

# **Access to justice and locus standi before Nigerian courts**

**By**

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## Declaration

I declare that this dissertation is my original work and has not been submitted for the award of a degree at any University.

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## Summary

Locus standi is a Latin word for standing. Traditionally, it implies that a litigant must have sufficient interest to apply to the court for the enforcement of the right of another person, challenge the actions of the government, have a court declare a law unconstitutional or even to litigate in the interest of the public otherwise the application will not be successful.

The interpretation of locus standi before the courts in most common law jurisdictions is liberal. Nigerian courts, however, interpret the principle of locus standi strictly, in the sense that standing is accorded the person who shows cause of action or sufficient interest. This position denies access to justice to many Nigerians who are poor or have no knowledge of their rights as the courts position on standing prevents NGOs or other individuals from applying to the courts on their behalf or litigating in the interest of the public.

Presently, the Fundamental Rights (Enforcement Procedure) Rules 2009 regulate the practice and procedure for the enforcement of human rights before Nigerian courts. The Rules encourage the courts to ‘welcome public interest litigation in the human rights field’ and not to dismiss or strike out human right cases for want of locus standi. However, it is doubtful if the courts will accept this invitation.

This study looks at the context of the interpretation of the principle of locus standi by Nigerian Courts and its effect on access to justice and public interest litigation by NGOs and individuals. It also examines the impact of the provision for locus standi of the Fundamental Rights (Enforcement Procedure) Rules 2009.

Finally, this study provides an analysis of the interpretation of this concept in other common law jurisdictions such as Kenya, India, United Kingdom and South Africa who once interpreted the concept strictly but now interpret it more liberally. This comparison is necessary to show that Nigerian courts are isolated in their position in the interpretation of locus standi and that there is need for the courts to conform to international best practice.

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## Chapter one

### 1 Introduction

#### 1.1 Background

Locus standi is a Latin word for standing.<sup>1</sup> Traditionally, it implies that a person who applies to the court for redress should have sufficient interest to approach the court.<sup>2</sup> The litigant must suffer harm or the harm should be about to happen to the litigant. Locus standi, when not interpreted liberally, simply means that only litigants with sufficient interest in the circumstances of the case have standing to bring an action in the interest of the public, to have a court declare a law unconstitutional or to challenge the actions of the government and its agencies.<sup>3</sup>

Nigerian courts generally interpret the principle of locus standi very strictly. They mostly accept cases where a person shows that he or she has personal interest in the subject matter of the litigation or that the violation complained of affects the party directly.<sup>4</sup> This has also been the position of the courts in public interest litigation cases,<sup>5</sup> and cases involving human right abuses. This follows the interpretation of section 6(6)(b) of the Nigerian Constitution by the Supreme Court in *Adesanya v President of the Federal Republic of Nigeria*<sup>6</sup> and subsequent judgments by the Nigerian courts who have followed the Supreme Court's interpretation as precedent. This position hinders access to justice because public spirited individuals and NGOs may not make an application to the

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<sup>1</sup> See Luyali 2011, 'Impact of unrestricted locus standi on access to justice' <http://www.kenyaplex.com/resources/2039-impact-of-unrestricted-locus-standi-on-access-to-justice.aspx> (accessed 28 September 2013). See also GF Michael and AV Raja 'Effectiveness of Environmental Public Interest Litigation in India: Determining the key variables' *Fordham Environmental Law Journal*, vol. 21, 2010 250,251.

<sup>2</sup> Luyali (n. 1 above).

<sup>3</sup> As above.

<sup>4</sup> D Olowu 'An integrative right-based approach to human development in Africa' (2009) *Pretoria University Law press*, 175.

<sup>5</sup> As above.

<sup>6</sup> (1981) 1 All NLR 1.

courts in the interest of the public given the fact that the majority of the Nigerian populace may have no knowledge of their rights.<sup>7</sup> Furthermore the complexities and cost of judicial processes prevent victims who are not educated and who are poor from applying to the court for redress, many people in Nigeria whose fundamental rights are violated may not actually be in a position to approach the court for relief, ‘because they are unsophisticated and indigent which in effect means they are incapable of enforcing their fundamental rights.’<sup>8</sup> The fear of the complicated court process or negative publicity can also make the victims shy away from legal action.<sup>9</sup> The resultant effect is that these victims are denied access to court that would have otherwise been possible if they were represented by NGOs or other individuals.

The Fundamental Rights (Enforcement Procedure) Rules 2009 (FREPR 2009) which replaced the Fundamental Rights (Enforcement Procedure) Rules 1979 provide that:<sup>10</sup>

The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

- (i) Anyone acting in his own interest;
- (ii) Anyone acting on behalf of another person;
- (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
- (iv) Anyone acting in the public interest, and
- (v) Association acting in the interest of its members or other individuals or groups.

It is not certain if the provision in the Fundamental Rights Enforcement Procedure rules 2009 will be followed by Nigerian courts. This is because of the provision of section 6(6)(b) of the Nigerian Constitution which the Supreme Court interpreted to be the constitutional provision for locus standi and the fact that this provision is made in the preamble of the Rules which has no binding effect.

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<sup>7</sup> Luyali (n. 1 above).

<sup>8</sup> As above.

<sup>9</sup> As above.

<sup>10</sup> Fundamental Rights Enforcement Procedure rules 2009 Preamble 3(e)



This study critically examines the effect of the strict interpretation of locus standi in the Nigerian legal system especially in public interest litigation, the effect of the provision of locus standi in preamble 3(e) of the Fundamental Rights Enforcement Procedure rules 2009 and suggests possible remedies.

## 1.2 Problem statement

The restrictive viewpoint of locus standi limits the role the NGOs, human rights activists and advocates can play with regard to litigating socio-economic matters that affect the poor.<sup>11</sup> Public spirited individuals and NGOs often have the resources and expertise in litigation and issues that affect the poor but are denied the standing to sue on such issues.<sup>12</sup> This contrasts remarkably with the situation in, say Kenya, South Africa and Uganda, where the constitutions specifically accord locus standi to NGOs and other individuals, by allowing individuals and groups to apply to courts for the enforcement of the human rights of others.<sup>13</sup>

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<sup>11</sup> M Eliantonio and N Stratieva 'The Locus Standi of Private Applicants under Article 230 (4) EC through a Political lens' *Maastricht Faculty of Law working paper 2009/13 4*. See also D Juma 'Access to the African Court on Human Peoples Right: A case of the Poacher turned Gamekeeper' (2007) *Essex Human Rights Review vol. 4 No. 2 15*. And C Cojocariu 'Handicapping Rules: The overly Restrictive Application of Admissibility criteria by the European Court of Human Rights to complaints concerning disabled people' (2011) *E.H.R.L.R issue 6 687*.

<sup>12</sup> N Themudo 'NGOs and resources: getting a closer grip on a complex area' (2000) *Documentos de discusion sobre el Tercer Sector, Nu'm. 5, 7*. See also J Beqiraj 'The Delicate Equilibrium of EU Trade Measures: The Seals case. German Law Journal vol.14 No. 01 289.

<sup>13</sup> See Article 22 of the 2010 Constitution of Kenya, which provides that: 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by— a) a person acting on behalf of another person who cannot act in their own name; b) a person acting as a member of, or in the interest of, a group or class of persons; c) a person acting in the public interest; or d) an association acting in the interest of one or more of its members; , section 38 of the Constitution of South Africa 1996, which provides that: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are — a) anyone acting in their own interest; b) anyone acting on behalf of another person who cannot act in their own name; c) anyone acting as a member of, or in the interest of, a group or class of persons; d) anyone acting in the public interest; and e) an association acting in the interest of its members; and section 32(2) of the Constitution of the Republic of Uganda 2006, which provides that: Any person or organisation may bring an action against the violation of another person's or group's human rights

The issue of locus standi which the Fundamental Rights Enforcement Procedure rules 2009 seeks to address is reflected in the preamble 3(e) of the rule and not in the text. Nigeria is a common law country; in common law preamble does not have the force of law.<sup>14</sup> The difficulty in implementing the provisions of preamble 3(e) of the Rules still prevents NGOs, human rights activists, advocates or public interest groups from instituting human rights application on behalf of the public or any potential victim.<sup>15</sup>

The provision in preamble (3e) of the Rules is inconsistent with the provision of in section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria as interpreted by the Supreme Court in Adesanya's case.

### 1.3 Research questions

1. What are the effects of a restrictive interpretation of locus standi by some Nigerian courts on access to justice?
2. What is the legal effect of the provision of locus standi in the Fundamental Rights Enforcement Procedure rules 2009?
3. What lessons can be learned from the interpretation of locus standi from other jurisdictions?

### 1.4 Research methodology

This study combines information obtained from library sources, Nigerian legislation, case law, NGO reports, and academic literature as well as international and regional treaties to which Nigeria is a party. Analysis of the provision and interpretation of locus standi in other jurisdiction such as Kenya, India, United Kingdom, Uganda and South Africa was carried out because these countries had strict provision and interpretation of locus standi rule but now are more liberal in their interpretation of the locus standi rule, the comparative analysis will show how isolated Nigeria is in her strict interpretation of locus standi and the need for her to conform to international best practices.

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<sup>14</sup> See the case of *Allen v Renfrew country* 69 OR 3d 742 (2004) and *Sherbrooke community center v SEIU* 2002 SKQB 101.

<sup>15</sup> Eliantonio and Stratieva (n. 11 above).

## 1.5 Significance of the study

The significance of this study cannot be overemphasized, considering the difficulty encountered by litigants in enforcing their human rights in Nigerian courts<sup>16</sup> as a result of restrictive provisions on standing. Effort to tackle human rights abuses which is widespread in the African continent, especially in Nigeria was given a boost in 2009 with the introduction of the new Fundamental Rights (Enforcement Procedure) Rules 2009.<sup>17</sup> However, there are still some issues with the Rules as regards their provision on locus standi.

The main motivation for this study is to underscore and contribute towards an understanding of the effect of the strict interpretation of locus standi by the Nigerian courts on human rights and public interest litigation. This study contributes to the future of human rights and public interest litigation in Nigeria by recommending suitable reforms that would help to surmount the challenges, contribute to legal certainty, and, hopefully, assist Nigeria to bring her human rights practices in line with international standards.

## 1.6 Literature review

There is an extensive literature on the interpretation of locus standi on human rights and public interest litigation in Nigeria.

Olowu, ascribed the perilous state of economic, social and cultural rights adjudication in Nigeria to substantive issues of the legal structure, he said 'perhaps the most formidable impediment to the effective protection of such rights remains, the common law procedural doctrine of locus standi.'<sup>18</sup>

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<sup>16</sup> MG Chiroma 'Challenges of enforcement of fundamental human rights under the Constitution of the Federal republic of Nigeria 1999' unpublished PGDLD thesis, Institute of advance legal studies (NIALS) University of Lagos, (2010) 15.

<sup>17</sup> As above, 15.

<sup>18</sup> Olowu (n. 4 above).

According to John,<sup>19</sup> standing to sue is the first step in access to justice. He further maintained that extensive access to justice is more likely to result in equal justice. Although, inequalities will always exist, people with power and wealth will all the time have more influence on governmental and private decisions than those that do not have power and resources. But this inequality is prevalent where access to courts is limited, because restrictions may likely not to affect economic interests.

Murombo wondered why there is so much academic write up against the principle of standing particularly in public interest environmental litigation. He then concluded that natural resources, animate or inanimate, increasingly requires us to lawfully protect them from the untenable exploitation that was brought about by industrialisation, but that locus standi became the 'arch enemy' of environmental protection and sustainable use of natural resources. He further posed a question, 'if only a litigant who has a sufficient specific individual interest could approach the courts to protect such interest, who was going to do this on behalf of nature'?<sup>20</sup>

In the opinion of Nijar, public interest litigation provides successful judicial defense of weaker sections of community, demands accountability from the government, encourages transparency in decision-making processes, ensures access to justice and ensures that authorities act in accordance with established obligation to abide by and put into effect legal norms.<sup>21</sup>This is also the opinion of the Nigerian Bar Association in its publication: *An x-ray of public interest litigation in Nigeria* where it says; 'the concept of Public Interest Litigation is a noble concept which makes justice quickly and readily available to the masses when their fundamental rights are been threatened'.<sup>22</sup>

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<sup>19</sup> See EB John 'standing to sue: the first step in access to justice' (1999) <http://www2.law.mercer.edu/elaw/standingtalk.html>, 2,3. (accessed 6 October 2013).

<sup>20</sup> T Murombo 'Strengthening locus standi in public interest environment litigation: Has leadership moved from the United States to South Africa?' *6/2 Law, Environment and Development Journal* (2010) 171, 172.

<sup>21</sup> GS Nijar 'Public interest litigation: A matter of justice an Asian perspective' [www.aseanlawassociation.org/9GADocs/Maysia.pdf](http://www.aseanlawassociation.org/9GADocs/Maysia.pdf) 3 (accessed November 5, 2013).

<sup>22</sup> See Nigerian bar association Abuja branch 'An x-ray of public interest litigation in Nigeria' [www.nbaabuja.org/?p=3883](http://www.nbaabuja.org/?p=3883) (accessed 25 September 2013).

Ghosh, believed that judicial activism signifies the concern of courts to find out suitable remedy to the aggrieved by formulating a new rule to resolve the conflicting questions in the event of illegality or vague laws. He attributed the current liberal interpretation of locus standi in India especially in public interest litigation to judicial activism.<sup>23</sup>

Adedimeji said that 'judicial activism in public interest litigation remains one of the veritable tools to bring about good governance, quality and responsive leadership and accountability in governance'.<sup>24</sup> Locus standi has been the main reason behind many public interest cases not being successful, many public interest cases have been 'lost or dismissed in the past as a result of these limitations, it is a challenge to the realization and successful prosecution of public interest cases'.<sup>25</sup> Litigants suing the government or any agency of government to challenge any decision or act of those in government face the task of showing sufficient interest in the matter.<sup>26</sup>

The Institute for Human Rights and Development said in a report that problems often arise from restrictive interpretations of locus standi.<sup>27</sup> It further states that:

However, in Nigeria, this test has been interpreted to mean that only those who have a 'personal right', that is those whose rights (Constitutional or legal) have been directly infringed by the executive or legislative decision can bring an action for judicial review. This greatly restricts access to justice and, therefore, accountability of government. Giving only those with a 'personal' right standing to sue greatly reduces the number of people eligible to bring action against the government.

The report further states that legal actions are expensive, therefore, restrictive interpretation of standing makes the person with sufficient interest and the right to bring

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<sup>23</sup> PK Ghosh 'Judicial activism and public interest litigation in India' (2013) *Golgotias Journal of Legal Studies* GJLS vol. 1, No. 1 2.

<sup>24</sup> See A Adedimeji (2009) 'Nigeria: judicial activism and public interest litigation', *Daily independent newspaper* 13 August 2009, [www.allafrica.com/stories/200908130402.html](http://www.allafrica.com/stories/200908130402.html) (accessed September 25, 2013).

<sup>25</sup> As above.

<sup>26</sup> As above.

<sup>27</sup> Institute for human rights and development in Africa 'judicial colloquium on locus standi in administrative justice and human rights enforcement report' presented on 8-9 October, 2001 at Kairaba beach hotel the Gambia.

an action to the court to rely solely on his resource and financial capabilities instead of the resources, financial strength and professionalism of a public interest group or an NGO. This is always an encumbrance, especially in developing countries where a lot of the people are poor and cannot afford the huge expense that comes with legal actions.<sup>28</sup>

Another problem the report stated is that ‘the person with standing has to actually want to bring the action’.<sup>29</sup> The lack of will power to bring the action can result in threats or gifts to dissuade the person from bringing the case to court. The result is that, under a restrictive locus standi regime, fewer cases are brought to court, lessening the pressure on government to hold fast to principles of good administration.<sup>30</sup>

Nwauche<sup>31</sup> opined that the requirement in preamble 3(e) of the Fundamental Rights (Enforcement Procedure) Rules (FREPR 2009) that the Court ‘shall 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 standing to sue’, suggest that the standing principle set out in *Adesanya v President of the Federal Republic of Nigeria*<sup>32</sup> was no longer a binding precedent.

According to Duru,<sup>33</sup> because the (FREPR 2009) were made pursuant to section 46(3) of the 1999 Constitution, they are considered to be equal with the provisions of the Constitution. He is of the opinion that the Rules have the same strength and influence as the provisions of the Constitution. He maintains that they are therefore of a ‘higher status than other laws in the hierarchy of laws in this country’ and that ‘in the event of any inconsistency between the fundamental rights (enforcement procedure) rule 2009 Rules and any other law, the former will prevail to the extent of such inconsistency’. He cited

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<sup>28</sup> As above.

<sup>29</sup> As above.

<sup>30</sup> As above.

<sup>31</sup> E Nwauche ‘The Nigerian Fundamental Rights (Enforcement Procedure) rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?’ (2010) *African Human Right Law Journal vol. 10 no.2 2010*, 513.

<sup>32</sup> (1981) 1 All NLR 1.

<sup>33</sup> See OW Duru ‘An overview of the Fundamental Right Enforcement Procedure Rules, 2009.’ <http://ssrn.com/author=18T4278> 4 (accessed 2 March 2013).

the decision of the Court of Appeal in the case of *Abia State University, Uturu v Chima Anyaibe* (1996) 1 NWLR (Pt. 439) at 660-661 as his basis, where it was stated that ‘the fundamental rights (enforcement procedure) rule 1979 form part of the Constitution and therefore enjoy the same force of law as the Constitution’. However, Sanni<sup>34</sup> disagrees with this assertion, he argues that, ‘assuming (without conceding) that the fundamental rights (enforcement procedure) rule 2009 are an integral part of the Constitution’, this however, cannot result in making the provisions of the Rules supersede the express provisions of the Constitution. Sections 1(1) and 1(3) of the 1999 Constitution entrench the principle of supremacy of the Constitution thus:

- (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria....
- (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.

Based on this provision, Sanni submitted that every one of the provisions of the (FREPR 2009) which are not in agreement with the Constitution stand the peril of being declared as null and void to the extent of their inconsistency.<sup>35</sup>

All the authors referred to above have contributed to the advancement of this study. But none of the authors have critically examined the effect of the strict interpretation of locus standi by the Nigeria courts on access to justice for the poor and the controversy surrounding the provision of locus standi in preamble 3e of the Fundamental Rights (Enforcement procedure) rules 2009 and the challenges it poses. This crucial gap in previous literature is what this study attempts to tackle.

## 1.7 Structure

This study comprise of four chapters.

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<sup>34</sup> A Sanni ‘Fundamental Right Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples Rights in Nigeria: The need for far-reaching reform’ (2011) *African Human Right Law Journal* vol. 11 no. 2 2011 528.

<sup>35</sup> As above.

Chapter one introduces the study.

Chapter two looks at the context of locus standi in the Nigerian legal system.

Chapter three is a comparative analysis of the constitutional provision and interpretation of locus standi under the courts in Kenya, India, United Kingdom, South Africa and the African Commission on Human and Peoples' Rights

Chapter four provides recommendations, summary and conclusion.



## Chapter two

### The context of locus standi in the Nigerian legal system

#### 2. Introduction

Access to justice is the right to have a dispute or allegation addressed by a competent court of law. The restrictive view of locus standi may constitute denial of access to justice. The right of access to justice is threatened where litigants are denied standing to commence an action.

The principle of locus standi<sup>36</sup> is entangled with human rights and public interest litigations and as a result it will be very intricate to engage in a scholarly discourse on locus standi and not also discuss the issue of human rights and public interest litigation. This chapter will dwell on the interpretation of rules of standing under Nigerian courts and the effect it has on human rights and public interest litigations.

