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AN APPRAISAL OF THE DOCTRINES OF EXHAUSTION, RIPENESS AND LOCUS STANDI AS MEANS TO PREVENTING FRIVOLOUS ACTION AGAINST ADMINISTRATIVE DECISIONS IN NIGERIA

Ilias B. Lawal[*] &
Sunday A. Fagbemi[**]

Abstract

Judicial review of administrative decisions is a great weapon in the hand of judges to control administrative excesses and abuse of power. Over the years, several doctrines were developed to aid the court in the determination of whether to intervene in administrative proceedings or to tarry until a decision is reached. To checkmate abuse of power by administrative agency or inferior courts, doctrines like prohibition, certiorari, mandamus, ultravires, declaration, habeascorpus are ready tools in the hands of the judiciary. Conversely, to prevent frivolous actions from citizenry, the doctrines of exhaustion, ripeness, and locusstandi were evolved.Judicial intervention may come either at the pre-enforcement or post-enforcement stages. The doctrines of exhaustion, ripeness and locusstandi are pre-enforcement remedies, while doctrines like certiorari, declaration and ultravires operate as post-enforcement remedies. This paper seeks to appraise pre-enforcement remedies. Case law is extensively used to illustrate their import.

1. Introduction

Judicial control is a great weapon in the hands of Judges. It comprises the power of a court to hold unconstitutional and unenforceable any decision, order or action by a public authority which is inconsistent or in conflict with the basic law of the land. According to GurramRamachandraRao,[1] the judiciary plays a very important role as a protector of the constitutional values that the founding fathers have given us. They try to undo the harm that is being done by the legislature and the executive and also try to provide every citizen what has been promised by the Constitution under the Directive Principles of State Policy.

Judicial control or review, as it is generally called, is the power of the Courts to invalidate on constitutional ground, the acts of government agencies, administrative bodies or

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[1] GurramRamachandraRao, "India: Judicial Review in India" available in www.mondaq.com/india/20649/Constitutional+Administrative+Law/Judicial+Review+in+India/,accessed on 26/3/2013 at 3.30pm.

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legislative actions within that jurisdiction. The underlying object of judicial reviews according to Pan Mohammad Faiz,[2] is to ensure that the authority does not abuse its power and that the individual receives just and fair treatment and to ensure that the authority reaches a conclusion which is correct in the eye of law.

In Nigeria, section 6 (6) (b) of the Federal Republic of Nigeria Constitution, 1999 as amended vests on the judiciary the power of adjudication in all matters between persons, or between government or authority and to any person, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. The implication of this provision is to guarantee to every Nigerian a ready avenue to seek redress against all matters affecting their interest either against an individual or against government bodies or agencies. Hence, the power offered by section 6 (6) (b) of the Constitution has been used by judiciary in Nigeria to intervene on different matters brought to it for adjudication by the citizen. However, this power is not entirely absolute, as there are inherent limitations embedded within it. However, as opined Pan Mohammad Faiz,[3] the duty of the court is to confine itself to the question of legality of the action challenged. It has to consider whether a decision-making authority has exceeded its power, committed error of law, violated rules of natural justice, and reached a decision which no reasonable man would have reached or otherwise abused its powers.[4]Conversely, the court has duty to ensure that the complainant has good reason to challenge administrative decision and had indeed exhausted all the internal administrative remedies before its jurisdiction for judicial control is invoked.

In order to balance the above two equations, various doctrines have been developed on both sides. For instance, where an`administrative agency or body has committed an error of làw, violated rules of natural justice or abused its power, the remedies available to citizen are prerogative writs of certiorari, prohibition, mandamus, habeas corpus, *quo waranto, ultra vires,* declaration and injunction amongst others. On the other hand, to checkmate frivolous actions against administrative agencies or bodies by citizens and to promote autonomy and enhancement of efficiency in administration, the doctrines of exhaustion of administrative remedies, ripeness of action and*locus standi*were evolved. The judicial intervention under the above doctrines may come either at pre-enforcement stage or post-enforcement stage. The doctrines of exhaustion, ripeness and *locus standi* fall within the ambit of pre-enforcement intervention, while the doctrine of *ultra vires, certiorari* and declaration among otherare relevant in the realm of post-enforcement remedies.

Due to the synergy among the doctrines of exhaustion, ripeness and *locus standi*, this paper seeks to appraise them. To appreciate the purpose and intendment of the three doctrines, the paper relies heavily on case law to illustrate these doctrines and draw the curtain with general conclusion.

2. Exhaustion of Administrative Remedies

[2] Pan Mohammad Faiz, "Judicial Review on Administrative Action", (2007), available at http://faizlawjournal.blogspot.com/2007/09/judicial-review-on-administrative.html,.accessed on 26/3/2013 at 1.46pm.

[3].*Ibid.*
[4].*Ibid.*

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"Exhaustion" means the chance of not getting any judicial relief until the complainant has exhausted all provided administrative remedies. For instance, a regulation must have been made and such regulation must have affected a party's interest. The law under which power is exercised must have provided administrative avenue for an injured party and instead of going to court to allow the administration to have a second look at the regulation and probably make amendment.

