of Administrative Law (IRAL) in order to review the processes and substance of judicial review in the whole country to see whether it is still needed in view of the current constitutional realities and emerging constitutional global trends. The government wanted to reform judicial review processes in order to avoid conducting politics by judicial means. The said committee was chaired by Lord Faulks QC, and was tasked to determine if there is needed balance between the rights of the Britons to access court to review government’s decisions and the need for the government institutions and public bodies to work effectively without unnecessary interference. Nevertheless, both the Law Society and the General Council of the Bar objected to the reform because they said that judicial review processes were working well and there wasn’t any conflict between right to access the courts and need for government to function effectively [92]. The committee closed consultation in October 2020 and published its report in March 2021 making two broad recommendations to the government i.e. legislating to reverse the judgment in *R (Cart) v The Upper Tribunal* [93] so that decisions of the upper tribunal are no longer eligible for judicial review, and then it recommended giving the courts the power to award suspended quashing orders [94]. The government accepted the committee’s recommendations and took steps towards their implementation by presenting before the parliament Judicial Review and Courts Bill 2021. The bill was deliberated upon by the House of Lords between January and April 2022, when it was passed back to the House of Commons for consideration of House Lords few amendments after which it received the traditional/constitutional Royal Assent on 28th April 2022 [95]. The Act specifically came to make “provision

⁸⁵ E. Michael Joye and K. Igweike, supra, p. 344

⁸⁶ see for instance *Arzika v Governor of Northern Region* (1961) All NLR 379

⁸⁷ For instance in *Agbeje v Commissioner of Police* (Unreported), suit No. Law 81/69 the Court of Appeal (West) held that Habeas corpus can be issued in all cases of unlawful deprivation of liberty.

⁸⁸ E.M. joye and K. Igweike, n. above, p. 282.

⁸⁹ See *Balewa v Doherty* supra.

⁹⁰ A. LeSueur, J. Hergerg and R. English, p. 325. See also *Anisminic v Foreign Compensation Commission* [1969]

⁹¹ *ibid*;

⁹² See Bar Council Response to the Independent Review of Administrative Law Call for Evidence, available on <https://www.barcouncil.org.uk/uploads/assets/d0bf3966-9772-4205-81c63d3bb91cc188/Bar-Council-IRAL-response.pdf> accessed on 2nd July, 2022 and Independent Review of Administrative Law call for evidence – Law Society response available on <https://www.lawsociety.org.uk/campaigns/consultation-responses/independent-review-of-administrative-law-call-for-evidence-law-society-response> accessed on 2nd July, 2022

⁹³ [2011] UKSC 28 Supreme Court

⁹⁴ See Judicial Review- Proposal for Reform, available on <https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/> accessed on 12th July 2022; this contains also the government response to the committee’s recommendations

⁹⁵ See UK Parliament - Judicial Review and Courts Bill completes passage through Parliament

about the provision that may be made by, and the effects of, quashing orders; to make provision restricting judicial review of certain decisions of the Upper Tribunal; to make provision about the use of written and electronic procedures in courts and tribunals; to make other provision about procedure in, and the organisation of, courts and tribunals; and for connected purposes” [⁹⁶]. While it is too early to academically commend or condemn some of the changes brought by these amendments as they are yet to be tested before the courts, what is clear is that the Act will bring a number of changes to judicial review in the UK that had never been brought for long in the public law history of the United Kingdom.

28 April 2022 available on <https://www.parliament.uk/business/news/2022/february-2022/lords-debates-judicial-review-and-courts-bill/> accessed on 1st August 2022; see also <https://www.legislation.gov.uk/ukpga/2022/35/introduction> accessed on the same date

⁹⁶ *ibid*