#### 2.1 Locus standi before Nigerian courts

The intention of the principle of locus standi is to regulate conflicts between two areas of public interest, that is, the interest of encouraging individual citizens to involve themselves keenly in the enforcement of law and the need to discourage a 'professional litigant and a meddlesome interloper to invoke the jurisdiction of the courts in matters

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<sup>36</sup> The principle of locus standi has been used to refer to various situation that affect a party's right to maintain relief from a court. It decides the right to apply to a court for redress from supposed illegal action. According to The Law Guide [www.thelaw.com](http://www.thelaw.com) standing means 'having a right to file a lawsuit.' It further provides that 'only a person or party that has actually been injured and has a cause of action can file a lawsuit.' Oputa JSC, in *Attorney-General of Kaduna State v Hazzan* [1985] 2 NWLR 483-497, the Nigerian Supreme Court, explained that locus standi means 'the legal capacity to challenge an order or act.' see also GF Michael and AV Raja 'Effectiveness of Environmental Public Interest Litigation in India: Determining the key variables *Fordham Environmental Law Journal*, vol. 21, 2010 250,251.

that may not concern him'.<sup>37</sup> This principle makes it possible to determine who the aggrieved person is and who is a stranger in a case.<sup>38</sup> The principle of locus standi determines the justiciability<sup>39</sup> of an action; it also impact on the jurisdiction<sup>40</sup> of the court. Locus standi is a preliminary matter that can be considered at the commencement of the litigation before the substantive matter is considered.<sup>41</sup> For a long time the principle of locus standi has generated a lot of problems in various jurisdictions to both litigants and the courts and Nigeria is not an exception.<sup>42</sup> While some jurisdictions have jettisoned the narrow and strict interpretation of this principle and has adapted a liberal approach to its interpretation, Nigerian courts have most times continued in the narrow and strict interpretation of the principle. Deciding who has standing to sue sometimes proves to be difficult. However, the Nigerian courts through some decided cases have laid down two tests to help determine who has standing to sue. One of the tests is whether the subject matter is justiciable, while the second one is whether there is a disagreement between the parties.<sup>43</sup> These two tests suggest that the plaintiff must have sufficient interest in the subject matter of the suit prior to the application otherwise he or she may not have the standing to sue. Without sufficient interest, the plaintiff would be treated as a stranger and, as such, denied the right to maintain the action in court.

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<sup>37</sup> See SA de Smith *Judicial review of administrative action* (1980) 409. Cited in EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: a need for a more liberal provision' (2009) *African human rights law journal* vol. 9 No. 2 549.

<sup>38</sup> As above.

<sup>39</sup> Locus standi and justiciability are totally different. 'The justiciability addresses the issue as to whether a dispute is amenable to resolution by a court of law, whereas the locus standi deals with the question of whether a litigant has sufficient interest to approach the court for relief'. See Taiwo (n. 37 above). The justiciability of a matter will affect the locus standi of the applicant and the court will lack jurisdiction to entertain a matter if the applicant lacks locus standi.

<sup>40</sup> 'Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction to hear and to decide a case. Judicial power is the right to determine actual controversies arising between diverse litigants, duly instituted in a court of proper jurisdiction'. See Taiwo (n. 37 above) 548.

<sup>41</sup> See *Prince Abdul Rasheed A. Adetona v Zenith International Bank Plc* SC. 78/2007.

<sup>42</sup> See Taiwo (n.37 above).

<sup>43</sup> See *Pacers Multi-Dynamics Ltd v The M.V Dancing sister & anor.* SC. 283/2001 12. And *Attorney-General Federation v Attorney-General of the 36 States of Nigeria* (2001) 9 SCM 45 59.

To sustain an application before the court, the plaintiff's identity must first be determined.<sup>44</sup> The locus standi of an applicant, like the issue of jurisdiction, can be challenged at any time during the trial, as well as for the first time on appeal.<sup>45</sup> A court will lose jurisdiction if the plaintiff lacks locus standi.<sup>46</sup>

Usually, Nigerian courts have taken the stand that a litigant cannot sue unless he can show that his or her fundamental rights are in danger.<sup>47</sup> This position has caused the courts to deny access when an individual, group or community applies to the court for redress for any wrong done to all individuals.<sup>48</sup> The locus standi of an applicant does not depend on the success or merit of the case but on whether he has sufficient interest in the subject matter of the dispute.<sup>49</sup> For a party to commence an action in a court of law it must be shown that the party has sufficient interest in the dispute or issue at hand.<sup>50</sup>

Accordingly, locus standi is also required in litigations involving violation of fundamental rights, it is not only relevant but paramount.<sup>51</sup> Consequently, a person must show cause of action or that he has an interest to sustainably set in motion the judicial

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<sup>44</sup> S Mentzer 'What You Need to Know Before You File: Legal Requirements for Bringing a Copyright Infringement Lawsuit' <http://www.whitecase.com/files/Publication/0c3e727d-4944-4529-80d9-81b79d3a7bff/Presentation/PublicationAttachment/8dff9d5a-d6ff-4039-bdf5-83bf7e7e25cb/Legal-Requirements-for-Bringing-Copyright-Infringement-Lawsuit.pdf> 1. (Accessed August 13, 2014).  
See also Luyali (n. 1 above).

<sup>45</sup> See *Sinmisola Carew v Iyabo Omolara Oguntokun & Ors SC 157/2000*; *Obaba v Military Government of Kwara State* (1994) 4 NWLR (pt 336) 26; *Bronik Motors Ltd v Wema Bank Ltd* (1983) 1 SCNLR 303; and *Adefulu v Oyesile* [1989] 5 NWLR (pt 122) 377.

<sup>46</sup> See case of *Thomas v Odufosoye* (1986) 3 NWLR (Pt.18) 63; *Bolaji v Bangbose* (1986) 4 NWLR (Pt.37) 633 and *Rev Rufus Iwuajoka Onuekwusi and Ors v The Registered Trustees of the Christ Methodist Zion Church SC.58/2003*.

<sup>47</sup> See BJ Fagbohunlu 'Litigating for the poor: challenges and opportunities' [www.serac.org/publications/litigating%20for%20poorchallenges.doc](http://www.serac.org/publications/litigating%20for%20poorchallenges.doc), (accessed 6 October 2013 2). It is believed that a strict interpretation of locus standi will affect access to justice, whereas a liberal one will make access to justice easy. See Taiwo (n. 37 above) 550. Liberal interpretations of the principle of locus standi can also promote public interest litigation and make possible the advancement of law in any country.

<sup>48</sup> As above.

<sup>49</sup> See A Adejiji, 'x-ray of public interest litigation in Nigeria' (2012) [www.punchng.com/feature/the-law-you/x-ray-of-public-interest-litigation-in-nigeria](http://www.punchng.com/feature/the-law-you/x-ray-of-public-interest-litigation-in-nigeria) 3. (accessed October 6 2013).

<sup>50</sup> As above.

<sup>51</sup> See JA Dada 'Impediments to human rights protection in Nigeria' <http://digitalcommons.law.ggu.edu> 20. (accessed October 6 2013).

process to redress a violation of his rights.<sup>52</sup> To be capable of sustaining an application in cases of public wrong or violation of a fundamental right affecting an uncertain number of people, ‘a plaintiff must show that he has suffered more, or is likely to suffer more than the multitude of individuals who have been collectively wronged’.<sup>53</sup>

Those who argue in favor of the principle of locus standi think that it puts the party who wants to be a litigant prepared so as to guarantee that he has a cause of action in a matter before endeavoring to bring it before the court; otherwise, his litigation would be exercise in futility.<sup>54</sup> For the lawyers, the principle gives them a suitable tool for legal advice to clients. The role of lawyers in the light of locus standi is to advise a person who wants to litigate over a matter that does not concern him on their lack of sufficient interest to bring an action in court over such matter.<sup>55</sup> By doing this, the lawyers assist the courts to save time from superfluous overload of work and assist themselves too to avoid embarking on an unproductive legal expedition that could be crammed with the ‘storms and winds of objections by opposing counsel and the legal thunder strikes emanating from an intelligent judge striking out the matter as being outside the court’s jurisdiction’.<sup>56</sup> The applications of the principle of locus standi also assist the state in the dispensation of justice which is the foundation of harmonious relationship in a state.<sup>57</sup> The significance of this assertion is reflected in the reality that when litigation is left in the hands of the actual parties whose interests are at stake, there would be no room for aggravating the disagreement, but rather the parties who are in disagreement can get the dispute resolved either by the courts or by themselves in case they want to settle the disagreement out of court.<sup>58</sup> ‘The aggravation of a dispute by third parties whose interests are not at stake can be a destabilizing factor to a state’s peace and security’, this can impact negatively in the

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<sup>52</sup> As above.

<sup>53</sup> See *Odenye v Efunuga* (1990) 7 NWLR (pt 164) 618; *Abraham Adesanya v The President of the Federal Republic of Nigeria* (1981) 1 All NLR 1 358.

<sup>54</sup> GN. Okeke, ‘Re-examining the role of locus standi in the Nigerian legal jurisprudence’ (2013) *Journal of Politics and Law* vol. 6 no.3 210.

<sup>55</sup> As above.

<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> As above.

socio-political structure of a state.<sup>59</sup> It is evident from those who argue in favour of the principle of locus standi that it prevents litigants whose interests are not infringed from instituting a legal action on the strength of a matter that is not connected to their interests.<sup>60</sup>

Ademola outlined some theoretical postulations as reasons for limiting access to a law court in cases involving the protection of public rights. The first reason according to him concern the fear that if private persons are allowed to protect public rights, there will be multiplicity of actions.<sup>61</sup> The second reason according to Ademola concerns the view that access to the court must be based on the strict personal interest in the subject matter of the litigation.<sup>62</sup> He further outlined the third reason to be the desire to discourage meddlesome interlopers from bringing so many discrete and irrelevant cases to cluster up the judicial system.<sup>63</sup>

However, Ademola also noted that these theoretical postulations are the traditional view on locus standi, if followed to its logical end; these postulations may ruin access to the law courts.<sup>64</sup> The trend now is a shift away from strict and narrow interpretation of locus standi as outlined above because of the problems it poses.<sup>65</sup>

There is an argument that a person can circumvent the rule on locus standi by obtaining a power of attorney. In the opinion of Okeke, the argument that a litigant whose interests are not infringed or who has no interest in a matter can get around the rule on locus standi ‘through the issuance of the power of attorney does not hold water’.<sup>66</sup> His reason for taking this stand is because the said power of attorney is exclusive in nature, ‘it gives the donee the power to do a thing on behalf of the donor’, in so doing the donor is barred

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<sup>59</sup> As above.

<sup>60</sup> As above.

<sup>61</sup> See Y Ademola *Constitutional law in Nigeria* (2003) Ibadan: Demyaxs Law books 447.

<sup>62</sup> See Ademola (n. 61 above) 447.

<sup>63</sup> As above 448.

<sup>64</sup> As above.

<sup>65</sup> Other countries have shifted away from a narrow and strict understanding of locus standi See (n. 13 above). See also chapter three below.

<sup>66</sup> Okeke (n. 54 above).

from doing that very act,' and it does not empower both the donee and the donor to do the same act at the same time'.<sup>67</sup> This is possible without the strict principle of locus standi. This means that, the person who issue the power of attorney and the person whom it is issued to can both still have access to court on their own merits each presenting his own case on the same subject matter if there is no power of attorney and no strict principle of locus standi.<sup>68</sup> The absence of locus standi allows all litigants to be parties in a litigation having the same subject matter irrespective of whether or not they have interests in the matter.<sup>69</sup>

As earlier stated, the Supreme Court has set two tests for determining locus standi, one of them being that the subject matter must be justiciable. It has been shown by some Court decisions which will be discoursed latter, that public interest litigation against government unconstitutional actions is hindered by the provisions of section 6(6)(c) of the 1999 Constitution of the Federal Republic of Nigeria which states:

The 'judicial powers' vested in the courts enumerated in the Constitution: Shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this Constitution.

From the above mentioned section, it appears that whoever approaches the court to adjudicate on the fundamental objectives and directive principles of state policy set out in chapter II of the Constitution will lack the locus standi to do so because according to the provisions of section 6(6)(c), no court can inquire into whether there has been compliance with chapter II of the Constitution.<sup>70</sup>

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<sup>67</sup> As above.

<sup>68</sup> As above.

<sup>69</sup> As above.

<sup>70</sup> GN Okeke & C Okeke 'The justiciability of the Non-justiciable Constitution policy of governance in Nigeria' *IOSR Journal of Humanities and social science*, Vol. 7 9.

Under Chapter II of the Constitution captioned, ‘fundamental objectives and directive principles of state policy,’ the rights, consisting of economic, social and cultural rights are comprehensively set out and are based on the necessity for the material well-being of the citizens with the state playing a central role.<sup>71</sup> The rights in chapter II of the 1999 Constitution is characterized by social equality and equal rights for all people; ‘this is rooted on the belief that the attainment of certain level of social and economic standard is a necessary condition for the enjoyment of the civil and political rights’.<sup>72</sup>

In *A. G. Ondo State v A. G. Federation*,<sup>73</sup> the Supreme Court held, inter alia, that ‘courts cannot enforce any of the provisions of Chapter II of the Constitution except the National Assembly has enacted specific laws for their enforcement’.<sup>74</sup> According to the Supreme Court in Ondo state’s case, chapter two of the Nigerian Constitution which provides guidance as to the constitutional policy of governance continues to be mere expressions ‘which cannot be enforced by legal process but would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard of them’.<sup>75</sup> The court also upheld that the contents of Chapter II of the Constitution can be made justiciable by legislation. This, however, means that public interest litigation against government illegal actions or unconstitutional laws may not be sustained in Nigerian courts because the applicant will lack the locus standi to do so since one of the test set out by the Court for locus standi is that the subject matter must be justiciable.

In view of the foregoing, it is rather obvious that Chapter II of the Constitution is non-justiciable, but there are ways by which the provisions of Chapter II can be made justiciable and these are contained in the very section 6(6)(c) that made Chapter II non-

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<sup>71</sup> JA Dada ‘Human rights under the Nigerian Constitution: Issues and problems’ (2012) *International journal of humanities and social science* vol.2 No.12 36.

<sup>72</sup> As above

<sup>73</sup> (2002) 9 NWLR (pt. 772), 222.

<sup>74</sup> As above.

<sup>75</sup> As above.

justiciable. Thus, in the case of *Federal Republic of Nigeria v Aneche & 3 ors*,<sup>76</sup> Niki Tobi (JSC) observed as follows:<sup>77</sup>

In my humble view section 6(6)(c) of the Constitution is neither total nor sacrosanct as the subsection provides a leeway by the use of the words “except as otherwise provided by this Constitution.” This means that if the Constitution otherwise provides in another section, which makes a section or sections of Chapter II justiciable, it will be so interpreted by the courts.

In *Bamidele Aturu v Minister of Petroleum resources & others*,<sup>78</sup> the Court observed that:

By enacting the Price Control Act and the Petroleum Act and providing in section 4 and 6 of those Act, for the control and regulation of prices of petroleum products, the National Assembly working in tandem with the Government has made the Economic Objectives in section 16(1)(b) of the Constitution in chapter II justiciable. The enactments are to secure the economic objectives of the state to control the national economy in such manner as to secure maximum welfare, freedom and happiness of every citizen of Nigeria.

### 2.1.1 The origin of restrictive interpretation of the rule locus standi in Nigeria

Section 46(1) of the Constitution makes a provision that implies that only the person whose right has been infringed can go to Court for redress, it provides thus:<sup>79</sup>

Any person who alleges that any of the provisions of this Chapter 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.

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<sup>76</sup> (2004) 1 SCM P. 36 78.

<sup>77</sup> As above.

<sup>78</sup> Suit no. FHC/ABJ/CS/591/09.

<sup>79</sup> Section 46(1) of the 1999 Constitution of the Federal Republic of Nigeria. The principle relating to locus Standi applied under the 1979 Constitution. Section 33(1) provided thus: ‘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 a fair hearing within a reasonable time by a Court of other tribunal established by law and constituted in such manner as to secure its independence and impartiality.’ Thus any person whose right had been trampled upon had the right to go to a competent court for redress. Section 42(1) of the same Constitution complemented the above provision, it provides: ‘Any person who alleges that any of the provisions of this chapter has been , is being or is likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.’ See Ademola (n. 61 above).



One of the earliest noteworthy litigation in which the restrictive interpretation of the rule on locus standi in Nigeria appears is the case of *Olawoyin v Attorney-General of Northern Region of Nigeria*.<sup>80</sup> In this case, the applicant challenged the provisions of the Children and Young Persons Law, 1958, of Northern Nigeria, which outlawed political activities by minors and prescribed penalties for minors and others who may be parties to the offences therein specified as unconstitutional.<sup>81</sup> He maintained that the provisions will infringe on his right to educate his children politically.<sup>82</sup> In dismissing the application, the Northern Nigerian High Court held that, ‘since no rights of the appellant were alleged to have been violated, a declaration cannot be made in vacuum’. The Court further maintained that ‘only a person whose rights had been violated by a statute may challenge its Constitutional validity and that the person’s rights must be directly or immediately threatened’; the Supreme Court thereafter also affirmed the judgment.<sup>83</sup>

Likewise, in *Gamioba v Ezezi*<sup>84</sup> the applicant challenged a certain trust instrument as inconsistent with the Nigerian Constitution. Brett FJ, who delivered the judgment of the court citing *Olawoyin v Attorney-General, Northern Nigeria*<sup>85</sup> held that, because the authority of a law is a matter that concerns the general public, it is the obligation of the court to form its own judgment as to the applicant’s locus standi, and not presume it merely because the defendant admitted it or did not challenge it.<sup>86</sup> The court was of the opinion that if a person applies to the court to declare a law invalid, he must be able to prove to the court not only that the statute is invalid, but that he has suffered an injury or is ‘immediately in danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with people generally’.<sup>87</sup>

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<sup>80</sup> (1961) All NLR 269. Cited in Taiwo (n. 37 above) 552.

<sup>81</sup> See Taiwo (n. 37 above) 552

<sup>82</sup> As above.

<sup>83</sup> As above.

<sup>84</sup> (1961) All NLR 584 cited in Taiwo (n. 37 above) 553.

<sup>85</sup> (1961) All NLR 269. Cited in Taiwo (n. 37 above) 552.

<sup>86</sup> See Taiwo (n. 37 above) 553.

<sup>87</sup> As above. See also *Attorney-General of Bendel State v Attorney-General of the Federation and 22 Others*, the Supreme Court held per Nnamani JSC said, ‘A party invoking the powers of the court with respect to an unconstitutional statute, must show, not only that the statute is invalid but that he has sustained or is

One of the most outstanding and most referenced decisions on strict interpretation of locus standi is the decision of the Supreme Court of Nigeria in the case of *Senator Abraham Ade Adesanya v President of the Federal Republic of Nigeria & anor.*<sup>88</sup> The applicant was a senator the defendant was the President of Nigeria while the second defendant was the Chief Judge of Bendel State.

The President appointed the Chief Judge of Bendel state Ovie-whiskey as chairman of the Federal Electoral Committee. The President thereafter, sent the appointment of the 2nd defendant to the confirmation of the Senate.<sup>89</sup> The appointment was confirmed by the Senate but the applicant disagreed with the confirmation of the appointment, maintaining that it contravened the provisions of the Nigerian Constitution. As a result, he instituted an action at the High Court for a declaration that the appointment of Ovie-whiskey was null and void and unconstitutional and the applicant got judgment in his favor from the High Court. Not being satisfied with the ruling of the High Court the defendants appealed to the Court of Appeal where the observation as regards the question of locus standi was raised. The Court of Appeal ruled that the applicant has no locus standi to sustain the suit. Thereafter, the applicant appealed to the Supreme Court and the Supreme Court upheld the decision of the appeal court that the applicant has no locus standi in this case because he participated in the events that lead to the confirmation of the 2nd defendant's appointment.<sup>90</sup>

An important judgment in the case of *Adasanya* is the judgment of Mohammed Bello JSC (as he then was) who interpreted section 6(6)(b) of 1979 Constitution of Nigeria into the law of locus standi. Section 6(6)(b) of the Constitution of Nigeria 1979<sup>91</sup> provides that:

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immediately in danger or sustained some direct injury from its enforcement and not merely that he suffers in some indefinite way in common with the public generally.'

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(1981) 1 All NLR 1.

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See <http://www.lawpavilionpersonal.com/lawreportssummary.jsp?suite=olabisi@9thfloor&pk=SC.1/1981&apk=564>.

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As above.

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This section is the same as Section 6(6) (b) of the 1999 Constitution of the Federal Republic of Nigeria.

The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Mohammed Bello JSC in *Adesanya's* case held that:

It seems to me that upon the construction of the subsection, it is only when the civil rights and obligations of the person who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the court may be invoked. In other words, standing will only be accorded to a Plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.