Procedurally, the issue of exhaustion of administrative remedies usually arises when litigant, aggrieved by an agency's actions seeks judicial review of that action without first pursuing the available remedies before the agency itself. The court, in such instance, must decide whether to review the agency's decision or to remit back the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.[5]

The origin of this doctrine could be traced to the United States of America in the case of *Myers v. Bethlehem Ship Building Corporation.*[6] In that case, the company had been served with a complaint alleging that it had engaged in unfair labour practices. The company took the position that the complaint was invalid because the Board had no jurisdiction over the company and the company tried to obtain immediate review of the complaint on the ground that it will suffer irreparable damage if it were forced to exhaust the available administrative remedy before going to the court. It was held that:

> It is the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Although, the court in the above case failed to adduce reasons for its decision, however, over the years, several reasons have been advanced for the doctrine of exhaustion through judicial decisions. Commentators and text writers believe that it protects or guarantees administrative autonomy.[7] Other advantages include: preservation of doctrine of separation of powers[8] and gaining of judicial economy.[9]The agencies have the specialized personnel, experience, and expertise to sort and decide matters that arise under their jurisdiction.[10]The

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[5]Gelpe, M. R., "Exhaustion of Administrative Remedies: Lessons from Environmental Cases",*The George Washington Law Review,* vol. 53, Nos. 1-2, (November 1984-January 1995), p. 3.

[6]303, U. S. 41 (1938).

[7]Ese, M., *Administrative Law*, 4th Edition, (Ikeja, Lagos, Princeton Publishing Co, 2012), pp. 403-408; Jaffe, LL., *Judicial Control of Administrative Action.*(Boston: Little, Brown & Co, 1985), pp. 424-58; Schwartz, B.,*Administrative Law,* (Toronto: Little, Brown & Co, 1976), pp. 497-514.

[8]Donnellan, R. L., "The Exhaustion Doctrine Should Not Be a Doctrine without Exceptions",103 *West Virginia Law Review,* Spring, (2001), ,pp. 361-86.

[9]*McKart v. United States, 395, U. S, 185,195, Bethlehem Steel Corporation v. Environmental Protection Agency,* 669 F. 2d 903, 907 (3d cir.1982).

[10]Farlex, E., "Legal Definition of Exhaustion of Remedies", available at http://legal-dictionary the free dictionary.com/Exhaustion+of+Remedies>Exhaustion of Remedies<OZ. accessed on 15th July, 2013 at 1. \ 30pm..

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doctrine also enhances the efficiency of administrative agencies and the judiciary,[11] and permits courts to benefit from an agency's determination of facts and exercise of discretion.[12]

The reasons advanced for exhaustion doctrine appeared plausible and capable of protecting administrative agencies against mischievous litigation. However, these reasons have received criticisms in some quarters. For instance, Marcia R. Gelpe is of the opinion that administrative autonomy is unclear, vague and non-conclusive as no agency has absolute autonomy because almost every administrative action is subject to judicial review.[13] Similarly, Fuchs[14] has criticised the doctrine of separation of power on the ground that no department of government should be permitted to exercise a degree of power which renders it unduly dangerous to human freedom. Furthermore, concerning the administrative efficiency advanced in favour of the exhaustion doctrine, Marcia R Gelpe has faulted this reason as being unpersuasive on the ground that exhaustion cases typically arise when the agency has completed one step or action and the party seeking judicial consideration has failed to invoke another administrative action, usually involving different agency personnel, hence, there is no disruption of the agency's procedures.

Whatever reasons or arguments against the doctrine of exhaustion, its advantages far outweigh its disadvantages. For example, the doctrine is a useful tool to insulate administrative agencies against frivolous actions by professional litigants and cranks; it also provides smooth platform for friction free administration. Due to the usefulness of exhaustion theory, the doctrine has gained statutory codification in many countries. For instance, in the United State of America and under the Administrative Act of 1946, a complainant cannot ordinarily resort to the courts until he has exhausted all administrative remedies.[15] Similarly, in Nigeria, there are ample stipulations in our municipal law to promote the doctrine.[16] What is more, since there is no rule

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[11] *Falbo v. United States, 320 U. S. 549, 558, 1944.*

[12] Gelpe, M. R., Gelpe, *Op cit,* p. 11. See generally Candidate, J. D., "The Role of the Exhaustion and Ripeness Doctrines in Reasonable Accommodation Denial Suit Under the Fair Housing Amendment Act" ,*BYU Journal of Public Law*, vol. 24, 2011. Also available at www.lawz.byu.edu/jpl/papers/v/24n2-melt-Hall.pdf, accessed on 18th Jul, 2013 at 6-26pm.

[13] *Ibid.*

[14] Fuchs, "An Approach to Administrative Law", Vol. 18, *(1940), NCLRev.* pp. 183, 194.

[15] Md. AwalHossainMollah l. "Judicial Control Over Administration and Protect the Citizen's Right: An Analytical Overview, available at http://Unpanlium.org/intradsc/group/public/documents/APCITY/UNPAN02006/.pdf.accessed on26th March, 2013 at 1. 37pm.

[16] See in this connection section 49 (1) of ObafemiAwolowo University (Transitional Provisions) Act, Cap 02, Laws of the Federation of Nigeria, 2004 as amended. The sub-section provides that "No suit shall be commenced against the University until at least three months after a written Notice of intention to commence the same shall have been served on the University by the intending plaintiff or his agent, and such notice shall clearly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims". The purpose of this provision is to encourage peaceful and amicable settlement of the dispute without resorting to litigation. Failure to comply with the provision of this section will render any action against the University incompetent since the intending plaintiff would have failed to exhaust the internal procedures within the University Act in matter of dispute. Thus, in the case of *ObafemiAwolowo University v. Oliyide& Sons Ltd (2002) FWLR (Pt. 105) 799 at 818-822,* where the respondent failed to serve the University with pre-action notice as contained in sections 46 and 49 of the above University Act, it was held that a pre-action notice is a condition precedent to the exercise of jurisdiction by the court. Similar provision is contained in section 110 (2) of the Nigeria Port Authority Act. See the case of *Ntiero v. Nigerian Ports Authority (2008) 6 SCM 119 at 153.* See further the

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without exception, the doctrine of exhaustion admits some exceptions to checkmate whatever lapses that could be seen in its rationale. Few of these exceptions are highlighted below.