The judgment of Bello JSC in *Adesanya's* case has been responsible for the controversies surrounding locus standi in Nigeria.<sup>92</sup> This is because almost all the decisions of courts made after *Adesanya's* case accepted Bello's opinion as being the decision of the Supreme Court on that issue and as such a binding precedent.<sup>93</sup> It is important to note that all the Justices of the Supreme Court in *Adesanya's* case did not agree with Bello's view and it therefore, did not represent the opinion of all the Justices of the Supreme Court that decided *Adesanya's* case.<sup>94</sup>

A critical analysis of *Adesanya's* case will disclose that the court was not unanimous in holding that section 6(6)(b) of the Constitution of Nigeria laid a test for locus standi in

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<sup>92</sup> See O Ilofulunwa 'Locus standi in Nigeria: an impediment to justice' [www.lexprimus.com/publications/locus%20standi%20in%20nigeria.pdf](http://www.lexprimus.com/publications/locus%20standi%20in%20nigeria.pdf) 1 (accessed 29 September 2013). 'The principle established in *Adesanya's* case was followed in *Irene Thomas and 5 Others v The Most Reverend Timothy Omotayo Olufosoye*. (1986) 1 NWLR pt18 669 In that case, the plaintiffs, who were communicants of the Anglican Communion within the Diocese of Lagos, challenged the appointment of Reverend Joseph Abiodun Adetiloye as the new Bishop of Lagos and asked the court to declare the appointment void'. They claimed that there was no due process in the appointment and that it contravened some provisions of the Constitution of the Church of Nigeria (Anglican) Communion. 'The defense, by notice of motion, argued that the plaintiffs had no locus standi to institute the action and that the statement of claim disclosed no reasonable cause of action. The trial court accepted the objection and dismissed the suit. The plaintiffs' appeal to the Court of Appeal was equally dismissed. A further appeal to the Supreme Court was also not successful. The Supreme Court held that the plaintiffs had no locus standi'. See Taiwo (n. 37 above) 553.

<sup>93</sup> See Ilofulunwa (n. 92 above).

<sup>94</sup> As above.

Nigeria.<sup>95</sup> Fatayi Williams CJN (as he then was) disagreed with Bello on this point, he said that:

...I take significant cognizance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumor-mongering is a pastime of the market places and the construction sites. To deny any member of such society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution ... access to the Court of Law to air his grievance on the flimsy excuse (of lack of sufficient interest) is to provide a ready recipe for organized disenchantment with the judicial process.

While Justices Nnamani and Idigbe agreed with Justice Bello that section 6(6)(b) of the Constitution laid a test for locus standi, Justices Sowemimo and Obaseki were on the side of Fatayi Williams CJN.<sup>96</sup> The deadlock would have been resolved by Justice Uwais but he took the view that the interpretation to be given to section 6(6)(b) will depend on the specifics and situation of each case and that no hard and fast rule should be set-up.<sup>97</sup>

In *AG Kaduna State v Hassan*<sup>98</sup> Oputa JSC (as he then was) realized this lack of agreement in Adesanya's case when he said that:<sup>99</sup>

It is on the issue of locus standing that I cannot pretend that I have not had some serious headache and considerable hesitation in views on locus standi between the majority and minority judgments between Justices of equal authority who were almost equally divided.

Oputa JSC further stated that: 'I am satisfied that upon the whole the Court of Appeal in its majority judgment was right in holding that the respondent had locus standi.'<sup>100</sup> In the final result, the Supreme Court after considering the circumstances of the matter, dismissed the appeal and affirmed the decisions of the Court of Appeal and High Court

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<sup>95</sup> As above 2.

<sup>96</sup> As above.

<sup>97</sup> As above.

<sup>98</sup> (1985) 2 NWLR (Pt 8) 483.

<sup>99</sup> As above 521.

<sup>100</sup> As above

Fascinatingly, most of the decisions of the courts afterwards did not put this contention observed by Oputa JSC above into considerations. For an applicant to be granted locus standi, most of the cases, the courts apply the principle that, he must demonstrate that his civil rights and obligations have been or are likely to be affected by the action as held in the Adesanya's case.<sup>101</sup> However, in what looked like a lone opinion, Ayoola JCA (as he then was) in *F.A.T.B.v Ezegbu*<sup>102</sup> stated thus:

I do not think section 6(6)(b) of the Constitution is relevant to the question of locus standi. If it is, we could as well remove any mention of locus standi from our law book. Section 6(6)(b) deals with judicial powers and not with individual rights. Locus standi deals with the rights of a party to sue. It must be noted that standing to sue is relative to a cause of action.

Ayoola JCA seemed to be alone in this position this is because subsequent other cases that came after that did not follow his position.

However, some years after, Ayoola JCA properly put into perspective section 6(6)(b) of the Constitution of Nigeria when he held in *NNPC v Fawehinmi*<sup>103</sup> that:

In most written Constitutions, there is a delimitation of the power of the three independent organs of government namely: the Executive, the Legislature, and the Judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the States in the courts and defines the nature and extent of such judicial powers does not directly deal with the right of access of the individual to the court. The main objective of section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of powers between the judiciary on the one hand and the other organs of government on the other, in order to obviate any claim of the other organs of government, or even attempt by them, to share judicial powers with the courts. Section 6(6)(b) of the Constitution is primarily and basically designed to describe the nature and extent of judicial powers vested in the courts. It is not intended to be a catch-all, all-purpose provision to be pressed into service for determination questions ranging from locus standi to the most uncontroversial questions of jurisdiction.

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<sup>101</sup> Senator Abraham Ade Adesanya v President of the Federal Republic of Nigeria & anor (1981) 1 All NLR 1.

<sup>102</sup> See also Ilofulunwa (n. 92 above).  
(1994) 9 NWLR 149, 236.

<sup>103</sup> (1998) 7 NWLR (pt. 559) 598, 612

This pronouncement in the opinion of Ilofulunwa, appropriately captures the effect of section 6(6)(b) of the Constitution and nothing more. Section 6(6)(b) is not proposed to be a yardstick for determining locus standi.<sup>104</sup> In the case of *Owodunmi v Registered Trustees of Celestial Church & Ors*<sup>105</sup> the Nigerian Supreme Court agreed with the position of Ayoola JCA on the effect of section 6(6)(b) of the Constitution. In this case, the 1st respondent, the trustees of the Church, had appointed the 2nd respondent as the Pastor of The Celestial Church of Christ upon the demise of the founding father and Pastor of the Church. The appellant, a registered trustee of the Church opposed the choice of the second respondent on the ground that the procedure adopted did not conform with the provision of section 111 of the Constitution of the Church and sought for a declaration that the naming, proclamation and enthronement of the 2nd respondent as the Pastor of the Church was void. He further claimed that the trustees of the Church lacked the power under its Constitution to name the successor to the office of the Pastor of the Church.

The Supreme Court in *Owodunmi's* case held that Bello's view on section 6(6)(b) laying down a requirement of standing was not the opinion of all the Justices. After reviewing *Adesanya's* case, *Ogundare JSC* delivered the lead judgment which was undisputed thus:<sup>106</sup>

It appears that the general belief is that this court laid down in that case that the law on locus standi is now derived from Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 (re-enacted in section 6(6)(b) of the 1999 Constitution)...I am not sure that this general belief represents the correct position of the seven Justices that sat on that case, only 2 (Bello and Nnamani JSC) expressed view to that effect.

*Ogundare JSC* stated further in the judgment that:<sup>107</sup>

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<sup>104</sup> See Ilofulunwa (n. 92 above) 3.  
<sup>105</sup> (2000) 10 NWLR (Pt. 675) 315.  
<sup>106</sup> As above 341.  
<sup>107</sup> As above.

From the extracts of their Lordship's judgments I have quoted above one can clearly see that there was not majority of the court in favour of Bello JSC's interpretation of Section 6 subsection (6)(b) of the Constitution.

Ogundare JSC further commented on the effect of Section 6(6)(b) of the Constitution thus:<sup>108</sup>

In any respectful view, I think Ayoola JCA (as he then was) correctly set out the scope of section 6 subsection (6)(b) of the Constitution ...in *NNPC v Fawehinmi & Ors*.

Although the Supreme Court unanimously overruled the decision of the Court of Appeal and held that the appellant had locus standi, the Court observed that the locus standi is a condition precedent to a determination on the merits of a case and that in the instant case, the fact and circumstances is different from the facts and circumstances of the Adesanya's case. The facts and circumstances in this case was sufficient to vest the appellant with locus standi to maintain the action.<sup>109</sup>

A movement towards a more liberal interpretation of locus standi can be seen in the judgment of the Nigerian Supreme Court, in *Chief Gani Fawehinmi v Akilu and Togun*<sup>110</sup> in which the Court went beyond the narrow confines of Section 6(6)(b) of the 1979 Constitution as interpreted in the Adesanya's case by the Supreme Court.

The Fawehinmi's case is the case concerning the death of one Mr. Dele Giwa, a journalist who was murdered by a parcel bomb at his residence in Ikeja in Lagos State of Nigeria on 3 November 1986.<sup>111</sup> Chief Gani Fawehinmi who was the applicant, friend and former legal adviser to the victim Mr. Dele Giwa, after privately investigating the case, presented the outcome of his investigation in a document to the Director of Public Prosecutions of Lagos State.<sup>112</sup> Fawehinmi asserted in that document that two army officers, Col. Akilu

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<sup>108</sup> As above.

<sup>109</sup> As above.

<sup>110</sup> (1987) 4 NWLR, 797.

<sup>111</sup> See L Atsegbua 'The Supreme court's approach to locus standi' (2013) <http://www.vanguardngr.com/2013/07/the-supreme-courts-approach-to-locus-standi-2/>, (accessed 6 October 2013).

<sup>112</sup> As above.

who was the Director of Military Intelligence and Lt. Col. Kunle Togun who was the Deputy Director of the State Security Service, were responsible for the death of Mr. Dele Giwa pursuant to section 342 of the Criminal Procedure Law of Lagos State.<sup>113</sup>

The late Chief Gani Fawehinmi, standing as a private prosecutor, asked that the Director of Public Prosecutions put into effect the power vested in him to take legal action against the Director of Military Intelligence Col. Akilu and the Deputy Director of the State Security Service Lt. Col Togun for the death of Mr. Dele Giwa, or on the other hand, to approve a certificate stating the same on the basis of the information made available to him.<sup>114</sup>

In response to the Director of Public Prosecutions' decision not to grant Fawehinmi's request, Fawehinmi filed an application to the High Court of Lagos State asking the court to grant him leave to apply for an order of mandamus mandating the Director of Public Prosecutions to commence proceedings against Col. Akilu and Lt. Col. Togun, or certify that he had seen the information put forward by Fawehinmi but had decided not to prosecute as public instance.<sup>115</sup> The application was however dismissed by the High Court.

Fawehinmi appealed to the Court of Appeal against this ruling but the ruling of the High Court of Lagos state was upheld by the Court of Appeal holding that he lacked locus standi to bring the application for mandamus, his application was therefore, also dismissed.<sup>116</sup> Fawehinmi went further to appeal to the Supreme Court which set aside the decisions of the Court of Appeal and granted the application for leave to apply for an order of mandamus against the Director of Public Prosecutions.<sup>117</sup>

Conversely, in *Adeyinka Abosede Badejo (Suing by her next friend Dr Babafemi Badejo) v Minister of Education*,<sup>118</sup> the Supreme Court seems to have brought back to life the

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<sup>113</sup> As above.

<sup>114</sup> As above.

<sup>115</sup> As above.

<sup>116</sup> As above.

<sup>117</sup> As above.

<sup>118</sup> (1996) 8 NWLR, pt. 464, p.15 cited in Atsegbua (n.111 above).



strict and out dated approach on locus standi. The applicant a primary six pupil from Ogun state sat for the National Common Entrance Examination and scored 293.<sup>119</sup> She was not invited for interview for admission into junior secondary school because she scored below the cut off mark for Ogun State which is her State of origin.<sup>120</sup> The cut off was 302 for boys and 296 for girls. Students with lower scores were invited for interview because the cut off marks for their states were lower, as low as 194 for boys and 151 for girls. She alleged that this infringed on her fundamental rights as protected by the 1979 Constitution as the policy was discriminatory, she was aggrieved with this discriminatory policy and sued asking the court to grant her leave to apply for an order to enforce her fundamental right to freedom from discrimination as guaranteed in section 39(1) of the 1979 Constitution now section 42 of the 1999 Constitution.<sup>121</sup> The high court dismissed the application on the grounds that she lacked locus standi.

This was overturned on appeal; the Court of Appeal however, ruled that the applicant had locus standi since her interest was affected. The respondent further appealed to the Supreme Court, the court held that the appellant did not have the locus standi to institute the action.<sup>122</sup> That the applicant is just one of the many candidate who did not score up to the cut-off mark for their states of origin and that the applicant is placing her own individual interest above that of the society. Kutigi JSC stated that ‘the fundamental right of the appellant should not stand above the country, state, or the people.’<sup>123</sup>

Another liberal interpretation of locus standi by the Nigerian courts can be seen in the case of *Chief Gani Fawehinmi v President of the Federal Republic of Nigeria*.<sup>124</sup> The

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<sup>119</sup> See Atsegbua (n. 111 above). Each of the 36 states of Nigeria is assigned a cutoff mark that their indigenes must score to qualify for an interview; this is to encourage the students from the states that are regarded as educationally disadvantaged.

<sup>120</sup> As above.

<sup>121</sup> As above.

<sup>122</sup> As above.

<sup>123</sup> With respect to his Lordship, the issue of legal standing is not dependent on the question of superiority of rights. It is not a question of whether the right of the appellant should prevail over that of the country, state or people. It is a question of whether the fundamental rights of the appellant had been infringed. See Atsegbua (n. 111 above).

<sup>124</sup> (2007) 14 NWLR pt. 1054, 275 C.A.

applicant, Chief Gani Fawehinmi instituted an action in the lower court against the respondents seeking for the determination of the following questions:<sup>125</sup>

- (a) Whether any public officer in Nigeria particularly a Minister of the Federal Republic of Nigeria is entitled to be paid yearly salary outside the salary prescribed by Certain Political, Public and Judicial Office Holders (Salaries and Allowances, etc.) Act No.6 of 2002.
- (b) Whether any Public Officer in Nigeria particularly a Minister of the Federal Republic of Nigeria is entitled to be paid in Foreign currency outside the currency prescribed by Certain Political, Public and Judicial Office Holders (Salaries and Allowances, etc.) Act No. 6 of 2002.
- (c) Whether the authorization by the President of the Federal Republic of Nigeria, 1st respondent, of payment of a Minister's salary outside that prescribed by the Act of the National Assembly and in foreign currency is not an abuse of power under the Constitution of the Federal Republic of Nigeria, 1999.

BFM Nyako, Judge of the Federal High Court, Abuja delivered his ruling striking out the appellants suit on the grounds that the appellant has no locus standi to maintain the action and that the matter was not justiciable. On appeal to the Court of Appeal, the appellant was successful and the ruling of the Federal High Court was overruled.

### **2.1.2 Standing to enforce fundamental human rights before Nigerian courts**

The 1999 Constitution of the Federal Republic of Nigeria, identifies the significance of access to justice in the protection of human rights.<sup>126</sup> It also identifies and emphasized the

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<sup>125</sup> As above.

<sup>126</sup> See the state of human rights in Nigeria 2005-2006, being a report on human rights violations monitored in Nigeria by Network of human rights violations monitors in collaboration with the National Human Rights Commission, UNDP and NORAD, 90. [http://web.ng.undp.org/publications/governance/STATE\\_OF\\_HUMAN\\_RIGHTS\\_REPORT\\_IN\\_NIGERIA.pdf](http://web.ng.undp.org/publications/governance/STATE_OF_HUMAN_RIGHTS_REPORT_IN_NIGERIA.pdf) Section 35(4) of the Nigerian Constitution stipulates that a person must be charged before a court of law within 'a reasonable time.' If there is a competent court of jurisdiction within a forty kilometer radius, 'a reasonable time' is defined by the Constitution to mean 'in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometers, a period of one day;' and 'in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable'. If the suspects have not been tried within 'two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for

importance of securing the independence of the courts to make it easy for the ordinary citizens to have access to justice.<sup>127</sup>

Chapter IV of the Constitution titled fundamental rights provides protection for most of the human rights. These rights are: right to life,<sup>128</sup> dignity,<sup>129</sup> personal liberty,<sup>130</sup> fair hearing,<sup>131</sup> private and family life,<sup>132</sup> freedom of thought, conscience and religion,<sup>133</sup> freedom of expression and the press,<sup>134</sup> peaceful assembly and association,<sup>135</sup> freedom of movement,<sup>136</sup> freedom from discrimination,<sup>137</sup> and the right to acquire and own immovable property anywhere in Nigeria.<sup>138</sup>

The statutory provision for human rights protection and enforcement in Nigeria comprises of the different legislations of the National Assembly and the state houses of assembly enacted for the protection of human rights in Nigeria. These are: the Legal Aid Act<sup>139</sup> the National Human Rights Commission Act 2010;<sup>140</sup> the child right act 2003; and

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trial at a later date'. Interestingly, the Nigerian Constitution did not clarify on the meaning of the phrase 'within a reasonable time' as to the length of time a case must go on in court before it is finalized. The Supreme Court however had reason to define this expression in the case of *Gozie Okeke v The State* (2003) 15 NWLR pt. 842 25. In his judgment, Justice Ogundare held that: 'The word "reasonable" in its ordinary meaning means moderate, tolerable or not excessive. What is reasonable in relation to the question whether an accused has a fair trial within a reasonable time depends on the circumstances of each particular case, including the place or country where the trial took place, the resources and infrastructures available to the appropriate organs in the country. It is, therefore, misleading to use the standard or the situation of things in one or a particular country to determine the question whether trials of criminal cases in another country involves an unreasonable delay ... A demand for a speedy trial, which has no regard to the conditions and circumstances in this country, will be unrealistic and be worse than unreasonable delay in trial itself.'

<sup>127</sup> As above. Section 17(2)(e) provides that: the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

<sup>128</sup> 1999 Constitution of the Federal Republic of Nigeria, section 33.

<sup>129</sup> As above Section 34.

<sup>130</sup> As above Section 35.

<sup>131</sup> As above section 36.

<sup>132</sup> As above section 37.

<sup>133</sup> As above section 38.

<sup>134</sup> As above section 39.

<sup>135</sup> As above section 40.

<sup>136</sup> As above section 41.

<sup>137</sup> As above section 42.

<sup>138</sup> As above section 43.

<sup>139</sup> Section 46 (4) (b) of the Nigerian Constitution made provision for legal aid to the poor to make it possible For poor Nigerians to have access to justice. It provides that the National Assembly: 'Shall make provisions (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this

the domestication of international treaties, for example, the African Charter on Human and Peoples' Rights.<sup>141</sup>

The Nigerian Constitution confers concurrent jurisdiction on both the State and Federal High Court with respect to the enforcement of the fundamental human rights in Nigeria.<sup>142</sup> The Constitution provides that 'any person who alleges that any provision of this chapter has been... contravened may apply to the High Court for redress.'<sup>143</sup> The Fundamental Rights (Procedure and Enforcement) Rules 2009 spell out the procedure for obtaining redress for contravention or likely contravention of people's rights as provided in chapter IV of the Constitution.<sup>144</sup>

As discoursed earlier, it is an established fact that before an applicant can successfully bring an application for the violation of his rights in Nigerian courts, he or she must have 'sufficient interest' in the matter. This restrictive approach has prevented access to the courts to applicants who otherwise would have had the privilege and freedom to bring an application to the court for human rights violation.<sup>145</sup> The principle of locus standi is described as a major limitation on the legal protection and enforcement of human rights

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Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real'. In light of this The Legal Aid Council was established by the Legal Aid Act 2011 to improve access to justice through the provision of free Legal assistance and legal advice to the poor.

<sup>140</sup> The National Human Rights Commission was established by the National Human Rights Commission Act, 1995, as amended by the National Human Rights Commission Act, 2010, to comply with the resolution of the United Nations General Assembly which requires all member States to establish national human rights institutions for the promotion and protection of human rights.

<sup>141</sup> International treaties are generally not enforceable in Nigerian Courts unless it is first domesticated as provided by section 12(1) of the Constitution which says: 'No treaty between the Federal and any other Country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. This position was held by the supreme court of Nigeria in the case of *Abacha v Fawehinmi* (2000) 6 NWLR (pt. 660) 228 sc. where it held as follows: 'An international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in our courts'.

<sup>142</sup> See *Alhaji Sheu Abdul Gafar v the Government of Kwara state S.C. 71/2002*. And *Tukur v Government of Gongola* (1989) 4 NWLR (pt. 117) 517. See also section 46(1) of the 1999 Nigerian Constitution.

<sup>143</sup> Section 46(1) of the 1999 Constitution of Nigeria.

<sup>144</sup> Preamble 1-3 of The Fundamentals rights (enforcement procedure) rules 2009.

<sup>145</sup> See *Taiwo* (n. 34 above) 564-565.

in Nigeria in the sense that it restricts access to courts.<sup>146</sup> Obiagwu and Odinkalu assert:<sup>147</sup>

There are two major obstacles posed by the strict interpretation of locus standi in Nigeria. First, human rights NGOs or an individual activist cannot sue to enforce generic or group rights because it would be difficult to show under those circumstances a special interest in such a matter to meet the requirements of the Adesanya rule. The second obstacle is that individual victims who are required to disclose a sufficient personal interest in the matter rarely succeeded because personal interest, defined as interest over and above that of the general public, is difficult to prove where the alleged violation also affects other members of the public.

However, there have been cases where the Nigerian courts have interpreted the principle of locus standi liberally when it comes to human rights violation. For example, if victim of the violation is incarcerated.

In *Richard Oma Ahonarogo v Governor of Lagos State*,<sup>148</sup> Augustine Eke a 14 years old boy was convicted of armed robbery by the Firearms and Robbery Tribunal in Lagos State; his legal counsel applied for the enforcement of the right to his life on his behalf on the ground that the convict could not be sentenced to death since he was a minor by virtue of section 368 of the Criminal Procedure Law of Lagos State of 1994.<sup>149</sup> The respondents in a preliminary objection challenged the locus standi of the applicant and the jurisdiction of the court Onalaja J (as he then was) dismissed the preliminary objection raised by the respondents and allowed the application. In Justice Onalaja's opinion the applicant, who is a legal practitioner and counsel to the convict, had the locus standi to enforce his client's fundamental right to life.

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<sup>146</sup> As above.

<sup>147</sup> See C Obiagwu & CA Odinkalu 'Combating legacies of colonialism and militarism' in An-Na'im (ed) *Human rights under African Constitutions* (2003) 211 233. See Taiwo (n. 37 above) 565.

<sup>148</sup> Unreported case cited in Sanni (n. 37 above) 520.

<sup>149</sup> Which provides that: 'where an offender who in the opinion of the court had not attained the age of 17 years at the time of the offence was committed is found guilty of a capital offence, sentence of death shall not be pronounced or recorded, but in lieu thereof, the court shall order such person to be detained during the pleasure of the President and if so ordered he shall be detained in accordance with the provisions of the Act'

In *Ozekhome v The President*,<sup>150</sup> the 2nd to 24th plaintiffs were detained under the State Security (Detention of Persons) Decree 2 of 1984.<sup>151</sup> The respondents in a preliminary objection challenged the locus standi of the first applicant in the action. In dismissing the preliminary objection, Segun J (as he then was) said:<sup>152</sup>

The 2nd to 24th plaintiff/respondents are in jail and they have sufficient interests to come out. To get out, they need the services of the 1st plaintiff/respondent – a legal practitioner. This lawyer has statutory rights to perform certain duties as a legal practitioner to his clients. These statutory rights are clearly spelt out in section 2 of the Legal Practitioners Act 1975 (see also Rules 7,4,14C and 29 of the Rules of Professional Conduct in the Legal Profession made pursuant to the Legal Practitioners Act, 1975). The combined effect of the law and the Rules show that the 1st plaintiff/respondent has sufficient interest in the matter. He has been briefed and he is now taking steps to ensure success of the litigation. I hold that he is an interested party on the face of the summons.

It is also important to note that some judges have saved applications filed on behalf of human right victims instead of dismissing them.<sup>153</sup> For example, in *Captain SA Asemota v Col SL Yesufu and Another*,<sup>154</sup> the wife of a detained army officer who applied to the Court seeking to enforce the fundamental right of her husband to personal liberty had sued in her own name, however, the trial judge, Somolu J (as he then was), instead of dismissing the application corrected it by substituting the husband's name for hers so that it will conform with the condition for locus standi.<sup>155</sup>

In a suit filed by SERAP and five other NGOs in 2010, *SERAP & others v Nigeria*,<sup>156</sup> the plaintiffs sought an order compelling the Central Bank of Nigeria and the Attorney General of the Federation to make public the detailed accounts relating to the spending huge amount of money between 1988 and 1994. They also sought for an order of the court compelling the respondents to bring to justice anyone suspected of corruption and

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<sup>150</sup> 1 NPILR 345 359. Cited in Sanni (n. 34 above) 520.

<sup>151</sup> see Sanni (n. 34 above) 520.

<sup>152</sup> As above.

<sup>153</sup> As above.

<sup>154</sup> (1981) 1 NSCR 420.

<sup>155</sup> As above.

<sup>156</sup> FHC/ABJ/CS/640/10.

mismanagement of the 12.4 billion dollars oil windfall. The plaintiffs also sought an order directing the respondents to provide adequate compensation, which may be in the form of reimbursement, satisfaction or guarantees of non-repetition to millions of Nigerians that have been denied their human rights as a result of the respondents failure and/or carelessness to ensure transparency and accountability in the spending of \$12.4 billion oil windfall between 1988 and 1994. The respondents challenged the locus standi of the plaintiffs to sustain the action. In the ruling of the High Court, Justice Gabriel Kolawole held that the plaintiffs lacked locus standi to bring the case.

### 2.1.3 Standing to sue in public interest litigation before Nigerian courts

Public interest litigation is usually instituted in the interest of the general public. An application to the court is initiated by one person on behalf of some victims or potential victims who cannot apply to the court for redress themselves due to one reason or the other.<sup>157</sup> Public interest litigation helps to limit the state powers against some illegal acts that may affect the overall interest of the public and to make state authorities to do for the benefit of the whole society that which they neglected to do.<sup>158</sup> Public interest litigation is intended to improve access to justice to the poor,<sup>159</sup> when their fundamental rights are infringed and for the protection of the public.<sup>160</sup> It is not important whether the person who makes the application will profit from its result, what matters is that the benefits will accrue to the general public or group of people.<sup>161</sup>

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<sup>157</sup> See I Sule 'Fundamental rights enforcement rules and public interest litigation: Understanding the rules' a paper presented at a day's workshop on public interest litigation organized by National Human Rights Commission at center for democratic studies Bayero University Kano. [http://works.bepress.com/ibrahim\\_sule](http://works.bepress.com/ibrahim_sule) 3 (accessed November 5, 2013)

<sup>158</sup> As above.

<sup>159</sup> 'The right of access to justice generally guarantees that every person has access to an independent and impartial court and the opportunity to receive a fair and just trial when that individual's liberty or property is at stake. Moreover, access to justice involves the availability of appropriate means of redress or remedies to aggrieved individuals or groups'. It ensures that government is held accountable for their deeds or omission. 'It is said that access to justice is not the same as access to court. In other words, it is access to remedies i.e. substantive justice as opposed to access to procedural justice that needs to be pursued'. See YM Badwaza 'Public interest litigation as practiced by South African human rights NGOs: any lessons for Ethiopia?' Unpublished LLM Dissertation University of Pretoria 2005 15.

<sup>160</sup> See Adedeji (n. 49 above).

<sup>161</sup> See Sule (n. 157 above).

Public interest litigation also serves as a medium for protecting, liberating, and transforming the interest of marginalised groups.<sup>162</sup> According to Akinrinmade, public interest cases raise issues, beyond any personal interest of the applicants, affecting a sector of the public or defenseless groups; seeking to explain or challenge vital questions of law; involving grave matters of general public concern or abuse by public body.<sup>163</sup>

Oladele pointed out that traditionally there are no 'personal gains or private motives for initiating public interest litigation', the success of public interest litigation is not just based on winning a particular action, but in making known the violation, sensitizing the public and helping to set off law reform.<sup>164</sup> Public law litigation is justified on the grounds that there is a duty on the part of the state to ensure smooth administration of justice, guarantee law and order, provide and maintain public works, which would be valuable to the society. In the event that government go back on its duty, it becomes necessary to resort to public interest litigation in order to remedy such wrong.<sup>165</sup>

As earlier stated above, traditionally, if an applicant does not have locus standi, he will be rejected by the Court without considering the merits. The traditional concept of locus standi has been identified as one of the major impediments to the initiation of public interest litigation which would have stirred growth in the various areas of human activities.<sup>166</sup>

Agbede argues that the Court has created an artificial barrier between the plaintiff and the court by the concept of locus standi. He questioned its justification thus:<sup>167</sup>

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<sup>162</sup> OG Akinrinmade 'Public Interest Litigation as a catalyst for sustainable development in Nigeria' *OIDA International Journal of Sustainable Development* 2013 Vol. 06, No.06 86.

<sup>163</sup> As above 87.

<sup>164</sup> See [www.nigeriavillagesquare.com/kayodeoladele/falana-vs-african-union-a-new-conundrum-in-access-to-justice.html](http://www.nigeriavillagesquare.com/kayodeoladele/falana-vs-african-union-a-new-conundrum-in-access-to-justice.html). accessed March 30, 2014.

<sup>165</sup> See Akinrinmade (n. 162 above) 88.

<sup>166</sup> As above 90.

<sup>167</sup> See IO Agbede 'The rule of law and the preservation of individual rights' in Ajomo & Owasanoye *Individual rights under the 1979 Constitution* (1993) 42. See also Taiwo (n. 37 above) 565.



One may like to ask why any Nigerian should live under an unconstitutional law until someone assumes power under it to his detriment? I think it will be good law and good sense for anybody to challenge a statute on the basis of its unconstitutionality whether or not his rights are being threatened. Otherwise how can our Constitution remain supreme when inconsistent states abound with none clothed with the locus standi to challenge them?

He therefore advised that the concept of locus standi should not be relevant when a law is being challenged for being unconstitutional.<sup>168</sup> However, some decided cases by the Nigerian courts have shown that the courts are not inclined to granting locus standi to plaintiffs who challenge unconstitutional laws or actions of the government.

The Attorney-General of the Federation ordinarily is considered to be the defender of public interest.<sup>169</sup> The Nigerian Constitution made provision for an Attorney-General of the Federation who shall be the Chief Law Officer of the Federation and a Minister of Justice of the Federation and empowers him to start or stop prosecutions in the public interest;<sup>170</sup> Section 174(3) provides:<sup>171</sup> 'in exercising his powers, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.' However, it is doubtful whether the Attorney-General can truly represent the public giving the fact that he is a member of the government. Aboki JSC observed in *Fawehinmi v President*<sup>172</sup> thus:

In our present reality, the Attorney-General of the Federation is also the Minister of Justice and a member of the Executive cabinet. He may not be disposed to instituting an action against the Government in which he is part of, it may tantamount to the Federal Government suing itself. Definitely he will not perform such duty...

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<sup>168</sup> As above 43.

<sup>169</sup> See *Fawehinmi v President* (2008) 23 WRN 65 and *SERAP & others v Nigeria* FHC/ABJ/CS/640/10.

<sup>170</sup> O Mba 'Judicial review of the prosecution powers of the Attorney General in England and Wales and Nigeria: an imperative of the rule of law' (2010) *Oxford U comparative L forum* 2 <http://ouclf.iuscomp.org> (accessed November 5, 2013).

<sup>171</sup> 1999 Constitution of the Federal Republic of Nigeria.

<sup>172</sup> (2008) 23 WRN 65.

He further asked 'who will approach the Court to challenge the Government where it violates or fails to enforce any provisions of the Constitution or the laws where the Attorney-General will not.'

However, public interest litigation has gradually emerged in Nigeria, and this is due to the activities of human rights activists and courageous judiciary which has adopted an activist approach.

In *Shell Petroleum Development Company Nig. Ltd v Chief Otoko and Others*<sup>173</sup> the plaintiffs instituted an action at the Bori High Court in Rivers State, claiming compensation for deprivation of use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The action was brought in a representative capacity. The Court of Appeal held that: 'It is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause of matter,' and rejected the purported representative action.

In another case of *Adediran and Anor v Interland Transport Ltd*,<sup>174</sup> the plaintiffs, *inter alia* brought an action for nuisance due to noise, vibrations, dust and obstruction of the roads in the estate. The Court however, asserted that the public or group cannot sue by representation and claim special damages for individuals when they do not suffer equally.

The case of *Keyamo v House of Assembly, Lagos State*,<sup>175</sup> is another example of the hurdle of locus standi which any person who wants to challenge the action of the government in Nigeria must cross before he can institute and or maintain an action. In that case Keyamo filed a suit challenging the constitutionality of the setting up of a panel by the Lagos House of Assembly, to investigate the Governor over allegations concerning the crime of forgery. The Court of Appeal upheld the ruling of the Lagos

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<sup>173</sup> (1990)6 NWLR(pt. 159-693.

<sup>174</sup> (1991) N WLR (PT.214) 155

<sup>175</sup> (2000) 12 N.W.C.R. 196

High Court that the plaintiff lacked the locus standi to institute the action. The Court, per Galadima JCA, held as follows:<sup>176</sup>

I have carefully perused and considered the entire originating process issued by the appellant in the lower Court. Not only has he woefully failed to disclose his legal authority to demand for the declarations sought but also failed to show what injury or injuries he will or would suffer...of all the reliefs being claimed by the appellant, none of them relate to him personally or his faceless clients whose future political interest he now seeks to protect. This approach is speculative and untenable in law. It is a mere academic exercise. Merely being a registered voter (even without proof of same) is not sufficient to sustain the prayers of the appellant. The appellant has simply not disclosed his interest in this suit.

Conversely, in *Inspector General of Police v All Nigerian Peoples Party & others*,<sup>177</sup> the plaintiffs sought a declaration that the provisions of the Public Order Act (Cap 382) Laws of the Federation of Nigeria 1990 which require police permit or any other authority for the holding of: rallies or processions in any part of Nigeria is illegal and unconstitutional as they contravene section 40 of the 1999 Constitution and article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap 10) Laws of the Federation of Nigeria 1990. The High Court held the opinion that:

...the Public Order Act does not only impose limitation on the right to assemble freely and associate with others, which right is guaranteed under section 40 of the 1999 constitution, it leaves unfettered the discretion on the whims of certain officials, including the police. The Public Order Act so far as it affects the right of citizens to assemble freely and associate with others, the sum of which is the right to hold rallies or processions or demonstration is an aberration to a democratic society, it is inconsistency with the provisions of the 1999 Constitution. The result is that it is void to the extent of its inconsistency with the provisions of the 1999 Constitution. In particular section 1(2),(3)(4)(5) and (6), 2, 3 and 4 are inconsistent with the fundamental rights provisions in the 1999 Constitution and to the extent of their inconsistency they are void - I hereby so declare.

The Appeal Court, as per Mohammad Aboki JSC also upheld the judgment of the lower court and ruled in favour of the respondents.

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<sup>176</sup>

As above

<sup>177</sup>

(2007) AHRLR 179 (Ngca 2007).

In *Malachy Ugwummadu v President, Federal Republic of Nigeria & 2 Ors*<sup>178</sup> the applicant approached the Federal High Court for an order of mandamus compelling the respondents to fully implement the entire content and provisions of the Appropriation Act 2009 which was an Act of the National Assembly. The applicant claimed that, the Government of the Federation for some time had not fully implemented the annual budget of the country which partly accounted for the economic woes and under development of the nation. The matter was thrown out on the ground that the applicant lacked the locus standi to institute the action.

In a more recent case of *Femi Falana v National Assembly*,<sup>179</sup> the Nigerian courts again stopped the applicant from challenging the actions of the government through the strict and out dated interpretation on locus standi. In that case, Falana challenged the powers of Federal lawmakers to grant huge and scandalous salaries and allowances to themselves.<sup>180</sup> Falana sought from the Federal High Court for a declaration that the members of the National Assembly are not permitted to receive the salaries and allowances they allotted to themselves outside the salaries and allowances determined and fixed for them by the Revenue Mobilisation and Fiscal Allocation Commission whose function it is to determine the remuneration suitable to political office holders, including the President, Vice-President, Governors, Deputy Governors, Ministers, Commissioners, Special Advisers, Legislators etc.<sup>181</sup> pursuant to Section 70 of the Constitution.<sup>182</sup> The National Assembly, through their counsel Kenneth Ikonne challenged the locus standi of the applicant Mr. Falana to question the salaries of the lawmakers and described him as a busy body who does not have interest in the action of the National Assembly. The presiding judge, Justice Ibrahim Auta of the Federal High

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<sup>178</sup> SUIT NO FHC/L/CS/1069/09

<sup>179</sup> Unreported. Cited in <http://www.channelstv.com/home/2012/05/23/court-says-falana-has-no-right-to-challenge-lawmakers-jumbo-pay/> (accessed 30 October 2013).

<sup>180</sup> As above.

<sup>181</sup> As above. See also <http://www.rmafc.gov.ng/abt.htm>. 'The Commission derives its powers and Constitutional functions from paragraph 32 of Part I of the Third Schedule to the 1999 Constitution of the Federal Republic of Nigeria'.

<sup>182</sup> Section 70 of the Constitution provides that a 'member of the Senate or of the House of Representatives shall receive such salary and other allowances as Revenue Mobilisation Allocation and Fiscal Commission may determine'.

Court ruled in favor of the respondents and held that Falana does not have the locus standi to make the application as he did not prove that he had suffered any greater injury than other Nigerian citizens caused by the action of the lawmakers.<sup>183</sup>

However, in another recent case decided in 2013, *Bamidele Aturu v Minister of Petroleum Resources*,<sup>184</sup> the Court took a decision in the favor of the public interest, showing that some Courts are now willing to extend the sphere of locus standi for public good. In that case, the plaintiff sought a declaration that the plan of the defendants to deregulate the downstream of the petroleum industry by not fixing the prices at which the product may be sold in Nigeria is unlawful, null, void and of no effect whatsoever being flagrant violation of mandatory provision of section 6 of the Petroleum Act, Cap P10, Laws of the Federation of Nigeria, 2004 and section 4 of the Price Control Act, Cap P28, Laws of the Federation of Nigeria, 2004.

The defendants challenged the jurisdiction of the Court to entertain the suit on the grounds that the plaintiff lacks the locus standi to constitute the suit. In deciding on the locus standi of the plaintiff the Court declared that it should be guided by the facts and the circumstances of each case. And also a distinction must be made between cases involving private rights which directly affect individuals as against public interest litigation where the private rights of the individual litigant may not directly be involved but has to do with an infraction of the provisions of the Constitution or the laws passed by the National Assembly which may affect the rights of citizens. In the Court's view, it is in the former i.e. private rights that the narrow interpretation of locus standi will apply, while in the later the wider interpretation will apply. It is against this backdrop that the Court ruled that the plaintiff is qualified to be accorded locus standi to constitute the suit, since the subject matter of the case involve both his private rights and the rights of other Nigerians. Accordingly, the Court entered judgment in favor of the plaintiff.

It appears that the Courts in deciding whether to accord standing to a plaintiff in a case involving public interest will consider the facts and circumstance of the matter as

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<sup>183</sup> See (n. 178 above).

<sup>184</sup> Suit No. FHC/ABJ/CS/591/09.

observed by the Court in Bamidele's case. Moreover, this case further illustrate that some Courts approach the issue of restricted locus standi more liberally.

## **2.2 Effect of the provision of locus standi on the Fundamental Rights (Enforcement Procedure) Rules 2009**

The judiciary regulates human rights court proceedings in Nigeria. Section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999, empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure for the enforcement of human rights in Nigeria. Pursuant to this, Hon. Justice Idris Legbo Kutigi, CJN (as he then was), promulgated the Fundamental Rights (Enforcement Procedure) Rules 2009, on November 11, 2009 which replaced the old rules - Fundamental Rights (Enforcement Procedure) Rules 1979. The Fundamental Rights (Enforcement Procedure) Rules 2009 outline the procedure for the commencement of an action for the enforcement of fundamental human rights in Nigerian Courts. The Rules are intended to prioritize human rights enforcement and to advance democracy.