3. Exceptions to the Exhaustion Doctrine

Since the United States Supreme Court's decision in the case of *Myer v. Bethlehem Ship Building Corporation,*[17] the United States has carved out some exceptions to the requirement that the plaintiff should exhaust the necessary administrative remedy before seeking judicial relief. Thus, in the case of *McKart v. United States,*[18] it was held that the plaintiff could bring action in court without necessarily following the administrative appeal procedure which was the administrative remedy. In this case, the court balanced a number of factors in determining that the action should not be barred by the exhaustion doctrine. Thus, presently, the grant of judicial review depends on various factors. For instance, judicial relief may be granted in spite of non-exhaustion of administrative remedies if an irreparable injury will be caused,[19] or the agency exercising the power has no jurisdiction.[20] If however, the remedy sought from the court will be the one that administrative agency will award to the plaintiff, the court will require the exhaustion of administrative remedy. Furthermore, the court will not grant exhaustion where it is apparent that granting same will be futile. According to Marcia R Gelpe, the appearance of futility may come from evidence of bad faith on the part of the agency, past patterns of an agency's decision making, the agency's position on the merit of cases in litigation over exhaustion, or other statement by the agency on the issue. In all these cases according to the learned writer, the exception rests on the idea that requiring exhaustion would not preserve the values that exhaustion should protect.[21]

3.1 United Kingdom

In England, the courts are willing and ready to assume jurisdiction and give judicial remedy immediately the administrative wrong is committed even when the litigant has not exhausted the administrative remedy provided for in the enabling Act. In the case of *R. v. Electricity Commissioner,*[22] the court granted judicial remedy in spite of the fact that the Minister might in the end not have confirmed the scheme being challenged. Also in *Cooper v. Wilson,*[23] judicial remedy was granted despite non-observance of right of special right of appeal to the Home Secretary.

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cases of *Mobil Product Nig. Ltd. v. Lagos State Environmental & Others (2002) 14 SCM 167; Ologolo&Ors v. Uche&Ors, (2005) 10-11 SCM 206 at 219-220.* See Ese, M., *Op cit*, p. 403.

[17] *(Supra).*

[18] 395 U. S. 185 (1960)

[19] Gelpe, M. R., *op cit.* See also William, F., "Exhaustion of Administrative Remedies – New Dimension Since Darby".18 *Pace Environmental Law Review,* (Winter),pp. 1-18; *Walker v Southern Railway 385 U. S. 126, 87 ct. 365, 17L Ed, 2d, 294 (1966).*

[20] William, F., *op cit,* Davis, K..C., *Administrative Law Treatise*, 2nd edition, (Minnesota: West Publishing Co., 1983), p. 478.

[21] Gelpe, M. R., *op cit.*

[22] (1924) 1 K. B. 171.

[23] (1973) 2 K. B. 309.

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3.2 . Nigeria

In Nigeria, the principle does not appear settled in view of diverse decisions by the courts. For instance, in the case of *Chief Janet Akinrinade v. Dr. LekanBalogun& Others,*[24] the plaintiff had contested the primary election against the 1st defendant under the platform of NPP prelude to the 1983 general election but lost. It was argued by the defendant that the plaintiff had not exhausted all domestic remedies in the constitution of the party before seeking redress in court. The court in rejecting this contention held that the plaintiff being a party member from its inception has a right to enforce any of the provisions of the Party's Constitution as it affects her right. However, in the case of *University of Ilorin v. IdowuOluwadare,*[25] following his expulsion under the provision of University of Ilorin Act[26] on account of examinations misconduct, the respondent, without exhausting the domestic remedies available within the University of Ilorin Act instituted this action. It was held that:

> Where the matters involve the award of degrees, diplomas and certificates and matters incidental thereto like examination malpractices, an aggrieved party, be he a student or a lecturer, should first exhaust all the internal machineries for the redress before recourse to court. Where he rushes to court without first exhausting all the remedies for redress available to him within the domestic forum, he would be held to have jumped the gun and the matter would be declared bad for incompetence. In the instant case, before the appeal of the respondent to the Council of the University of Ilorin was determined, the respondent filed an action before the Federal High Court, which action was premature and rendered the suit incompetent.

Invariably, in Nigeria, where the enabling statute provides for internal remedy to be followed by the plaintiff before instituting action in court, failure to exhaust the remedy will render the action incompetent. Save in this circumstance, every citizen of Nigeria has a right of access to court.[27]

4. Doctrine of Ripeness

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[24](1985) 6 UILR 588.

[25](2009) All FWLR (Pt. 452) 1175 at 1207. See also the case *Magit v. University of Agriculture, Makurdi (2000) 12 SCM 226 or (2005) 19 NWLR (Pt. 959) 211.*

[26] Cap. U7, Laws of the Federation of Nigeria, 2004 as amended.

[27] See in this connection section 17 (2) (e) of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides that: "The independence, impartiality and integrity of court of law, and easy accessibility thereto shall be secured and maintained. See also section 315 (3) of the Constitution of the Federal Republic of Nigeria, 1999 as amended and the case of *Adediran v. Interland Transport Ltd (1991) 9 NWLR (Pt. 214) 155 at 180.*

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The doctrine of ripeness intersects with several related doctrines such as exhaustion and standing to sue. For instance, in cases involving a challenge to administrative decisions, ripeness is closely related to exhaustion of administrative remedies. Similarly, when considering the general legal qualification for judicial review, ripeness overlaps with the doctrine of standing to sue or *locus standi.*The doctrines of exhaustion, primary jurisdiction, and ripeness are closely related since the two doctrines address the allocation of decision-making authority between courts and agencies.[28] Thus, the doctrine of ripeness like jurisdiction is a threshold issue in legal proceedings. Hence, whenever it is raised in judicial proceedings, it must be decided before any further step is taken in the proceedings.