The overriding objectives of the Fundamental Rights (Enforcement Procedure) Rules 2009 are provided in the Preamble. Paragraph 1 of the preamble states that:<sup>185</sup>

The Court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially whenever it exercises any power given it by these Rules or any other law and whenever it applies or interprets any rule.

The Fundamental Rights (Enforcement Procedure) Rules 2009 made provision for the liberal interpretation of locus standi in paragraph 3(e) of the preamble where it states that:

The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

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<sup>185</sup> Preamble 1 of the fundamental rights (enforcement procedure) rules, 2009.

- (vi) Anyone acting in his own interest;
- (vii) Anyone acting on behalf of another person;
- (viii) Anyone acting as a member of, or in the interest of a group or class of persons;
- (ix) Anyone acting in the public interest, and
- (x) Association acting in the interest of its members or other individuals or groups

Since the liberalisation of the rule of locus standi is provided in the preamble of the rules, the relevant question is what is the legal effect of a preamble?

### 2.2.1 Legal effect of a preamble

A preamble is simply an opening declaration that has slight or no influence in law; according to Sanni ‘a preamble is too abstract and is usually just a statement of fact, unlike the wording of the actual law’.<sup>186</sup> Generally a preamble is a pronouncement by the parliament of the reasons for the passage of the bill.<sup>187</sup> A preamble to a document is an opening statement that explains the document's principle and original philosophy and is not an essential part of that document it neither enlarges nor confers powers.<sup>188</sup>

According to Qianfan and Chunqiu, some legal scholars hold different opinion on the effect of the preamble;<sup>189</sup> there are scholars who are of the opinion that constitutional preambles have no legal effect. They hold this opinion because of the following reasons:<sup>190</sup> The preamble does not have normative effect because it is too abstract. The contents of some preambles lack clarity, a determined normative scope and normative counterparts, and it is not easy for judges to directly use it to decide cases. In addition, the principles in the preamble are often made concrete in the Constitutional articles; a factual narrative does not have effect.<sup>191</sup> Constitutional preambles do not have effect because

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<sup>186</sup> See Sanni (n. 34 above), 524

<sup>187</sup> See <http://legal-dictionary.thefreedictionary.com/preamble> (accessed October 19 2013).

<sup>188</sup> As above.

<sup>189</sup> Z Qianfan & Y Chunqiu ‘The controversy on the preamble to the Constitution and its Effects’ <http://chinacopyrightandmedia.wordpress.com/2013/06/10/the-controversy-on-the-preamble-to-the-Constitution-and-its-effects/> (accessed September 10 2013).

<sup>190</sup> As above.

<sup>191</sup> As above.

they lack the structural conditions to be legal norms. From legal scholar's point of view if they are made into normative documents with effect, it will be impracticable to find the three component conditions of presumption, handling and judgment within them, therefore, cannot be held to have effect.<sup>192</sup>

Other scholars believes that Constitutional preambles have legal effect. They hold this opinion because of the following reasons:<sup>193</sup> Preambles are a component of the Constitution, and should have effect. As an essential legal document, a Constitution includes the official articles and the preamble and it cannot be said on the topic of effect that only articles are discussed, and preambles are not.<sup>194</sup> The revision of Constitutional preambles conforms to the procedure for Constitutional revision, and therefore should have effect. It acts as guidance for the correct interpretation and application of the articles of a Constitution.<sup>195</sup>

Justice Charles T. Hackland (Ontario Superior Court of Justice Canada) stated in *Allen v Renfrew county* that:<sup>196</sup> 'A Preamble is a helpful interpretative device...certain judgments have attributed considerable importance to the interpretative assistance rendered by the preamble in Constitutional litigation.' He further states that: 'under normal circumstances, preambles can be used to identify the purpose of statute, and also as an aid to construing ambiguous statutory language.'<sup>197</sup> In the same case, Lamer, C.J.C has this to say:<sup>198</sup>

Although the preamble is clearly part of the Constitution, it is equally clear that it has no enacting force... in other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.

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<sup>192</sup> As above.  
<sup>193</sup> As above.  
<sup>194</sup> As above.  
<sup>195</sup> As above.  
<sup>196</sup> 69 OR 3d 742 (2004).  
<sup>197</sup> As above.  
<sup>198</sup> As above.



This opinion is repeatedly stated in an interpretation act such as section 13 of the Interpretation Act of Canada which says:<sup>199</sup> ‘The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.’

Equally, when a contract is brought before the court for interpretation, no legal power is given to the preamble.<sup>200</sup> In *Sherbrooke community center v SEIU*, Court of Queen’s Bench Judge Gerein said:<sup>201</sup>

The preamble to a contract is nothing more than an introduction to that about which the parties have actually agreed. It puts the agreement into context. It describes the goals of the agreement. It speaks to what went before and the spirit in which agreement was achieved. On the other hand, it does not contain any promises. It does not contain any restrictions or commitments. It could be removed entirely without in any way altering that which was agreed to and set out in specific terms.

In the classical case of *Jacobson v Massachusetts*,<sup>202</sup> the court held thus:<sup>203</sup>

Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments...

Due to the fear of the effects the preamble may have, and the application and interpretation of the preamble, the 1999 Australian referendum on whether to adopt a new preamble included a promise that the preamble, if adopted, could not be enforceable by the courts.<sup>204</sup> The 1999 Australian referendum suggested that the Constitution should have a provision that will ensure that the preamble will have no legal force and could not be used for the purpose of interpreting the Constitution or other laws, it tried to avoid making use of expressions which might have legal consequences, on the preamble.<sup>205</sup>

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<sup>199</sup> [www.http://laws-lois.justice.gc.ca/eng/acts/l-21/FullText.html](http://laws-lois.justice.gc.ca/eng/acts/l-21/FullText.html) (accessed October 20 2013).

<sup>200</sup> See <http://www.duhaime.org/LegalDictionary/P/Preamble.aspx> (accessed October 20 2013).  
<sup>201</sup> 2002 SKQB 101.

<sup>202</sup> 197 U.S. 11 (1905).

<sup>203</sup> As above

<sup>204</sup> See <http://en.wikipedia.org/wiki/Preamble> (accessed October 20 2013).

<sup>205</sup> A Twomey ‘The preamble and indigenous recognition’ (2011) *A/IR*, vol. 15 no. 2, 14.

There has been a lot of controversies on the legal implication and interpretation of a preamble by the court.<sup>206</sup> Generally it is believed that a preamble cannot be applied on its own as a positive law since it has no positive force; there has been contest on how and when a preamble may be used in the interpretation of the statute which it introduces.<sup>207</sup> In other cases, it is said that a ‘preamble can only be used to resolve ambiguity and that where the provisions of a statute are plain and clear, no recourse can be had to the preamble’.<sup>208</sup>

Justice Mason put this view in *Wacando v Commonwealth* as follows:<sup>209</sup>

It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object. According to this argument, resort may be had to a preamble as part of the context of the whole Act to interpret words of generality and identify ambiguity in addition to resolving ambiguity.

The provision for the liberalisation of the rules on locus standi in the Fundamental Rights (Enforcement Procedure) rules 2009 is very important; it will strengthen the enforcement of human rights in Nigerian courts and bring her human rights practice in accordance with international standards. Rather than insert it in the preamble of the rules, and subject it to controversies and legal consequences, it is better provided for in the text of the rules.

Preamble 3(e) of the Fundamental Rights (Enforcement Procedure) rules 2009 encourages courts to ‘welcome public interest litigations in the human rights field’ and emphasizes that ‘no human rights case may be dismissed or struck out for want of locus standi.’ Again this provision dispute the provision of locus standi in sections 6(6)(b) of

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<sup>206</sup> As above 5.  
<sup>207</sup> As above.  
<sup>208</sup> As above.  
<sup>209</sup> (1981) 148 CLR 1, 23.

the 1999 Constitution of the Federal Republic of Nigeria which is the basis for many Nigeria court's ruling on locus standi, it cannot be assumed that a procedural rules may overturn the decisions of the Supreme Court.

Some writers are of the opinion that since the Rules are considered to be of 'Constitutional flavor' and have been made by the Chief Justice of the Federation, it enjoys the same statute as the Constitution. This is the opinion of Duru<sup>210</sup> and Nwauche<sup>211</sup>

However, Dakas is of a different opinion, he said:<sup>212</sup>

...the Supreme Court emphatically stated in *Attorney-General of Abia State v Attorney-General of the Federation* (2002) 6 NWLR (pt. 763) 264, an Act of the National Assembly cannot circumscribe, abridge or otherwise curtail the provisions of the Constitution, unless the Constitution expressly so permits.

Abiola Sanni also thinks that 'the Fundamental Rights (Enforcement Procedure) Rules 2009, having been made by the Chief Justice of Nigeria, are akin to subsidiary legislation'.<sup>213</sup> And further says that 'this will not make the provisions of the Rules override the express provisions of the Constitution'.<sup>214</sup>

It is clear, that the Nigerian Constitution is the highest law in the country and it enjoys the highest status in the hierarchy of laws in Nigeria, this is because of the superiority clause

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<sup>210</sup> See Duru (n. 33 above) 3-4. Duru said: 'Since the 2009 FREP Rules were made pursuant to Section 46 (3) of the 1999 Constitution, they are deemed to be at par with the provisions of the Constitution. They possess the same force and potency as the provisions of the Constitution. They are thus of a higher status than other laws in the hierarchy of laws in this country. In the event of any inconsistency between the FREP Rules and any other law, the former will prevail to the extent of such inconsistency'.

<sup>211</sup> See Nwauche (n. 31 above) 513.

<sup>212</sup> See CJ Dakas 'Judicial reforms of the legal framework for human rights litigation in Nigeria: novelties and perplexities' [www.nials-nigeria.org/dakas](http://www.nials-nigeria.org/dakas) accessed November 5 2013 41.

<sup>213</sup> Sanni (n. 34 above) 528.

<sup>214</sup> As above. The Chief Justice may have not intended to make the provisions of preamble 3(e) of the FREPR mandatory or obligatory. He might just be setting the stage for a shift towards a liberal view of the rule on locus standi. He may be aware of the controversy the provision might generate if it is included in the text of the rule hence its inclusion in the preamble.

in the Constitution.<sup>215</sup> Section 1(3) of the Constitution states that: ‘If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.’

The provisions of preamble 3(e) of the fundamental rights (enforcement procedure) rules 2009 are clearly inconsistent with the provisions of section 6(6)(b) of the Nigerian Constitution as interpreted by the Supreme Court in Adesanya's case.<sup>216</sup> The provisions in the rules cannot override the provisions of the Constitution. Therefore, all the provisions of the Fundamental Rights (Enforcement Procedure) Rules 2009 which are conflicting with the Constitution are at the risk of being declared as null and void to the extent of their contradiction.<sup>217</sup> This can be seen in the SERAP case<sup>218</sup> which was brought under the Fundamental Rights (Enforcement Procedure) Rules 2009. The Federal Government argued that the former Chief Justice of Nigeria Idris Legbo Kutigi exceeded his Constitutional powers by liberalising the rules on locus standi, when he enacted the Fundamental Rights (Enforcement Procedure) Rules 2009, permitting public interest litigation, and allowing the inclusion of the African Charter on Human and Peoples' Rights in the Rules. The Court in this case denied SERAP standing as earlier mentioned.<sup>219</sup>

Despite the provisions in Order XV of the Fundamental Rights (Enforcement Procedure) Rules 2009, which provides thus:

2. From the commencement of these Rules, pending Human Rights applications commenced under the 1979 Rules shall not be defeated in whole or in part, or suffer any judicial censure, or be struck out or prejudiced, or be adjourned or dismissed, for failure to comply with these Rules provided the applications are in substantial compliance with the Rules.

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<sup>215</sup> Section 1(1) of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>216</sup> Although, the Supreme Court liberalised standing in *Gani Fawehinmi v Akilu, AG Kaduna v Hassan*, the Courts also relied on Adesanya's case to deny standing in *Adeyinka Abosedo v Ministry of Education, Keyamo v House of Assembly Lagos state SERAP & others v Nigeria*. It seems the Courts will consider the facts and circumstances of the case before according standing, the Courts has not demonstrated that in all cases it accords standing to the plaintiff.

<sup>217</sup> See Sanni (n. 34 above), 528.

<sup>218</sup> FHC/ABJ/640/10.

<sup>219</sup> As above.

3. Such pending Human Rights applications may continue to be heard and determined as though they have been brought under these Rules.

The Supreme Courts cases decided after the enactment of the Rules seems not to take the above provisions into consideration with respect to the provisions of preamble 3(e) of the Rules. For example In the case of *Sinmisola Carew v Iyabo Omolara Oguntokun & ors*,<sup>220</sup> decided in 2011, the plaintiff sued the respondents who were executors of the will of late Alhaja Adijatu Ayoola Balogun. The respondents refused to pay probate and solicitors fees and expenses from the available funds of the deceased bankers. The learned trial judge after a careful consideration of the matter dismissed the application on the ground that it is premature. On appeal the respondents challenged the locus standi of the applicant for the first time. The Court of Appeal held that the plaintiff lacked the locus standi to bring the application and said:<sup>221</sup>

The conclusion I have come to that the 1<sup>st</sup> respondent lacked the locus standi to have brought the originating summons, should ordinarily only directly affect the motions before us on appeal however, the implication is that the suit itself is structurally defective such that the lower court lacked the jurisdiction to entertain it. The conclusion I have come to is that the suit ought to be struck out. I accordingly make an order striking out the suit.

The plaintiff appealed the decision of the Appeal Court, but the Supreme Court upheld the decision of the lower court.<sup>222</sup>

Similarly, in *Pacers Multi – Dynamics Ltd v The M. V. Dancing Sister & anor*,<sup>223</sup> the plaintiff is the owner of 13600 metric tons of Brazilian white refined sugar shipped on board the respondent's vessel, Dancing Sister for carriage from Brazil to Lagos. The plaintiff claimed against the respondents jointly and severally for the value of 58.9 metric tons short landed cargo and damages for breach of contract and breach of duty and/or negligence of the respondents their servants or agent in respect to the said goods during the voyage. The respondents filed an application for an order striking out the action on

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<sup>220</sup> SC 157/2000.

<sup>221</sup> As above.

<sup>222</sup> As above.

<sup>223</sup> SC 283/2001.

the grounds that the plaintiff has no locus standi to institute and or maintain the action since he is not a party to the bill of lading either as a consignee or endorsee and so cannot sue on the bill. The Court of Appeal held that the plaintiff lacks the standing to sue in this matter and he has no sufficient interest in the subject matter. On appeal to the Supreme Court, the Supreme Court affirmed the decision of the Appeal Court.

## 2.3 Conclusion

The Courts has continued to give a strict interpretation to the principle of locus standi in Nigeria. One of the tests established by the Supreme Court for granting standing is that the subject matter must be justiciable this means that if any person wishes to litigate on any of the provisions of chapter II of the Constitution he will lack the standing to do so since it has been declared non-justiciable by section 6 of the Nigerian Constitution.

The question one might ask arising from the foregoing is: should Nigerian Courts continue to permit the provisions of Section 6 of the Constitution to bind its hands on all matters concerning the basic rights provisions in chapter II of the Constitution? The answer to this question is a categorical, no. there is need for judicial activism and ingenuity on the part of the judges.

Although the Courts have accorded standing to plaintiffs in some cases but it seems that in doing that the Court will consider the facts and circumstance of the case.

It is clear that there is controversy on whether provisions of a preamble have legal force and whether the provisions of preamble 3(e) of the Rules can be enforced in the Courts. It is the submission of this study that preamble to a statute has no legal force but it often show the basic intent of a statute; therefore, carefulness must be exercised with regard to what to write and what not to write as a preamble to a statute or rule.<sup>224</sup> ‘A preamble that

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<sup>224</sup> Z Qianfan & Y Chunqiu (n. 189 above).

is right should clearly indicate the subjects formulating the statute, the objective and the basic principles of the statute'.<sup>225</sup>

It is believed that human rights without access to the means of enforcing such rights do not have meaning and that the principle of locus standi as interpreted by the Nigerian Courts impedes access to justice for the poor.

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<sup>225</sup>

As above.

## Chapter three

### Comparative analysis of the constitutional provisions and interpretation of locus standi before the courts in Kenya, India, United Kingdom and South Africa

#### 3. Introduction

United Kingdom Kenya, India, and South Africa are countries whose courts have once interpreted the principle of locus standi strictly but have moved from the strict interpretation of locus standi to a liberal and broader interpretation. A comparative analysis of these countries shift towards a liberal interpretation of locus standi and their legislative amendment will be invaluable to Nigerian courts to change the way they have so far interpreted the common law principle of locus standi. Moreover, with globalization and shift towards a global legal system, it is expected that Nigerian courts should embrace foreign domestic and international legal systems and best practice where such systems shows progressive trends that is in harmony with the modern drive towards making use of the law to achieve sustainable development.<sup>226</sup> This chapter will consider the interpretation of locus standi by the courts in these countries and the benefits of the shift towards a liberal interpretation by these countries and what lessons Nigeria can learn from them.

#### 3.1 Locus standi before the Courts in United Kingdom

In the 19<sup>th</sup> Century locus standi was interpreted very restrictively in United Kingdom.<sup>227</sup> Lord Justice James laid the principle down in 1880 in the *Ex P. Sidebotham* case<sup>228</sup> to the

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<sup>226</sup> Murombo (n. 20 above) 177.

<sup>227</sup> HMS Azim 'Locus standi: Historical development in England.'  
[www.legalreliance.blogspot.com/2012/11/locus-standi.html](http://www.legalreliance.blogspot.com/2012/11/locus-standi.html) accessed January 23, 2014. The process is virtually the same in England, Scotland, Northern Ireland and Wales, I propose to consider them in the context of United Kingdom.

<sup>228</sup> (1880) 14 Ch D 458 at 465



effect that a man must show that he himself had suffered a particular loss and had been injuriously affected in his money or property rights to be an aggrieved person and thus granted locus standi. This decision became the locus classicus on the subject and has been applied by Courts in UK.<sup>229</sup>

In *Buxton*,<sup>230</sup> B, was the owner of land adjacent to a chalk pit, he challenged the granting of planning permission for a quarrying, the Court held that he was not a person aggrieved and cannot challenge the permission for the quarrying, the decision had not affected his legal rights and thus could not complain.

The restrictive position by the Courts came under attacks in 1960s.<sup>231</sup> This led to the liberal approach championed by Lord Denning. In *R v Paddington Valuation Officer, ex parte Peachey Property Corp Ltd*,<sup>232</sup> Lord Denning said:

If a ratepayer or other person finds his name included in a valuation list which is invalid, he is entitled to come to the court and apply to have it quashed. He is not to be put off by the plea that he has suffered no damage, any more than the voters were in *Ashby v White*. The court would not listen, of course, to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done...So here it will listen to any ratepayer who complains that the list is invalid.

In the United Kingdom, before 1978, there were different principles or tests on the subject of locus standi for mandamus, certiorari, prohibition and injunctions.<sup>233</sup> The courts approach is stricter in cases of mandamus and injunctions; it required proof that

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<sup>229</sup> See *R v London Sessions Appeal Committee Ex. P. Westminster Corporation* [1951] 2 K.B. 508; *Ealing Corporation v Jones* [1959] 1 Q.B. 384. See also Azim (n. 227 above).

<sup>230</sup> *Buxton v Minister of Housing and Local Government* [1961] 1 Q.B. 278

<sup>231</sup> See Azim (n. 227 above).

<sup>232</sup> (1966) 1QB 380 at 400-1

<sup>233</sup> MDA Jalil 'Locus standi rule for judicial review: The current law in UK and Malaysia' journal undang-undang dan masyarakat 8 (2004) 60. See also *R. v. Thames Magistrates' Court, ex p. Greenbaum* (1959) 55 LGR 129. See also, *R. v. Commissioner of Customs and Excise, ex p. Cooke and Stevenson* [1970] 3 All ER 1068. *Boyce v. Paddington Borough Council* [1903] 3 All ER 1068. *R. v. Commissioner of Customs and Excise, ex p. Cooke and Stevenson* [1970] 3 All ER 1068.

the person's lawful rights have been affected or a person to have suffered particular damage.<sup>234</sup>

In 1978, the judicial review process<sup>235</sup> was reformed.<sup>236</sup> It became possible to process in one form, the prerogative remedies<sup>237</sup> and the remedies of declaration and injunction.<sup>238</sup> An application is first made to the court *ex parte* for leave to request judicial review, the court then carry out test of *locus standi*.<sup>239</sup>

Order 53 of the Rules of Supreme Court, which came into force on 11 January 1978, provides that: 'The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates'. Similar provision is made in section 31(3) of the Supreme Court Act 1981 UK thus:

No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

These rules suggest that the party who may apply for judicial review must have sufficient interest in the matter as the requirement of *locus standi*.<sup>240</sup> It does not require the old

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<sup>234</sup> As above.

<sup>235</sup> 'Judicial review is a procedure in English administrative law by which the courts in England and Wales supervise the exercise of public power on the application of an individual. A person who feels that an exercise of such power by a government authority, such as a minister, the local council or a statutory tribunal, is unlawful, perhaps because it has violated his or her rights, may apply to the Administrative Court (a division of the High Court) for judicial review of the decision and have it set aside (quashed) and possibly obtain damages'. See [http://en.wikipedia.org/wiki/Judicial\\_review\\_in\\_English\\_law](http://en.wikipedia.org/wiki/Judicial_review_in_English_law) (accessed December 17, 2013).

<sup>236</sup> See JD Cooke 'Conflict of principle and pragmatism *locus standi* under Article 173(4) ECT' [www.europainstitut.de/fileadmin/schriften/353.pdf](http://www.europainstitut.de/fileadmin/schriften/353.pdf) 10.

<sup>237</sup> The prerogative remedies are principally *certiorari*, prohibition, *mandamus* and *habeas corpus*, It is official order directing the behavior of another arm of government, such as an agency, official, or other court. It was originally available only to the Crown under English law, and reflected the discretionary prerogative and extraordinary power of the monarch.

<sup>238</sup> See Cooke (n. 236 above).

<sup>239</sup> See <http://www.justice.gov.uk/downloads/courts/administrative-court/applying-for-judicial-review.pdf>. (accessed 15 August 2014). See also part 54.4 Judicial review and statutory review and Section 31(3) of the Senior Courts Act 1981.

<sup>240</sup> See Jalil (n. 233 above) 60.

judicially created condition that the applicant must be an aggrieved person, and must have specific lawful right to the subject matter.<sup>241</sup> The provisions of Order 53 of the Rules of Supreme Court and section 31(3) of the Supreme Court Act 1981 UK may have liberalized the principle of locus standi to allow the public spirited people and NGOs to apply for judicial review even if they are not an aggrieved person or have specific legal right in the subject matter. These rules also unified the procedure for obtaining all forms of relief as stated by the House of Lords in *R. v Inland Revenue Commissioner, ex p. National Federation of Self-employed and Small Businesses Ltd* thus:<sup>242</sup>

Your Lordships can take judicial notice of the fact that the main purpose of the new Order 53 was to sweep away these procedural differences including, in particular, differences as to locus standi; to substitute for them a single simplified procedure for obtaining all forms of relief, and to leave to the court a wide discretion as to what interlocutory directions, including orders for discovery, were appropriate to the particular case.

In determining the locus standi of the applicant the court will consider the powers or duties in law of those against whom the relief is sought, ‘the position of the applicant in relation to those powers or duties and to the breach of those said to have been committed’.<sup>243</sup>

Order 53 rule 3(5) of the Rules of Supreme Court (UK) and section 31(3) of the Supreme Court Act 1981 (UK) stipulate that locus standi should be determined when the applicant is applying for leave.<sup>244</sup> Referring to the provisions, the House of Lords has observed that determining locus standi involves two level of test.<sup>245</sup> At the stage where the applicant is seeking leave, the court will form a provisional view as to whether he has a sufficient

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<sup>241</sup> See <http://www2.warwick.ac.uk/fac/soc/law/chrp/projects/spendingcuts/resources/database/legal/judicial-review/> (accessed 15 August 2014).

<sup>242</sup> (1982) AC 617 cited in Jalil (n. 233 above) 61.

<sup>243</sup> As above.

<sup>244</sup> See Jalil (n. 233 above) 61.

<sup>245</sup> See *R. v Inland Revenue Commissioner, ex p. National Federation of Self-employed and Small Businesses Ltd* (1982) AC 617 cited in Jalil (n. 233 above) 61.

interest, and at the full hearing, the adequacy of the applicant's interest will be assessed against the full legal and factual background to the application.<sup>246</sup>

Courts in the UK have, since the coming of Order 53 in 1978 adopted a liberal approach to the sufficient interest test.<sup>247</sup> This is because it is important that the courts allow, in suitable cases, conscientious citizens to bring claims in the interest of the public. However, it should be noted that the reason of the test is to ensure that 'frivolous and vexatious litigation against public bodies is avoided'.<sup>248</sup> The applicant's locus standi will be determined in the background of all factual and legal conditions in the case, such as:

(a) Strength and importance of the grounds of challenge: in *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*<sup>249</sup> the UK Government approved aid for the construction of a dam and hydro-electric power station in Malaysia. In considering the application concerning that action by the government the judge said that 'the merits of the challenge are an important, if not dominant, factor when considering standing'.

(b) Proximity of the decision to the claimant: an applicant who challenges a decision which directly infringes on his personal right will evidently have locus standi to bring a claim for judicial review; therefore, a direct financial or legal interest in the matter is not necessary.<sup>250</sup> The different handling of competitors by government agencies may also give rise to sufficient interest.<sup>251</sup> In the case of *R v Attorney General, ex parte ICI Plc*<sup>252</sup> the Court granted ICI Plc locus standi to seek judicial review of the way the Inland Revenue proposed to value business goods used by Shell, Esso and BP. ICI Plc claimed that this would have given its competitors an unnaturally favourable taxation system.<sup>253</sup>

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<sup>246</sup> Jalil (n. 233 above) 61.

<sup>247</sup> See Quick guides judicial review [www.ashurst.com/doc.aspx?id\\_Resource=4654](http://www.ashurst.com/doc.aspx?id_Resource=4654). (accessed December 18, 2013) 3.

<sup>248</sup> A Street 'Judicial review and the Rule of law who is in control?' (2013) *The Constitution Society* 35.  
<sup>249</sup> (1995) 1 All ER 611.

<sup>250</sup> See Quick guides judicial review (n. 247 above) 3.

<sup>251</sup> As above.

<sup>252</sup> (1987) 1 C.M.L.R. 72. Cited in Quick guides Judicial review (n. 247 above) 3.

<sup>253</sup> As above.

(c) Whether there is an alternative remedy: locus standi will be denied to an applicant to proceed with a claim for judicial review where a claimant has failed to exhaust other possible remedies except in exceptional circumstances; such remedies have included a statutory complaints procedure, the possibility of bringing a private prosecution and other statutory mechanisms.<sup>254</sup>

In *R v IRC, ex parte National Federation of Self-Employed and Small Businesses Ltd*,<sup>255</sup> the House of Lords did not grant the Federation locus standi in the case because it could not show that the Revenue had failed to perform their statutory duty. Lord Diplock in this matter said that ‘he could hold that the Federation had sufficient interest if the Federation could prove that the conduct of the Revenue was ultra vires or unlawful in the circumstances’.<sup>256</sup>

The Courts decisions regarding locus standi stress on defending the rule of law and ensuring that the State fulfils its legal duties. In *R v Somerset County Council and ARC Southern Ltd, ex parte Dix*<sup>257</sup> for example, Justice Sedly wrote:

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say, misuses of public power; and the courts have always been alive to the fact that a person or organization with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well-placed to call the attention of the court to an apparent misuse of public power.

Judicial review permits the participation of persons other than the applicant and the respondent.<sup>258</sup> This shows the role of judicial review as an instrument for public accountability instead of two party disputes. The court may allow two categories of third

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<sup>254</sup> See Quick guides judicial review (n. 247 above) 3.

<sup>255</sup> (1982) AC 617.

<sup>256</sup> As above.

<sup>257</sup> (1997) Env LR 111.

<sup>258</sup> M Ahiuwalia 'Third party interveners in Judicial reviews. <http://thestudentlawyer.com/2014/06/23/third-party-intervenors-in-judicial-reviews/> (accessed 15 August, 2014). See also A Denny and A Welsh 'Judicial review: Challenging public authority decisions (2011) *Advocates for international development 6 and Quick guides judicial review* (n. 247 above) 3.

person who may be involved in judicial review.<sup>259</sup> One of such person is an interested person; he is any person other than the applicant and the respondent who is directly affected by the claim, interested persons may therefore appeal the judgment of the court.<sup>260</sup>

Another of such person is an ‘intervener’; he is any party permitted ‘(a) to file evidence or (b) to make representations at the hearing of the judicial review’.<sup>261</sup> The court will permit an intervener if through their knowledge, are likely to be able to help the court to comprehend either the legal issues in question or the factual basis of the claim.<sup>262</sup>

*R v Greater London Council; Ex Parte Blackburn*<sup>263</sup> is one of the earliest cases where the Courts in the United Kingdom liberalized the rule on locus standi. A ratepayer applied for an order to stop the council from assigning its responsibility for film censorship to the British Board of Film Classification (BBFC) and thereby allowing the showing of pornographic films. The respondents challenged the ratepayer’s locus standi on the ground that he was affected differently from other residents. Lord Denning noted ‘that if such a ratepayer lacked standing, then no one would actually have standing to sue’.<sup>264</sup> He suggested that unconstitutional government deed should not be immunized from challenge:<sup>265</sup>

I regard it as a matter of high Constitutional principle that if there is a good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty’s subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.

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<sup>259</sup> Ahiuwalia (n. 258 above).

<sup>260</sup> Quick guides judicial review (n. 247 above) 3.

<sup>261</sup> As above.

<sup>262</sup> As above. ‘In recent years there has been a striking increase in interventions in judicial review. Interveners have included campaign groups, government departments and companies indirectly affected by the outcome of the review. It should be remembered, though, that intervention may have costs consequences for the intervening party’. See *R v Central Criminal Court, ex parte Francis & Francis* [1989] AC 346. Cited in Quick guides judicial review (n. 247 above) 3

<sup>263</sup> [1976] 1 WLR 550.

<sup>264</sup> As above.

<sup>265</sup> As above.

Although the Court did not grant such an order, it agreed that the applicant's place as a dweller of Greater London, with a wife who was a ratepayer and children who might be affected by pornographic films, gave him locus standi to sustain the application.<sup>266</sup>

The House of Lords also accorded a taxpayer locus standi to challenge government action, in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses*.<sup>267</sup> In that matter a group of printing industry workers did not pay the taxes due on earnings for casual labour. The Inland Revenue Commissioners decided not to look into taxes left unpaid for years between 1977 and 1978. The applicants who are an organisation of small business owners, argued that the agreement was not according to the law and therefore, above the Revenue's authority.<sup>268</sup> Lord Wilberforce's in his ruling emphasised the rule of law and the problem of immunising unlawful conduct from challenge thus:<sup>269</sup>

It would, in my view be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to court to vindicate the rule of law and get the unlawful conduct stopped.

Courts in the United Kingdom have also accorded locus standi to organisations to represent the interests of their members or clients of the organisation. For example, in *R v Inspectorate of Pollution, ex parte Greenpeace*,<sup>270</sup> the court granted locus standi to the environmental group, Greenpeace to challenge the decision to authorize a nuclear power plant's construction on the basis that Greenpeace was a responsible and esteemed body with a genuine concern for the environment that could successfully represent the interests of its 2500 members.<sup>271</sup>

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<sup>266</sup> See <http://lbpubliclaw.blogspot.com/2006/05/judicial-review.html>

<sup>267</sup> (1981) 2 All ER 93.

<sup>268</sup> As above.

<sup>269</sup> As above.

<sup>270</sup> (1994) 4 All ER 329.

<sup>271</sup> As above. See also Z Hinson & D Hubbard 'Locus standi: standing to bring a legal action' *Legal Assistance Center* 2012 89.

Similarly, in *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte World Development Movement Ltd*,<sup>272</sup> a British conglomerate sought for support in providing a hydro-electric project on the Pergau river in Malaysia. An interested government agency advised that it was not cost-effective and would be an abuse of the overseas aid programme, but the respondent decided to endorse support. The applicants, who are a pressure group concerned in giving advice and support on issues of aid, asked for an assurance that no further assistance would be approved, and sought a judicial review of the respondent to offer that reassurance. The respondent challenged their standing to seek judicial review and the court held that:<sup>273</sup>

The question of standing had to be settled only in the context and merits of the case as a whole. It was not merely a preliminary issue. The importance of vindicating the rule of law, the absence of any other likely interested party, and of the issue in general required the application to proceed. It was for the court to decide whether particular actions fell within the purpose of the Act, but once it did, it was for the respondent to weigh the various factors. In this case the Act required assistance to be given to economically sound projects, but no evidence to support that purpose was available and the respondent's decision was unlawful.

The Court observed that the applicants had sufficient interest to challenge the legality of this expenditure and provided five considerations which influenced the Court's decision thus.<sup>274</sup>

- i) The importance of vindicating the rule of law; ii) The importance of the issue raised; iii) The likely absence of any other responsible challenger; iv) The nature of the breach of duty against which relief was sought; v) The prominent role of the applicants in giving advice, guidance and assistance with regard to aid.

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<sup>272</sup> (1995) 1 WLR 386

<sup>273</sup> As above.

<sup>274</sup> As above.



### 3.1.1 Judicial Review under Part 54 of the Civil Procedure Rules 1998 in the UK

Applications for judicial review under Order 53 of the Rules of the Supreme Court (UK) have been amended in the UK. Order 53 of the Rules of Supreme Court (UK) has been repealed and replaced by the new Part 54 of the Civil Procedure Rules 1998 (CPR). Judicial review of administrative actions is now completely within the framework of the Civil Procedure Rules.<sup>275</sup> The new rules in Part 54 of Civil Procedure Rules have made a few amendments regarding the permission stage and third party intervention, however, the locus standi rule has not been amended, it still demands sufficient interest to the subject matter to have locus standi.<sup>276</sup>

Part 54.4 of CPR 1998 outlines new rules to be followed at the stage of granting leave. Before applying for leave, the applicant should normally comply with the pre-action procedure for judicial review. This demands that the applicant should send a letter before action to the respondent. The letter will have to indicate the ‘decision, act or omission being challenged, set out a summary of the facts and the reasons for the challenge’.<sup>277</sup> A standard form is set out at Annex A to the pre-action protocol. The applicant reasons for bringing the claim for judicial review, a statement of facts relied on, any written evidence in support of the claim, copies of any document on which the applicant proposes to rely and a list of essential documents for advance reading by the court must be included in the claim form.<sup>278</sup>

Part 54 of the Civil Procedure Rules 1998 which is the new rules for judicial review provide for exchange of communication between the parties at the stage where the applicant is seeking for leave. Based on the communication by the applicant and the respondent, the Court will determine locus standi and take a decision whether to give permission for judicial review.<sup>279</sup> This was not found in Order 53 of the Rules of Supreme Court, Order 53 of the Rules of Supreme Court provides that the applicant apply

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<sup>275</sup> Part 54.2 of the Civil Procedure Rules 1998. See also Jalil (n. 233 above) 62.

<sup>276</sup> Part 54.4.1 of the Civil Procedure Rules 1998

<sup>277</sup> 54.4 of Civil Procedure Rules 1998

<sup>278</sup> As above.

<sup>279</sup> As above.

for leave *ex parte* a communication between the judge by one party without the other party being aware or present.

Part 54.17 of Civil Procedure Rules 1998 (UK) provides that:

- (1) Any person may apply for permission
  - (a) to file evidence; or (b) make representations at the hearing of the judicial review.
- (2) An application under paragraph (1) should be made promptly.

This rule empowers the court to permit any person to apply to file proof or make representations at the judicial review hearing, whether in support of, or to challenge the claim.<sup>280</sup> Permission may be given by the Court on terms, such as ‘that the person bear their own costs in any event, or that the time for making oral representations be limited or that representations be limited to written representations’.<sup>281</sup> This rule along with the sufficient interest condition provides prospect for the public interest litigation. Consequently, under the new rule of the Civil Procedure Rule a ‘public-spirited man or a representative organization may take part at the hearing of an application for judicial review’.<sup>282</sup>

In *R v Secretary of State for Trade & Industry & ORS, ex parte Greenpeace Ltd*,<sup>283</sup> Greenpeace applied for leave to apply for judicial review. The application was considered by Jowitt J who, for good reason directed that the matter continue to a substantive hearing at which all matters could be considered, including delay, permission and, if suitable, the substantive application. At the hearing the parties provided very helpful and lengthy arguments and written submissions.<sup>284</sup> Other than Greenpeace, the parties are ten oil and gas companies and the Secretary of State for Trade and Industry. Previously, the status of the Oil Companies in these matter has been as interested parties rather than as respondents but based on the application made by Mr. Ouseley QC on their behalf (which was met with neutrality on the part of Greenpeace and the Secretary of State) the Court

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<sup>280</sup> Part 54.17 of Civil Procedure Rules 1998.

<sup>281</sup> As above.

<sup>282</sup> See Jalil (n. 233 above) 63. See also D Smith, K Ashton and L Bridges 'Third party intervention in Judicial Review' (2001) *Public law project* 14 & 24.

<sup>283</sup> (2000) Env LR 221.

<sup>284</sup> As above. See also <http://www.coastlaw.uct.ac.za/iczm/cases/greenp.htm> (accessed December 21, 2013).

accepted that they be accorded the status of respondents.<sup>285</sup> The Court, on hearing the substantial matter, accorded Greenpeace standing to for the judicial review.

Similarly, in *R (on the application of Friends of the Earth) v Environment Agency*,<sup>286</sup> the Court granted Friends of the Earth's application for permission to apply for judicial review. The applicant (Friends of the Earth) sought to challenge a decision by the respondent (Environment Agency) to allow an amendment to a waste management licence, under Pt II of the Environmental Protection Act 1990, necessary for the dismantling of ships containing various toxic waste substances at Hartlepool.<sup>287</sup> The interested party (“AUK”) in a preliminary hearing asked the Administrative Court to consider whether the Environment Agency had been right to accept that it had erred in law in permitting the modifications, contending that Environment Agency's decision to make the compromise be voided. The Seal Sands wildlife site where the dismantling activities were intended to be undertaken was protected as a Site of Special Scientific Interest, and a Special Area of Conservation, and was subject to protection under the Habitats Directive 92/43 and the Conservation (Natural Habitats &c.) Regulations 1994 (SI 1994/2716) (as amended). Article 6 of the Habitats Directive provided that:

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Accordingly, the Court consented to Friends of Earth's application to quash the modification decision.

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<sup>285</sup> As above.

<sup>286</sup> (2003) EWHC 3193.

<sup>287</sup> As above.

In *R (Gentle and Clarke) v Prime Minister & Ors*,<sup>288</sup> locus standi was accorded the applicants who asked the England and Wales Court of Appeal to rule on the legality of the refusal of the Government to hold an independent inquiry into the situation that led to the incursion of Iraq. The applicants based their argument on the procedural appendage of Article 2 of the European Convention on Human Rights (ECHR), they argued that the United Kingdom was in breach of Article 2 of the Convention<sup>289</sup> by sending armed forces to Iraq devoid of taking reasonable steps to satisfy itself that the incursion was legal as a matter of public international law.<sup>290</sup>

In the matter of an application by *Martin Corey (AP) for Judicial Review (Northern Ireland)*,<sup>291</sup> the applicant was given permission to challenge the decision of a parole commissioner to revoke his licence of release from prison after he had served nine years in prison and qualified for release on parole. 'The recommendation to revoke his licence was based on material the Secretary of State supplied, including confidential information from the security services'. On 15 April 2010 the Secretary of State for that reason revoked Mr. Cory's licence, and was taken into prison custody.<sup>292</sup> The applicant sought judicial review of the commissioners' decision on the reason (among others) (1) that the recommendation disclosed insufficient information and (2) that the rejection to direct his release had been based mainly on the closed material and so breached article 5(4) of the European Convention on Human Rights. Article 5(4) provides:

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<sup>288</sup> (2006) EWCA Civ 1689, [2007] 2 WLR 195. See also *R(Bisher Al Rawi & Ors) v (1) Secretary of State for Foreign & Commonwealth Affairs (2) SSHD* [2006] EWCA Civ 1279 [2007] 2 WLR 1219, Where the England and Wales Court of Appeal was asked to 'consider the Secretary of State's refusal to make formal requests to the United States government for the return to the United Kingdom of non-British persons detained at Guantanamo Bay as constituting a breach of legitimate expectation and rights of family members', among others.