Procedurally, the doctrine of ripeness like exhaustion is concerned with the problems of timing or fitness of application for judicial review; which persons might ask for review; and in what circumstances? Generally, an administrative action is not reviewable in a court unless and until the action results in the imposition of an obligation, denial of a right, or fixing of some legal relationship as a consummation of the administrative process.[29] According to the doctrine of ripeness, cases are declared not ripe for judicial intervention when the injuries are too speculative, or never occurring, or it involves issues which are not real, present or imminent or issues that are abstract, hypothetical or remote.[30] The purpose of ripeness doctrine, according to Davis,[31] is to conserve judicial machinery for problem which is real and present or imminent and to refuse to squander it on problems which are abstract or hypothetical or remote. The doctrine protects administrative agencies from judicial interference until a final agency decision is reached. In sum total, the court will treat as unripe any administrative decision, which has not yet affected or threatened the plaintiff substantially. In the case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade,*[32] Lord Summer said as follows:

> It has for many years be customary to hear and determine claims for a declaration of rights when a real and not a fictitious or academic question is involved and is in being between two parties.

In effect, the judiciary will only intervene when the matter in issue is not academic, hypothetical or fictitious, but where there is a real and substantive issue to be determined between the parties. In practice, the two prongs of the ripeness doctrine as developed by the United States Supreme Court in the case of *Williamson County Regulatory Planning Commission v. Hamilton Bank,*[33] in a case affecting taking claims are: first, the regulatory authority must reach a final decision regarding the allowable development on the plaintiff's property; and second, the owner must exhaust state compensation remedies before resorting to

[28]Gelpe, M. R., *op cit.*

[29]USLEGAL.Com.,"Ripeness of Question for Judicial Review", available at USlegal.com/judicial-review-of-administrative-decision/ripeness-of-question-for-judicial-review, accessed on 18th July, 2013 at 6.52pm.

[30] It is a fundamental principle of law that the court will not entertain a hypothetical or academic action. See *Audu v. Attorney General &Another (2012) 12 SCM (Pt. 2) 23, PHCN v. Ofoelo (2012) 12 SCM (Pt. 2) 390, National Park Hospital Association v. DOI, 538 U. S. 803 (U.S). 2003.* See generally Sergeant Shriver National Centre on Poverty Law, "Ripeness", available at Federalpracticemanual.org/nude/20, accessed on 18th July, 2013 at 6.45pm.

[31] Davis, K. Culp.,*op cit,* p.478.

[32] (1921) App. Cas. 435.

[33]473 U. S. 172 (1985).

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court.[34] Failure to meet the two prongs of the ripeness doctrine is fatal to a taking claim. Ripeness is therefore a question of subject matter jurisdiction. If a case is not ripe for review, the court lacks subject matter jurisdiction and they must dismiss the claim. An unripe claim can therefore be disposed of by a motion to dismiss for lack of subject matter jurisdiction.[35] In the case of *Abbot Laboratories v. Gardner,*[36] it was held that the court evaluates both the fitness of the issues for judicial decision and the hardship to the parties before withholding court consideration.

In the determination of whether or not an action is ripe for judicial intervention by way of judicial review, courts should take into account the following questions: Whether delayed judicial review would cause hardship to the plaintiffs? Whether judicial intervention would be inappropriate because it would interfere with further administrative actions? Whether the courts can benefit from further factual development of the issues presented for final adjudication? Whether legal issues are presented for review? And whether all administrative remedies are exhausted before approaching the judiciary?[37]

Once the above questions are answered in the negative, the court will decline jurisdiction to intervene in administrative action.[38] In the early American cases, courts were reluctant to intervene unless further action had been taken by the administration in relation to the matter in issue. It was the opinion of the courts not to prevent or stifle administration processes until further steps had been taken and its effect felt in a concrete way by challenging parties. In the case of *Helco Products Coy.v. Mcnutt,*[39] the United States Federal Drug and Cosmetic Act forbids the shipment in interstate commerce of adulterated food. Violators of this provision are liable to penal action ranging from seizure of the goods to payment of fines. During the World War II, blue poppy seeds which are used on bakery products were unobtainable, but white poppy seeds could be purchased. Helco Company sought the permission of the Food and Drug Administrator to colour the white poppy seed with harmless vegetable dye and wrote to demand if doing so will not amount to violation of the Drug and Cosmetic Act. The administrator replied that such an action would result in an adulterated product within the meaning of the Act. The Company not satisfied wrote the Attorney General for advice; however, the Attorney General replied that his duty was to give opinion only to the President of the United States and head of Executive Department. Helco sought a declaratory judgment against the Federal Security Administrator and the Attorney General that the Act did not prohibit its proposed action. It was held that:

> To permit suit for a declaratory judgment upon mere advisory and administrative opinion might discharge the practice of giving such opinion.

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[34] Overstreet, G., "The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases", *Journal of Land Use & Environmental Law*, vol. 10, (1994),p. 5; Army Brigham Boulris, "Ripeness and Exhaustion of Remedies: Getting to the Merits", available in www.brighamore.com/library/ripenessandechaustionofremedies.gettingtothemerits.pdf, p. 4, accessed on 18th July, 2013 at 6.39pm.

[35] Overstreet, G.,*op cit.*See *Gilbert v. City of Cambridge, 932 F. 2d 51, 64 (1st Cir. 1991).*

[36] 387 U. S. 136 (1987)

[37] "Ripeness of Question for Judicial Review", *op cit.*

[38] See *City of Fall River v. FERC, 507 F. 3d 1 (1st Cir. 2007), Schultz v. Awrren County, 249 S. W. 3d 898 (Mo. Ct. App. 2008)*

[39] 137 U. S. F 24 281.

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Truly, in practice, many pre-enforcement actions may sound academic and unreal, but in order to clear certain ambiguity, the citizen may want to apply for declaration. Recent cases have held issues ripe for hearing if all available and necessary steps had been taken that put no one in doubt as to the purpose and intention of the agency.[40] *In Pierce v. Society of Sisters*[41] the State of Oregon enacted a statute requiring all children between the ages of 8 to 10 years to attend public schools. The law is to be operative 2 to 3 years after its making. In anticipation of this, the patrons refused to enter their children into private schools, and those who were there were being withdrawn. The plaintiff, a Roman Catholic Order, brought a suit to restrain the threatened enforcement of law as it threatened to destroy their business. The effect is that if the suit is not brought before the operation of the law, the proprietor will suffer irreparable lost when the law became operative. It was held that the injury to private schools was "present and real" therefore the cause was ripe for hearing.

The doctrine of ripeness is recognized not only in America but also in some other common law jurisdictions. The doctrine normally arises when the courts are invited to give declaratory judgment to issues that may not yet be well defined. For instance, in *Dyson v. Attorney General*[42] the court refused a declaratory order. In that case an action was brought against the Attorney General to test the validity of notices issued by the English Inland Revenue Commissioners under the Finance Act of 1910. The plaintiff contended that the Commissioners had exceeded their power in requiring Dyson (a tax payer) under penalty to submit to them certain particulars specified in the form of notice. The court held that the rules have created a new cause of action in so far as they relate to declaratory judgments in an action in which no consequential relief is or could be claimed.

In Nigeria, section 46 of the 1999 Constitution, as amended appear to have given recognition to this doctrine by allowing a litigant to come to court immediately his right is threatened. The doctrine came up for examination in the case of *Archbishop OlubunmiOkogie v. Attorney General of Lagos State.*[43] In that case, the Ministry of Education in line with free education policy of the government sent a circular to all private schools indicating that in the following year only government public school would be allowed in Lagos State. The plaintiff sought a declaration that the circular will affect their right under section 36 of the 1979 Constitution. The court held that despite the future operation of the circular the case was ripe for hearing.

It is clear from this case that the Constitution even envisages that concrete steps must have been taken by the administration to effectuate their intention otherwise the matter will be a mere conjecture and therefore abstract. The above pre-enforcement issues are normally settled before the court will entertain the merit or grant relief to an aggrieved party.

5. The Doctrine of Locus Standi

In law, standing or *locus standi* is the term for the ability of a party to demonstrate to the court his sufficient connection to any harm from the law or action challenged to support that

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[40] See the case of *Abbot Laboratories v. Gardner (supra).*
[41] 268. U. S. 510 (1925).
[42] (1991) I K. B. 410.
[43] (1981) 1 NCLR 218.

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party's participation in the case.[44] The term "*locus standi'* denotes, 'the right to bring an action or to be heard in a given forum'.[45] The word *locus standi*is used interchangeably with terms like 'standing' or 'title to sue'.[46]

The doctrine of *locus standi* or standing, determines the competence of a plaintiff to assert the matter of their complaint before the court.[47] The doctrine of *locus standi* is a concept whereby only a person who has a legal right or whose rights have been adversely affected, or who may have suffered or is likely to suffer special damage in consequence of an alleged wrongdoing by a public authority can institute proceedings to obtain judicial redress.[48] The doctrine of *locus standi*has root in the English and Roman-Dutch Common Law. Under these laws, according to TumaiMurombo, the doctrine was developed to ensure that Courts play their proper function in constitutional democracy where the rule of law and the doctrine of separation of powers underline the constitutional system, namely that courts do not make law but merely apply the law by adjudicating disputes that are ripe for adjudication and not prospective hypothetical cases.[49]

Secondly, the doctrine was developed to, in a way, prevent the floodgates from opening, where every Dickand Harry or busybodies, cranks and other mischief makers could take up any case and bring it before the court regardless of their interest in the matter or the outcome.[50] Thirdly, this legal situation was born out of the focus of private law litigation on the protection and vindication of private interest, or rights.[51] However, due to public interest, the scope of the doctrine of *locus standi* has been widened since public interest litigation demanded for objectivity, forensic skill, procedural gamesmanship and socio-legal perception.[52]

In practice, there are two ways that a right is granted; it is either granted through the constitution by its inclusion in the bills of rights or it may be conferred by statute.[53] Hence, in most jurisdictions, the doctrine of *locus standi* has graduated from its primitive status to be recognized under the constitution. For instance, in the United States of America, Article III, section 3 of America Constitution requires a prospective litigant to show that, such injury is