<sup>289</sup> Article 2 of the European Convention on Human Rights (ECHR) states that: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection'.

<sup>290</sup> See (2006) EWCA (n. 289 above).

<sup>291</sup> (2013) UKSC 76. See also an application of James Clyde Reilly for Judicial Review (Northern Ireland) (2013) UKSC 61

<sup>292</sup> As above.

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

It is important to note that there have been situations where the Court has denied applicants permission for a judicial review.<sup>293</sup> For example, Sir Robert Megarry noted that:

Courts should not admit people wishing to meddle in others' concerns in order to interfere or proclaim a favourite doctrine. However, courts may use their power to declare individuals vexatious litigants who may not proceed without the permission of the court, and their authority to strike out vexatious and frivolous claims, to control and eliminate unmeritorious public interest actions.<sup>294</sup>

### 3.2 The interpretation of locus standi before the Kenyan courts

The common law position on locus standi to institute judicial proceedings and the absence of an express provision in the 1963 Constitution of Kenya for the liberalisation of the rules on locus standi contributed, in large part, to the unsuccessful public interest litigation instituted by public-spirited individuals.<sup>295</sup> The injury caused by environmental destruction is often of such general nature that it becomes unreasonable to expect that only those directly affected have locus standi to institute judicial proceedings in respect of the alleged harm.<sup>296</sup>

According to Odiambo 'a major constraint within the legal framework relates to the vexing question of standing.' He maintains that 'standing has been used by courts in

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<sup>293</sup> See *R v Secretary of State for Business, Enterprise and Regulatory Reform ex parte WWF-UK and Corner House Research* (2008). Cited in Summary of Judicial Reviews undertaken by a selection of NGOs since 1990 [www.unece.org/env/pp/compliance/C200823/Amicus%20brief/AnnexMJRstakenbyUKNGSsince1990amend.doc](http://www.unece.org/env/pp/compliance/C200823/Amicus%20brief/AnnexMJRstakenbyUKNGSsince1990amend.doc) (accessed December 23, 2013) 'Permission refused on the papers and WWF-UK ordered to pay costs of £8,500 for the Treasury Solicitor to file a written defence'.

<sup>294</sup> Z Hinson & D Hubbard (n. 272 above) 89.

<sup>295</sup> BYK Sang 'Tending towards greater eco-protection in Kenya: public interest environmental litigation and its prospects within the new Constitutional order' (2013) *Journal of African law* vol. 57 31.

<sup>296</sup> As above 32.

Kenya to defeat a number of initiatives aimed at securing the public interest.’<sup>297</sup> This insufficient legal framework is the outcome of the lack of a constitutional basis for public interest litigation as the 1963 Constitution of Kenya does not have any provisions guaranteeing public interest litigation. It is imperative that as the Constitution is reviewed, this guarantee be built into the Constitution.<sup>298</sup>

Okidi, suggested that despite the insufficient legal framework, there is a sense in which the failure of public interest litigation in Kenya is a function of an incompetent legal profession and judiciary.<sup>299</sup> The advocates for the public interest litigation can prompt a change in the attitudes of judicial officers by applying sufficiently strong, persistent and consistent pressure on the judicial system to be creative and radically protect the public interest through judicial activism.<sup>300</sup>

The 1963 Constitution of Kenya did not make express provision for according anybody locus standi to institute action on behalf of an individual or in the interest of the public. However, most of the preliminary objections on the grounds of locus standi in Kenyan Courts were based on section 61 and 62 of the Civil Procedure Act which provides that:<sup>301</sup>

In the case of a public nuisance, the Attorney-General, or two or more persons having the consent in writing of the Attorney-General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case in the case of an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of the trust, the Attorney-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney-General, may institute a suit, whether contentious or not in the High Court to obtain a decree...

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<sup>297</sup> MO Odhiambo ‘Legal and institutional constraints to public interest litigation as a mechanism for the enforcement of environmental rights and duties in Kenya’ *fifth international conference on environmental compliance and enforcement* <http://www.inece.org/5thvol2/odhiambo.pdf> accessed January 21, 2014, 267.

<sup>298</sup> As above.

<sup>299</sup> CO Okidi, ‘The practice and principles in environmental law for Kenya’ *a paper prepared for the KNAS/IDRC public lectures at the Kenya National Academy of Sciences* 1996 13.

<sup>300</sup> As above.

<sup>301</sup> See Civil procedure Act section 61 and 62.

The above provisions of the Civil Procedure Act have led to the inconsistent interpretation of locus standi by the Kenyan courts. Before the 2010 Constitution, the courts in Kenya have given strict interpretation to the principle of locus standi which requires potential applicants to have sufficient interest in the subject matter of the suit; this common law rule on locus standi and its strict interpretation by the Kenyan Courts impeded the successful actions regarding public interest litigation in Kenya.<sup>302</sup> There are a lot of decisions of the courts in Kenya that points to this fact. For example, in the case of *Wangari Maathar v Kenya Times Media Trust*,<sup>303</sup> the applicant filed an application in order to prevent Kenya Times Media Trust from proceeding with the building of a proposed high rise building in a public park in Nairobi called Uhuru Park pending the determination of the substantive suit filed by her, she alleged breach of local government laws and sued on behalf of the public.<sup>304</sup> Kenya Times Media Trust filed a preliminary objection and wanted to have the application struck out on the grounds that ‘it disclosed no cause of action and that the applicant had no locus standi to file the suit or the application’.<sup>305</sup>

The court per Dugdale J held that:<sup>306</sup>

1. There was no merit in the three grounds of objection filed by the applicant against the preliminary objection raised by the respondent.
2. The plaint disclosed no cause of action against the defendant/respondent.
3. Only the Attorney-General can sue on behalf of the public. In any event, it was clear that the plaintiff was not bringing an action on behalf of anyone else.
4. The plaint did not allege that there was an actual or anticipated breach by the defendant of any rights, public or private, in relation to the plaintiff or even that the plaintiff had a right of action against the defendant.

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<sup>302</sup> Sang (n. 295 above) 30.

<sup>303</sup> Civil case No. 5403 of 1989 High Court at Nairobi.

<sup>304</sup> As above.

<sup>305</sup> As above.

<sup>306</sup> As above.

5. The plaintiff's strong views that it would have been preferable if the building never took place in the interest of many people who had not been directly consulted were personal and immaterial.
6. The plaintiff had no right of action against the defendant and therefore she had no locus standi.

The court was of the opinion that there was no claim of damage or probable damage or injury neither was the respondent company in breach of any rights, public or private in relation to the applicant nor had the company caused damage to her nor did she anticipate any damage or injury.<sup>307</sup> The court dismissed the application on the grounds that the applicant has no locus standi.<sup>308</sup>

Although, it seems the court interpreted locus standi liberally in some subsequent cases, this was not consistent.<sup>309</sup> In the 1991 case of *Maina Kamanda and another v Nairobi city council and another*.<sup>310</sup> The applicants, who were residing in Nairobi and rate payers, commenced an action against the first defendant, Nairobi city council to restrain them from allowing the second defendant, the former chairman of the council to carry on enjoying certain facilities which he had enjoyed when he was the Chairman of the erstwhile Nairobi City Commission. The second respondent raised a preliminary objection that the applicants had no locus standi to bring the application because they did not show cause of action and that consequently, they had no sufficient interest in seeking the relief. The second respondent further contended that the applicants claim was a matter

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<sup>307</sup> See <http://www.ecolex.org/ecolex/ledge/view/RecordDetails;DIDPFDSI?id=COU-143935&index=courtdecisions> accessed November 16 2013.

<sup>308</sup> According to Sang, 'The court also downplayed the criticality of public participation and consultation; this adversely influenced Subsequent actions of a similar nature'. Dugdale J held: 'The plaintiff has strong views that it would be preferable if the building of the complex never took place in the interests of many people who had not been directly consulted. Of course many buildings are being put up in Nairobi without many people being consulted. Professor Maathai apparently thinks this is a special case. Her personal views are immaterial. The Court finds that the Plaintiff has no right of action against the defendant company and hence she has no locus standi. In this regard, it is possible to draw a correlation between the strictures of the common law's interpretation of locus standi and the corresponding indifference to broader imperatives of participatory democracy which may bear far reaching implications, including eroding other human rights.' See Sang (n. 295 above) 34.

<sup>309</sup> See Sang (n. 295 above) 35.

<sup>310</sup> Civil case no. 6153 of 1991 at High Court of Nairobi.



in the realm of a public interest and thus required the consent of the Attorney General to initiate action which they had not done. Akiwumi J held that:<sup>311</sup>

It would be a grave lacuna in our system of public law if a pressure group or even a single public-spirited tax payer, were prevented by an outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped. The Attorney General, although he occasionally applies for the prerogative orders against public authorities that do not form part of the central government, in practice never does so against government departments.

The Court ruled that the applicants had locus standi to bring the suit.

However, in 1994, in *Maathai & 2 others v City council of Nairobi & 2 others*,<sup>312</sup> the court again departed from its liberal approach in Maina Kamanda's case above, the court interpreted locus standi restrictively. In Maathai's case, the applicant, as rate payers to the Nairobi City Council instituted an action against the 3rd defendant seeking among other things an injunction from the court to stop the 3rd defendant who acquired a piece of land illegally from selling or carrying out construction upon the said piece of land. The 3rd defendant raised a preliminary objection challenging the locus standi of the plaintiff to bring the suit.<sup>313</sup>

The court as per Ole Keiwua J held that:<sup>314</sup>

The plaintiffs had no locus standi to seek injunctive relief as they did not have sufficient interest to bring the action. Only the Attorney General could sue on behalf of the public for the purpose of preventing public wrongs. A private individual is able to sue on behalf of the public where he has sustained particular injury as a result of a public wrong. The plaintiffs in this case failed to show that there had been any failure of any public duty in which they alone had a unique interest as opposed to that of the general public.

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<sup>311</sup> As above.

<sup>312</sup> Civil case no. 72 of 1994 at High Court of Nairobi.

<sup>313</sup> As above.

<sup>314</sup> As above.

In a different approach the Court in *Insurance Company of East Africa v Attorney General & 4 others*<sup>315</sup> interpreted the locus standi rule liberally. Before 1932, Nyali Ltd owned a parcel of freehold land on the mainland North of Mombasa Island which was later sub-divided into 60 sub-plots and a strip of land fronting the Indian Ocean within the scheme was given away and preserved as open space for use as a public utility. Some plots were sold to the plaintiff in 1979. Later when he was developing his land, he found that the open space had been sold to the 3rd and 4th defendants. The plot sold covered the spaces of the road reserve leading to the Indian Ocean. The plaintiff filed an application seeking for an injunction to restrain them from carrying out developments on the parcel of land and from denying the plaintiff's right of entry to the ocean through the land. The application was challenged by the defendants on the grounds that it was incompetent because it did not state the grounds for the application and the applicant had no interest or locus standi to seek the injunction.

Waki J, in granting the application observed that:<sup>316</sup>

This case raised issues of public rights and environmental implications. In environmental matters, the issue of locus standi which has for a long time shackled the courts of law must be tamed. A liberal and purposive interpretation of locus standi has been adopted. Moreover, the plaintiff's private rights had been advanced in this case and it had the necessary locus standi.

It is interesting to note that in the *Insurance Company of East Africa* case above, the court recognized that 'the issue of locus standi has for a long time shackled the courts and must be tamed', it also rejected the view that it is only the Attorney General who has the locus standi in all matters to protect Public rights.<sup>317</sup>

Subsequently, in *Law Society of Kenya v Commissioner of Lands and 2 others*<sup>318</sup> the High Court again applied the strict common law rule on locus standi; in its judgments the

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<sup>315</sup> Civil suit 135 of 1998 High Court of Kenya at Mombasa.

<sup>316</sup> As above.

<sup>317</sup> As above.

<sup>318</sup> Civil case no. 464 of 2000 High Court at Nakuru. 'The Law Society of Kenya (the plaintiff) brought a suit against the Commissioner of Lands (1st defendant), Lima Ltd (the 2nd defendant) and Usin Gishu Land Registrar (3rd defendant). It claimed that the 1st defendant had unlawfully allocated certain land which was held by the Government in trust for its members and the public generally. The plaintiff averred

court held that matters of public interest were only within the Attorney General's capability to institute proceedings. The court further held that:<sup>319</sup>

The test of locus-standi is embodied in HC Misc Application No 58 of 1997 – *Hon Raila Odinga v Hon Justice Abdul Majid Cockar* and *Republic v GBM Kariuki* Misc Cr Appl No 6 of 1994 which are authorities for the proposition that for a party to have locus standi in a matter he ought to show that his own interest particularly has been prejudiced or about to be prejudiced. If the interest in issue is a public one, then the litigant must show that the matter complained of has injured him over and above injury, loss or prejudice suffered by the rest of the public in order to have a right to appear in court and to be heard on that matter. Otherwise public interests are litigated upon by the Attorney General or such other body as the law sets out in that regard.

Similarly, in *El-Busaidy v Commissioner of Lands & 2others*<sup>320</sup> the court also held that:

For a party to have a locus standi in a suit, he ought to show that his own interest particularly has been prejudiced or is about to be prejudiced. He must show that the matter has injured him over and above the injury, loss or prejudice suffered by the rest of the public. Otherwise public interests are litigated upon by the Attorney-General.

It is clear from the above cases that the interpretation of locus standi by Kenya's courts before the 2010 Constitution is similar to the situation in Nigeria at present. Also similar to Nigeria is the practice that only the Attorney General can institute action on public interest. The strict interpretation of locus standi has been recognized by the Kenya's court as being outdated and haven shackled the courts for a long time. The courts further remarked that it would be a 'grave lacuna in the legal system if a pressure group or even a single public-spirited tax payer were prevented from bringing the matter to the attention of the court' to get illegal behavior stopped or to promote the rule of law and for want of locus standi.

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further that by dint of section 3 of the Law Society of Kenya Act, it had the legal right to sue on behalf of 100 of its members in Eldoret and similarly on behalf of other members of the legal profession in Kenya and members of the public in general.'

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As above.

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Civil case no. 613 of 2001 High Court at Mombasa.

These different opinions against the strict interpretation of the rule of locus standi may have led to the express provision in the Kenyan Constitution to allow NGOs and other individuals to apply to court for redress on behalf of victims. The express provisions for locus standi in the Kenya's Constitution have laid to rest the inconsistent interpretation of the rule of locus standi in the Kenya's courts. It has done away with the outdated rule of locus standi and has provided a platform for anyone to bring an application before a court, this includes a person acting on behalf of another person; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an NGO.

### 3.2.1 Locus standi before the Kenyan 2010 Constitution

In 2010, a new Constitution entered into force in Kenya. It has inaugurated into the Kenyan legal framework, among other things, express Constitutional recognition of the broader understanding of locus standi. This Constitution establishes a new order in the way the courts in Kenya will interpret the principle of locus standi, the lack of an express provision in the repealed 1963 Constitution for locus standi contributed, in large part, to the frustration of public interest litigations instituted by public-spirited individuals.<sup>321</sup>

Article 22 of the Kenyan Constitution provides thus:<sup>322</sup>

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - a) a person acting on behalf of another person who cannot act in their own name;
  - b) a person acting as a member of, or in the interest of, a group or class of persons;
  - c) a person acting in the public interest; or
  - d) an association acting in the interest of one or more of its members.

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<sup>321</sup> See Sang (n. 295 above) 30.

<sup>322</sup> The Constitution of Kenya article 22.

This express provision in the 2010 Kenya's Constitution has giving anyone the locus standi to institute an action on behalf of an individual and in the interest of the public.

There have been some notable decisions by the Kenyan courts since the promulgation of the 2010 Constitution with regard to locus standi and the right to challenge the Constitutionality of certain laws<sup>323</sup>. An example is the case of *Dennis Mogambi Mong'are v Attorney General & 3 others*.<sup>324</sup> In this case the petitioner Denis Mogambi challenged the Constitutionality of section 23 of the Sixth Schedule to the 2010 Kenyan Constitution and the Vetting of Judges and Magistrates Act (VJMA), 2011, he petitioned the High Court on the 26<sup>th</sup> August 2011 in the interest of the public. His concern was that the Vetting of Judges and Magistrates Act (VJMA), 2011 shall violate, infringe or threaten the fundamental rights and freedoms of judges and magistrates. The petitioner sought the following declarations:<sup>325</sup>

- i) A declaration that the rights of judges and magistrates under Articles 19, 20, 22, 23, 24, 25, 27, 28, 29, 47 and 50 of the Constitution have been denied, infringed, violated and/or threatened.
- ii) A declaration that sections 2 to 4 and 17 to 23 of the VJMA are inconsistent with Articles 19(1), (2) and (3), 20(1), 21(1), 22(1) and (2), 23(3), 24(2) (a) (b) and (c), 25(a) and (c), 27(1),(2),(4) and (5), 28, 47(1) and (2), and 50(1) and (2) of the Constitution and are to that extent illegal, null and void.
- iii) An order for compensation of all judges and magistrates who have been or will be or are likely to be affected by the VJMA taking into account their contract with the former Constitution and the period the judge or magistrate will have served according to the Constitution.
- iv) An injunction to restrain the respondents from doing anything prejudicial to the judges and magistrates pending the hearing of the Petition.

The court held that:<sup>326</sup>

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<sup>323</sup> B Luseka 'Public interest litigation securing protection of social and economic rights: challenges, opportunities and lessons' unpublished LLM dissertation, Central European University, 2012 42.

<sup>324</sup> High Court of Kenya at Nairobi petition No. 146 of 2011.

<sup>325</sup> As above.

<sup>326</sup> As above.

The High Court under Article 165(3) (d) of the Constitution has jurisdiction to hear any question respecting the interpretation of this Constitution, including determination of any question whether any law is inconsistent with or in contravention of the Constitution. The matter before us falls squarely within these provisions.

It is interesting to note that in the Denis Mogambi's case the locus standi of the petitioner was not challenged even though he does not have sufficient interest in the subject matter, he was a law student and had instituted an action on behalf of the judges and magistrates. It is also worthy of note also that the case was giving accelerated hearing in accordance with the provisions of the Constitution, a practice that is encouraging.

In a recently decided case of *John Harun Mwau & 3 others v Attorney General & 2 others*,<sup>327</sup> the petitioners, John Harun Mwau, Professor Lawrence Gumbe, Martin Muthomi Gitonga and Milton Mugambi Imanyara brought different petitions which were consolidated by Hon. Mr. Justice Lenaola, the Head of the Constitutional and Human Rights Division of the High Court. The following issues were framed for determination:<sup>328</sup>

- i. A determination of the question as to when the next general election should be lawfully held.
- ii. A determination as to whether an amendment to the Constitution affecting the term of the President can be proposed, enacted or effected into law without a referendum being held under the Constitution.
- iii. A determination whether the unexpired term of the existing members of Parliament includes terms and conditions of service.
- iv. A determination whether the President has power or authority to dissolve Parliament under the current Constitution.
- v. Who should bear the costs of the petitions as consolidated?

Professor Yash Pal Ghai, the first friend of the court challenged the jurisdiction of the court to entertain the matter on the grounds that the petitioners are seeking for relief

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<sup>327</sup> Petition No. 123 of 2001 and 185 of 2011 (2012) eKLR.  
<sup>328</sup> As above 5.