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[44] .Priya, L., "Expansion of *Locus Standi*: A Path for Development of PIL", Lawyersclubindia, Interactive Platform for Lawyers & Indian Public, 2011, p. 2.
[45] Bryan A. Garner, *op cit*, p. 960.
[46] Tumai, M., "Strengthening *Locus Standi* in Public Interest Environmental Litigation: Has Leadership moved from the United States to South Africa? 6/2, *Law, Environment and Development Journal,* (2010),p. 165.*Adesanya v. Federal Republic of Nigeria, 2 ACLC 1 at 16.*See also Oniemola, P. K., and Olowononi, E. O., "Application of the Doctrine of *Locus Standi* in Proceedings for Judicial Review in Nigeria, The Gambia and Canada, *The Nigerian Law Journal,*vol. 17, No. 1, (2014), p 133.
[47] Hough, B., "A Re-Examination of the Case for a *Locus Standi* Rules in Public Law", *28 Cambrian Law Review,*(1997), pp. 83-104 also available at eprints.bournemouth.ac.uk2905/1/86pdf, accessed on 18th July, 2013 at 7.02pm.
[48] Okany.M. C. *Nigerian Administrative Law.*(Onitsha, Nigeria,African First Publishers.Africana Academic, 2007), p.325.
[49] Tumai, M., *op cit,* p 167.
[50] *Ibid*, p. 168.
[51] *Ibid.*
[52] Priya, L., *op cit*
[53] Tanyanyiwa, T. R., "*Locus Standi* – A Conundrum in Environmental Rights Protection: Will the Answer come from the Supreme Court or Constitution Making Process", available at tinashetayanyiwafiles.wordpress.com2011/04/locus-standi-e28093-a-conundrum-in-environmental-right-protection., accessed on 18th July, 2013 at 7.13pm.

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"concrete and particularized; the threat or injury must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favourable judicial decision will prevent or redress the injury.[54]

Under the Constitution of the Federal Republic of Nigeria, 1999 as amended, there are provisions which require *locus standi* in bringing certain suits in the courts. In the first instance, section 6 (6) of the Constitution vests judicial powers in the country on the superior courts to adjudicate all matters between persons or between government or authority and any person in Nigeria involving civil rights and obligation of those persons. By virtue of this provision, the courts have been granted the power of judicial review. However, the power is not absolute as it admits some restrictions under sub-section 6 (6) (c) and (d). The exceptions under the sub-sections exclude the jurisdiction of the courts in respect of infringement of the provisions set out under Chapter II of the Constitution relating to "Fundamental Objectives and Directive Principles of State Policy".[55]

Furthermore, section 36 (1) of the 1999 Constitution states *inter alia* that in the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to fair hearing by the court or other tribunal established by law. In addition to the foregoing, section 46 (1) of the Constitution specifically provides that any person who alleges that any of the provision of the Chapter IV of the Constitution bordering on that person's fundamental human rights has been violated may apply to the high court in that State for redress. The implication of this provision is that the right conferred by section 46 (1) of the Constitution recognizes the fact that before a redress is sought in court in respect of violation of rights of any Nigerian citizen, such right must relate to the individual who is alleging breach of the right. In other words, he must disclose his standing in the case, otherwise, the suit will be dismissed.

The language of section 46 of the Constitution according to Okany and rightly too, is that *locus standi* is required in order to sustain a claim that there has been an infringement of particular provision of the Constitution.[56]LaasyaPriya also posited that under the doctrine of *locus standi*, a party is only allowed to assert his or her right but cannot raise the claims of a third party no matter how closed they are to each other.[57]Obviously, the doctrine of *locus standi* limits the access of the citizen to the court, thus, for a litigant to successfully commence and lead evidence in an action in courts as far as the issue of *locus standi* is concerned, he must show that he is directly affected by the act he complained about,that the issue is not one bordering on general interest common to the public at large but that the right infringed is peculiar to him and that the right has been infringed or that there is a real threat of an immediate infringement of such right. Under the Nigeria jurisprudence, the case of *Olawoyin v. Attorney General, Northern Region of Nigeria,*[58]set the pace for the operation of the doctrine of *locus standi*. In the case, the

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[54]*Summers v. Garth Island Institute, 552 U. S. 128 S. C. 1118, (2008).*

[55] In Nigeria, the provisions of Chapter II of the Federal Republic of Nigeria Constitution, 1999 as amended caption 'Fundamental Objectives and Directives Principles of State Policy are not justiciable, hence, the violation of the principle therein cannot be challenged in court. However, the provisions are normative in that they help government in the formulation of policies that will improve on the general welfare and wellbeing of the citizenry.

[56]Okany, M. C. ,*op cit*, p. 326.See also Ese, M., *op cit, p. 428*

[57]Priya, L.,*opcit*, p. 2.

[58](1961) 2 SC NLR 5 at 10.

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appellant sought a declaration that Part 3 of the Children and Young Persons Law, Northern Region of Nigeria 1959 has been rendered void and unenforceable by the provisions of the Constitution of Nigeria, 1960, the trial judge dismissed the claim on the ground that no right of the appellant was alleged to have been infringed and that "it would be contrary to principle to make the declaration asked for in *vacuo*" of an infringement of the appellant's right which would give him a legal right or *locus standi* to sue. The appellant appealed the decision to the Supreme Court. While laying the foundation for the acid test for the determination of the doctrine of *locus standi*, Unsworth F.J (as he then was) said as follows:

> The appellant did not in his claim allege any interest, but his counsel said the evidence would be that the appellant had children whom he wished to educate politically. There was no suggestion that the appellant was in imminent danger of coming into conflict with the law or that there has been any real or direct interference with his normal business or other activities … the appellant failed to show that he has a sufficient interest to sustain a claim. It seems to me that to hold that there was an interest here would amount to saying that a private individual obtains an interest by mere enactment of a law with which he may in the future come in conflict.

The decision in the above case, open the Pandora's Box for several other cases decided by the Nigerian courts on this doctrine. For instance, in the case of*Abraham Adesanya v. President of Federal Republic of Nigeria & Another.*[59] the appellant as Senator brought this action challenging the appointment of the Chairman of the Federal Electoral Commission which had been confirmed by Senate on the ground that the appointee was still Chief Judge of Bendel State at the time and therefore not qualified. The trial court granted the declaration but refused the claim for injunction. On appeal, the issue of interest of the Appellant to challenge the appointment was raised. The issue was subsequently referred to the Supreme Court which held that a person seeking relief must have sufficient interest in the performance of the duty sought to be enforced or that his interest is adversely affected. In holding that the appellant lacks *locus standi* to institute the action, Bello JSC (as he then was) said as follows:

> A careful perusal of the problem would reveal that there is no jurisdiction within the common law countries where a general licence or blank cheque – if I may use that expression without any string or restriction, is given to a private individual to question the validity of legislative or executive action in a court of law. It is a common ground in all the jurisdictions of the common law countries that the claimant must have some justiciable interest which may be affected by the action or that he will suffer injury or damage as result of the action. In most cases, the area of dispute, and sometime, of conflicting decisions, has been whether or not on particular facts and situation, the claimant has sufficient interest or injury to accord him hearing. In the final analysis, whether a claimant has sufficient

[59] (1981) S. C. 112

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justiciable interest or sufferance of injury or damage depends on the facts and circumstances of each case.[60]

Apparently, from the standpoint of the Nigeria Supreme Court's decision in the above case, it could be safely said that the doctrine of *standing* is an aspect of justiciability. Hence, it is submitted that the problem of *locus standi* is surrounded by the same complexities and vagaries inherent in justiciability. The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the High Court and not on the issues he wishes to have adjudicated. Thus, in determining this, it is the cause of action that one has to examine to ascertain whether there is disclosed a *locus standi* or standing to sue.

When a party's standing to sue is in issue in a case, the question is whether the person whose standing in issue is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. Hence, *locus standi* is a forerunner or precursor to court's jurisdiction.[61]In the case of *locus standi,* the proper order to make when a party lacks *locus standi*to sue is to strike out the case and not an order of dismissal.[62] Premised on the foregoing, the doctrine of *locus standi*is the foundation of suit or legal matter. However, the operation of the doctrine is amenable to expansion. For instance, the doctrine had been interpreted and applied by the courts in two main ways namely: narrow or restrictive application and liberal and expansive application. Under the narrow and restrictive application, many suits including public interest litigations are thrown out of Nigerian courts almost on daily basis for lack of *locus standi*.[63]Conversely, taking a cue from other jurisdictions such as, Canada, United States of America, England, Australia, New Zealand and India where the doctrine and rigours of *lòcus standi* have been watered down, the Nigerian courts are gradually shifting ground from the strict application of *locus standi* rules in deserving cases. This new approach has greatly liberalised citizens' access to court. The *locus classicus* for the liberal application of *locus standi* in Nigeria is the case of *Patrick Isagba v. Benson Alegbe.*[64]The court gave a wide meaning to *locus standi* in litigation by a concerned and patriotic citizen to ensure the observance of the provisions of the Nigeria Constitution. In this case, Omosun J, (as he then was) held as follows:

> The plaintiff is a citizen of Nigeria. He has alleged that the defendants have contravened the provisions of the Constitution. It is suggested that he has no *locus standi,* that he is a meddlesome litigant and that he has no sufficient interest to enable him to bring the action. His interest cannot be quantified in terms of Naira and kobo, but certainly like all Nigerians. To adopt the view that he has no sufficient interest would lead to chaos. I

[60] See in this connection the cases of: *Gamioba& Others v. Ezesi II & Other* (1961) All NLR 584;*Fawehimni v. Maryam Babangida*(Unreported Suit No. LD/583/90); *Thomas v. Olufosoye*(1986) 1 NWLR (Pt. 18) 669;*Inakoju v. Adeleke& Others* (2007) 1 SCM 1 at 67-70; *A. G. Anambra State v. A.G. Federation* (2007) 12 SCM (Pt. 1) 1 at 62-63;*Basinco Motors Ltd v. Woermann Line &Another*(2009) 8 SCM 103 at 124.1 All. N. L. R. 269.

[61]*Flast v. Cohen* 392 U. S. 83, S. C (1942)*Bolaji v. Bamgbose*(1986) 4 NWLR (Pt. 37) 632; *Momoh v. Olotu* (1990) 1 All NLR 117*; Owner of M. V. Baco Liner 3 v. Adeniji* (1993) 3 NWLR (Pt. 274) 195.

[62]*BuraimohOloriode&Ors v. Simeon Oyebi&Ors*(1984) 5 S. C 1 at 32.

[63] See in this connection the cases of: *Eleso v. Government of Ogun State* (1990) 2 NWLR (Pt. 133) 420*; Erejuwa II, Olu of Warri* (1994)4 NWLR(Pt. 339) 416;*Ebongo v. Uwemedimo*(1995) 8 NWLR (Pt. 411) 22 at 45 *and Emezi v. Osuagwu&Ors*(2005)3 SCM 30 at 42-43.

[64](1981) 2 NCLR 424.

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cannot contemplate what will happen if violations of the Constitution go unchecked. It means that anyone with impunity can violate the Constitution and no one can say so because his private rights have not been injured.

The above liberal approach has been followed in several cases since then. For instance, in the case of *Fawehinmi v. Akilu& Others,*[65] the Supreme Court liberally interpreted and widened the scope of the doctrine of *locus standi* in favour of the appellant's application for mandamus in criminal case. In this case, the appellant had applied for an order of mandamus to compel the Director of Public Prosecution to prosecute the killer of his bosom friend and client, late Mr. Dele Giwa. In resolving the issue of *locus standi* raised by the respondents in favour of the appellant, the Nigerian Supreme Court held that:

Every Nigerian is his brother's keeper and that any person including a legal practitioner can bring an application for an order of mandamus to compel the Director of Public Prosecution to exercise his discretion to prosecute an alleged crime or in default permit a private prosecution of it.[66]

The above cases demonstrate the liberal approach to the application of the doctrine of *locus standi* in Nigeria. This approach has further received pragmatic application in cases involving violation of fundamental human right of Nigerian citizens under the Fundamental Rights Enforcement Procedure Rules of2009. Under this Rules, two major stipulations are` inserted to remove the previous impediments on the citizenry access to court in cases involving human rights enforcement. In the first instance, Order 1, Rule 3 (e) of the Fundamental Rights Enforcement Procedure Rules,2009 states that:

The Court must proactively pursue enhanced access to justice for all classes of litigant, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented"

In the second instance of cases, Order 1, Rule 3 (f) of the Fundamental Rights Enforcement Procedure Rules of 2009 provides that:

The court must encourage and welcome public interest litigation 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 organization, may launch human rights suit on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
(i) Anyone acting in his own interest;
(ii) Anyone acting on behalf of another person;

[65](1987) 1 NWLR (Pt. 67) 197.
[66] See further the cases of: *Beko-RansomeKuti&Ors v. A. G Federation (Ureported suit No. M/287/92); Mike Ozekhome&Ors v. President of the Federal Republic of Nigeria (1990) 2 WBRN 58.*

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(iii) Anyone acting as a member of, or in the interest of; a group or class of persons;
(iv) Anyone acting in the public interest; and
(v) An association acting in the interest of its members or other individuals or groups"

The import of the above provisions is that all Nigerian Citizens as well as their relations, friends and associates are given free access to court and in that instance, no procedural formulae or arid legalism shall be allowed to hamper, inhibit, hinder, or obstruct human right enforcement litigations in courts in Nigerian.[67]The courts are enjoined to take proactive steps and enhance access to justice for all classes of litigants especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented.[68]

The doctrine of *locus standi* in other jurisdictions practising similar legal system with Nigeria appears to be similar to the country's position before the enactment of Fundamental Rights Enforcement Procedure Rules, 2008 albeit with little variations. For instance, in the United State of America, the general consensus is that the party who invokes the power of court or institute an action, must be able to show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.[69]

In the case of *Tasmania v Victoria,*[70]it was held that an action for declaration may be brought by one of those affected to test the validity of an enactment for the purpose of protecting the public interest, even though no actual injury has been established. Again, in the case of *A.G. of Victoria v. Commonwealth,*[71] it was held that an action lay even before the enactment in question came into force. In the Indian case of *Dwarkadas v. Sholapur Spinning Company,*[72] it was held that only a plaintiff who can show that his right has been affected by a statute may challenge its validity and that his right must be directly or absolutely threatened. Similarly, in the Australian case of *Crounch v. The Commonwealth*[73]it was held that the plaintiff's allegation that his business was hampered by the necessity of obtaining permits under an allegedly invalid law is sufficient to sustain his action.

In the Great Britain, where most of the other countries inherited their legal system including Nigeria, the doctrine has started to move gradually from the original position in favour of the freedom of individual as against abuse of power by government or its agencies. For instance, in the case of *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd,*[74]Lord Diplock said among other things that: "it would, in my view, be a grave *lacuna* in our system of public law if pressure group, like the Federation, or even a single public spirited taxpayer, were prevented by out-dated technical rules of *locus standi* from

[67] See Order 1, Rule 3 (h) of the Fundamental Rights (Enforcement Procedure) Rules, 2008.
[68]Oniemola, P. K.*et al, op cit,* p. 147.
[69]*Forthing v. Mellon (supra).*
[70](1935) 52 C. L. R 533.
[71] (1954) S. C. 119
[72](1954) S. C. 119.
[73](1948) 77 CLR 339.
[74] (1981) 2 W. L. R 723 at 74

bringing the matter to the attention of the court to vindicate the rule of law or get the unlawful conduct stopped".

In Zimbabwe, a new dimension added to the issue of standing to sue is to look at the age of the litigant. Hence, one need to be an adult above the age of 18 years and mentally competent in the case of human being or to be a duly recognized legal entity in the case of organization to be able to be recognized as having *locus standi* under the Zimbabwe Law.[75]

6. Conclusion

The three doctrines discussed in this paper operate as a practical limitation on the availability of judicial review of administrative action. The symbolic tune of these doctrines is that in order to be able to challenge an administrative action, a litigant must ensure that he first and foremost exhaust the internal procedure within an enabling statute in order to determine the ripeness of his action. Invariably, a litigant may also satisfy these two requirements and still have his case dismissed if the court comes to the conclusion that he lacks the *locus standi* to institute the action in the first instance.

Of course, courts are established for the purpose of protecting the interest of citizens against executive and legislative excesses or maladministration. A careful perusal of the doctrines of exhaustion, ripeness and *locus standi* reveals one single fact that there is no jurisdiction within the common law countries where a licence or blank cheque is given to the citizen or mischief maker to take up any case and bring it before the court without first and foremost establishing his interest in the matter and what steps he had taken within the administrative provision to mitigate his loss.

Various reasons discussed in this paper have been canvassed in favour of the doctrines. However, it is submitted that it is better to allow a party to go to court and to be heard first, than to refuse him access to courts. Non-access to court, in our mind, will open a cache of media criticisms as to the constitutionality of restrictive laws within the legal system. Granted the fact that our courts have inherent powers to deal with vexatious litigation on frivolous claims, it is strongly suggested that the courts should lean in favour of citizens in cases of judicial review and dismiss the case after satisfying itself that the litigant's action is completely academic or speculative. We therefore commend the new innovations introduced to the doctrine of *locus standi* as contained in the Fundamental Rights (Enforcement Procedure) Rules, 2009.

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[75] Tanyanyiwa, T. R., *op cit,* p. 2.