‘based on a hypothetical case and in effect what is sought is an advisory opinion from this court’.<sup>329</sup> He submits that Article 165 of the Constitution which conferred upon the High Court jurisdiction ‘contemplates that there must be a dispute between the parties for which they seek relief’, and that what the petitioners are requesting is an ‘abstract interpretation of the Constitution which is not permitted by Article 165 of the Constitution. He further argued that there is no imminent danger to the loss of rights and for that reason ‘the petitioners cannot bring this case before the court under Articles 22(1), 23(1) and 165(3)(b) for the enforcement of fundamental rights and freedoms’.<sup>330</sup>

The first petitioner through his counsel Mr. Mwangi argued that the court has jurisdiction to hear this case and that under Article 3 of the Constitution, everyone is encouraged ‘to defend and protect the Constitution and promote its values’ and that a personal interest was unnecessary.<sup>331</sup> This is also the position of the second, third and fourth petitioners as well as the third friend of the court.

The court held that this matter is definitely within the jurisdiction of this court and also observed that:

In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public...

The Court in *John Githongo & 2 ors. v Harun Mwau & 4 ors.*<sup>332</sup> stated that Article 22 of the 2010 Constitution provides an independent and direct access to the Courts for enforcing rights and freedom.

In *Kenyan Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) v Marsh Park Hotel*,<sup>333</sup> the locus standi of the claimant to originate the claim on behalf of its members was challenged. The Industrial Court relying

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<sup>329</sup> As above 7.

<sup>330</sup> As above.

<sup>331</sup> As above 9.

<sup>332</sup> Petition No. 44 of 2012 High Court of Kenya , Nairobi (2012) eKLR.

<sup>333</sup> Case No. 85 of 2013 Industrial Court at Kisumu.

on the provisions of Article 22 of the Constitution held that the claimant had the locus standi to bring the matter before the Court.

In *C.K. et al v the Commissioner of Police/Inspector General of the National Police Service et al*,<sup>334</sup> a case brought by a Kenyan NGO on behalf eleven Kenyan girls, the respondents argued that the Court lacked the jurisdiction to here the matter. The Court ruled that it had the jurisdiction to entertain the matter and noted that:

...that under article 22 of the Constitution of Kenya everyone has the right to institute court proceedings for enforcement of the Bill of Rights, including a person acting on behalf of another person who cannot act in their own name, which legitimated the 12th petitioner to act on behalf of the first eleven petitioners. Second, article 23(1) of the Constitution of Kenya provides that the High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

### **3.2.2 The liberalisation of locus standi in the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013**

The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013 was made by the Chief Justice of Kenya in exercise of the powers conferred on him by Article 22(3) as read with Article 23 and Article 165 (3) (b) of the Constitution of Kenya, to simplify and reinforce the structure of human rights litigation in Kenya. This rule regulates the procedure for the commencement of an action for the enforcement of Fundamental Human Rights in Kenya.

In line with the Constitution, the Rules made provision for the liberalisation of locus standi. It provides that:<sup>335</sup>

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<sup>334</sup> Petition No.8 of 2012 High Court of Kenya.

<sup>335</sup> Rule 4(1)&(2) Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013.



Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—

- (i) a person acting on behalf of another person who cannot act in their own name;
- (ii) a person acting as a member of, or in the interest of, a group or class of persons;
- (iii) a person acting in the public interest; or
- (iv) an association acting in the interest of one or more of its members.

Unlike the Nigerian rules which provides for the liberalisation of locus standi in the preamble to the rule thereby subjecting it to controversies and legal consequences the Kenyan rules provides for the liberalisation of the rule on locus standi in the main body of the rules and the provision is consistent with the provisions of Article 22 of the Kenyan Constitution.

### 3.3 The interpretation of locus standi before the Indian Courts

The relaxation of locus standi requirement in public interest litigation and judicial review in India is largely a judicially constructed phenomenon, and linked to active declaration of the judiciary.<sup>336</sup> In the late 1950s and 1960s there had been tension between the court and Parliament over land reform.<sup>337</sup> This raised concerns about judicial encroachment and the separation of powers. During this period, governments enacted legislations providing for land reform.<sup>338</sup> The Parliament enacted the first constitutional amendment, creating the ninth schedule considered to be beyond judicial review, out of fear that the judiciary would find planned land reforms unconstitutional, a concern which was proved to be true following the decisions of the Supreme Court.<sup>339</sup> The Court held that ‘Parliament did not have the power to amend the Constitution if such amendments abridged the fundamental

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<sup>336</sup> S Sen ‘Public interest litigation in India: Implication for law and Development’ (2012) *Mahanirban Calcutta Research Group Kolkata India* 7.

<sup>337</sup> See <http://js2012.wordpress.com/why-jansatyagraha-2012/land-reforms-in-india/>

<sup>338</sup> V Guari ‘Fundamental rights and public interest litigation in India: overreaching or underachieving?’ *Indian journal of law and economics* vol. 1 No. 1 72.

<sup>339</sup> Sen (n. 336 above) 7.

rights guaranteed in the Constitution and/or altered the basic structure of the Constitution itself,<sup>340</sup> which in the opinion of the judges composed of fundamentals such as ‘democracy, rule of law, secularism, separation of powers and judicial review.’<sup>341</sup>

At the time when there had been tension between the Court and Parliament, there was an increasing comprehension on the part of the Supreme Court judges that the judiciary was generally perceived as an elitist body which would hand out justice only to those who could afford it.<sup>342</sup> Identifying the need to place everyone equal before the law, some judges took the lead in raising concerns about improving access to justice for the underprivileged.<sup>343</sup>

Although, the Indian Constitution did not make specific provision for the liberalisation of the rules on locus standi, the Indian Courts have relaxed the traditional rule on locus standi. They have done this so as to facilitate access to justice for the poor. The relaxation of the strict interpretation of locus standi has been linked to the rise in public interest litigation in that country.<sup>344</sup> Essential to the development of the Indian jurisprudence on the relaxation of the traditional rule on locus standi is the activist Judges who are bold, creative and imaginative enough to transform the existing legal rules into new traditions with the goal of making law accessible to the poor in Indian and give effect to the aspirations of the Constitution.<sup>345</sup> According to Justice Bhagwati, one of the activist Judges who have contributed in the emergence of this new liberal view of locus standi:<sup>346</sup>

The Judges in India have asked themselves the question: can judges really escape addressing themselves to substantial questions of social justice? Can they...simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their inquiry into law and life within the narrow confines of a narrow defined rule of law?

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<sup>340</sup> See *Golaknath v State of Punjab*, A.I.R. 1967 S.C. 1643 and *Kesavananda Bharati v State of Kerala*, A.I.R. 1973 S.C. 1461. Cited in *Sen* (n. 336 above) 7.

<sup>341</sup> *Guari* (n. 338 above).

<sup>342</sup> *Baxi v. State of Uttar Pradesh* (1983) 2 S.C.C. 308

<sup>343</sup> As above.

<sup>344</sup> T Ngcukaitobi ‘The evolution of standing rules in South Africa and their significance in promoting social Justice’ *South African journal on Human Rights* vol. 18, no. 4 (2002) 601.

<sup>345</sup> As above.

<sup>346</sup> SK Agrawala ‘The legal philosophy PN Bhagwati’ (1987) cited in *Ngcukaitobi* (n. 344 above).

He further stated in *Gupta v president of India*:<sup>347</sup>

Where a legal injury is caused to a person or determinate class of persons by reason of violation of any Constitutional or legal right...and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction or order.

The courts in India inferred their powers to give a liberal interpretation to locus standi from the provisions of Article 32 of the Constitution which says:

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrantor and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Article 32 is very broad; it did not state how or by whom the Court can be moved to take action.<sup>348</sup> The court has observed that the drafters of the Constitution did not outline precise form of proceeding for enforcement of a fundamental right and they did not demand that such proceeding should conform to any rigid pattern or straightjacket formulas.<sup>349</sup> The Constitution empowered the Court to assemble the information it needs to determine standing in public interest litigation cases by subpoenaing any needed persons or documents, and all civil and judicial authorities are required to assist as needed.<sup>350</sup> It also empowered the Supreme Court to pass any decree or directives, as is required for doing complete justice in any cause or matter and as authorized by the

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<sup>347</sup> AIR 1982 SCC.

<sup>348</sup> AM Sood 'Litigating reproductive rights: using public interest litigation and international law to promote gender justice in India' (2006) Center for Reproductive Rights New York 24.

<sup>349</sup> As above. 'There was no limitation in the words of clause(1) of Article 32 that the fundamental right which is sought to be enforced by moving the Supreme Court should be one belonging to the person who moves the court nor did it say that the court should be moved only by a particular kind of proceeding. It was clear in the plain language of the clause that whenever there is a violation of a fundamental right, anyone could move the Supreme Court for enforcement of the fundamental right'. The court also opined that, '...Clause (1) of Art. 32 say that the Supreme Court can be moved for enforcement of a fundamental right by any "appropriate" proceeding. There is no limitation in regard to the kind of proceeding envisaged in Clause (1) of Art. 32 except that the proceeding must be appropriate and this requirement of appropriateness must be judged in the light of the purpose for which the proceeding is to be taken, namely enforcement of a fundamental right'. See Sen (n. 336 above) 16.

<sup>350</sup> India Constitution Article 32(2).

Constitution. The Court's orders are enforceable throughout India and, as the highest court in the country, such orders are binding upon all other Courts in Indian.<sup>351</sup>

Even though the Constitution suggests the kinds of remedies that the judiciary can apply to enforce Constitutional rights, it leaves the list open-ended, this shows the intention of the Constitution drafters not to allow any procedural technicalities to stand in the way of enforcement of fundamental rights. The Supreme Court has interpreted this Constitution's remedy provision as 'conferring on the Supreme Court powers to enforce the fundamental rights in the widest possible terms'.<sup>352</sup>

In *Bandhua Mukti Morcha v Union of India*, the Supreme Court stated:<sup>353</sup>

It must be remembered that the problems of the poor which are now coming before the Court are qualitatively different from those which have hitherto occupied the attention of the Court and they need...a different kind of judicial approach. If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution.

The Supreme Court concluded:<sup>354</sup>

We have therefore to abandon the laissez faire approach in the judicial process, particularly when it involves a question of enforcement of fundamental rights, and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of people.

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<sup>351</sup> India Constitution Article 141, 142(1), 144. The independence of the judiciary in India improves the probable success of the Public interest litigation mechanism improvised by the Courts. 'Unlike members of the executive and legislative branches, who are elected, Supreme Court Justices are selected from a pool of senior-most High Court Judges by a consortium of current justices on the apex bench, and appointed with the approval of the President of India. There are currently 26 seats on the Supreme Court, and the Constitution provides for these seats be filled on the basis of seniority—by individuals who have served at least five years as a High Court judge or ten years as a court advocate. The Supreme Court's chief justice position is filled on the basis of seniority within the apex bench. Once appointed, Supreme Court Justices are protected by fixed salaries, tenure until the age of 65, and a heavily safeguarded removal process'. See Sood (n. 348 above) 25.

<sup>352</sup> As above.

<sup>353</sup> 2 S.C.R 67 (1984) cited in Sood (n. 348 above) 25.

<sup>354</sup> As above.

One of the earliest cases where the Indian Courts interpreted locus standi liberally is the case of *Hussainara Khatoon v State of Bihar*.<sup>355</sup> This case was concerned with the rights of prisoners under trial; it disclosed a shocking situation surrounding the administration of justice in the State of Bihar.<sup>356</sup> There were large number of men, women and children behind prison bars for years awaiting trial in courts of law. Some of the offences were trivial, which even if proved, would not merit sentence for more than a few months, perhaps a year or two, and yet they remained in confinement, dispossessed of their freedom, for as much as ten years without trial.<sup>357</sup> Based on a series of articles published in a famous newspaper ‘the Indian Express’ which uncovered the plight of under trial prisoners in the state of Bihar,<sup>358</sup> an advocate filed a writ petition on behalf of the prisoners drawing the attention of the Court’s to the appalling plight of these prisoners.

The Supreme Court acknowledged the locus standi of the advocate to maintain the petition. Subsequently, the Court in its pronouncement gave orders through which the right to speedy trial was considered to be an integral and an essential part of the safeguard of life and personal liberty.<sup>359</sup>

Soon thereafter, in *Upendra Baxi (Dr) v State of U.P.*<sup>360</sup> two noted professors of law in Delhi University filed writ petitions in the Supreme Court seeking for enforcement of the Constitutional right of the inmates of a Protective Home at Agra who were living in cruel and undignified conditions in utter violation of Article 21 of the Constitution.<sup>361</sup> The professors also pointed out various abuses of the law, which includes long awaiting trials in court, trafficking of women and children and the non-payment of wages to bonded laborers among others. The Supreme Court granted the professors locus standi to

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<sup>355</sup> Bihar, AIR 1979 SC 1377

<sup>356</sup> As above.

<sup>357</sup> As above.

<sup>358</sup> See KG Balakrishnan ‘Growth of public interest litigation in India’ An address by Chief Justice of India, Singapore Academy of Law, fifteenth Annual Lecture October 8, 2008 12.

<sup>359</sup> As above.

<sup>360</sup> (1983) 2 SCC 308. Cited in Balakrishnan (n. 358 above).

<sup>361</sup> As above. See also <http://twocircles.net/book/export/html/135427>. (accessed December 13, 2013).

represent the people who were poor and suffering and issued directions and orders that greatly improved the conditions of these people.<sup>362</sup>

In *Municipal Council, Ratlam v Vardichand*,<sup>363</sup> the residents of a district of the Municipality claimed that the Municipality had failed even after several pleas, to provide basic amenities such as sanitary facilities on the roads, public conveniences and deterrence of the discharge from the nearby Alcohol Plant of bad smelling fluids into the public street, the Municipal Council challenged the petition on the ground that the petitioners having been aware of the insanitary conditions on their own choice decided to live in that locality and therefore they could not complain, they also pleaded financial constraint in providing the amenities.<sup>364</sup> The Court recognized the locus standi of the residents and in doing so said:<sup>365</sup>

If the...centre of gravity of justice is to shift as indeed the Preamble to the Constitution mandates, from the traditional individualism of locus standi to the community orientation of public interest litigation, the court must consider the issues as there is need to focus on the ordinary men.

The Magistrate ruled in favour of the residents and ordered the municipality to provide the amenities.

The case of *S.P. Gupta v Union of India*<sup>366</sup> remembered as the ‘Judges Transfer Case’, dealt with aspects of locus standi, Law of Evidence, Constitutional Law and Executive-Judiciary relations; which was determined by seven judges, the matter to be determined concerned several contentious issues:<sup>367</sup>

1. The claim of privilege of certain correspondence between certain Chief Justices, the CJI and the Law Minister.
2. The locus standi of the petitioners.
3. The circumstances of appointment and conditions of service and confirmation of Additional

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<sup>362</sup> As above.

<sup>363</sup> 1980 AIR 1622, 1981 SCR (1) 97.

<sup>364</sup> As above. See also <http://indiankanoon.org/doc/440471/> (accessed December 13, 2013).

<sup>365</sup> As above.

<sup>366</sup> AIR 1982 SC 149

<sup>367</sup> As above.

Judges, arising in the context of Justices Vohra & Kumar of the Allahbad High Court.

4. The circumstances of transfer of Judges, arising in the context of Chief Justice KBN Singh of the Patna High Court.

With regards to locus standi, the Court was of the opinion that the petition could be maintained.<sup>368</sup> The good faith genuineness of the petitioners could not be questioned; and the subject was evidently one of Constitutional implication, with a definite bearing on the separation of powers as expressed in the Indian Constitution.<sup>369</sup>

The seven judges decided that the petitioners did certainly have locus standi, but after hearing the whole case, most of the judges granted no relief and dismissed all the petitions.

It is important to note that the Court, in exercise of its discretion has however been careful not to liberalize the concept of locus standi in criminal matters and not to intervene in the case of meddlesome interloper or busybody.

In *S.P. Gupta v Union of India*.<sup>370</sup> The court opined that:

...we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation...the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court.

Also in *Janata dal v H.S. Chowdhary*,<sup>371</sup> the Court observed that the petitioner who is a Lawyer was pursuing private interest of the accused and therefore lacked locus standi to institute the matter as public interest litigation. The Court said:

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<sup>368</sup> See <http://letstalkaboutthelaw.wordpress.com/2011/09/27/a-look-into-the-past-s-p-gupta-v-president-of-india/> (accessed December 14, 2013).

<sup>369</sup> As above.

<sup>370</sup> AIR 1982 SC 149.

<sup>371</sup> (1992) 4 SCC 305. Cited in AH Desai & S Muralidhar 'Public interest litigation: Potential and problems' in BN Kirpal et al. (eds) *Supreme but not infallible – Essays in honor of the Supreme Court of India* New Delhi Oxford University Press 2000 4. See also <http://www.indiankanoon.org/doc/1830927/> the court said:

Even if a million questions of law were to be deeply gone into and examined in criminal case of this nature registered against specified accused persons, it is for them and them alone to rise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants.

In *Panchhi v State of UP*,<sup>372</sup> the Court denied the National Commission for Women standing to get involved in a case of a death sentence handed to a woman. This, the Court said, was ‘for the obvious reason that under the Code of Criminal Procedure, the National Commission for Women or any other organization cannot have locus standi in this murder case’.

Although the Courts have granted locus standi in matters of public interest litigation, they have been careful to note that public interest litigation cannot be sustained by a ‘middle-some interloper or busybody, wayfarers, or officious intervenors having no public interest except for personal gain either for themselves or for the glare of publicity’.<sup>373</sup>

### **3.3.1 The effect of the liberalisation of locus standi by the Indian Courts on the poor, helpless and disabled members of the society**

The liberalisation of locus standi by the Indian courts has led to the development of public interest litigation in that country. The distinctive model of public interest litigation that has evolved in India considers various issues, examples are: gender justice, consumer protection, prevention of environmental pollution and ecological destruction; it also looks

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‘Examining the present case on the touch-stone of the above mentioned cases, it is clear that though petitioner is a member of the noble profession, but while the matter is still at investigating stage, he cannot be permitted to intervene and the doors of the Court will not be ajar for him. He has no direct interest in such investigation nor suffers any special loss. Therefore, at the threshold, one can safely conclude that he has no locus-standi to claim reliefs mentioned above’.

<sup>372</sup>

<sup>373</sup>

(1988) 1 SCC 177.

See *Desai & Muralidhar* (n. 371 above) 4. See also *Simranjit Singh Mann v Union of India* (1992) 4 SCC 653. The Court observed: ‘But we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others....’



at social and political space for the underprivileged and other defenseless groups in the public.<sup>374</sup> The courts have adjudicated on many cases concerning different types of entitlements and protections like the availability of food, right to clean air, political representation, safe working conditions, affirmative action, anti-discrimination measures and the regulation of prison conditions and others. For example, in *People's Union for Democratic Rights v Union of India*,<sup>375</sup> an NGO petitioned against governmental agency's violation of labour laws, the government agency violated the provisions of Article 24 of the Constitution and the provisions of the Employment of Children Acts, 1938 and 1970 when they employed under aged children who were below the age of 14 to work in a construction work.<sup>376</sup> They also violated section 7 of the Contract Labour (Regulation and Abolition) Act 1970 when they engaged contractors and registered them as principal employers, the contractors in turn employed workers who were under paid. There was also a violation of the Contract Labour (Regulations and Abolition) Act, 1970 when they deprived and exploited the workers and denied them of their right to proper living condition, medical and other amenities guaranteed under the Act<sup>377</sup>

Allowing the petition, the Court held:<sup>378</sup>

Public interest litigation which is strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and that other opposing such claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and indicate public interest which demands that violations of Constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed...

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<sup>374</sup> Balakrishnan (n. 358 above) 15.

<sup>375</sup> AIR 1982 SC 1473 cited in Balakrishnan (n. 358 above)15.

<sup>376</sup> See <http://indiankanoon.org/doc/496663/> (accessed December 14, 2013).

<sup>377</sup> As above.

<sup>378</sup> See (n. 375 above).

Similarly, in *Bandhua Mukti Morcha v Union of India*<sup>379</sup> the petitioners were NGOs dedicated to the cause of the elimination of forced labour also known as bonded labourers in the country. The NGO in their petition alerted the Court that there exist a large number of labourers working under cruel and unbearable situation in some of the stone quarries situated in the district of Faridabad, State of Haryana; that many of them were bonded labourers; that the provisions of the Constitution and various social welfare laws passed for the advantage of the said workmen were not being implemented in regard to these labourers.<sup>380</sup>

In entertaining the petition the Court held that:<sup>381</sup>

...when a complaint is made on behalf of workmen that they are held in bondage and are working and living in miserable conditions without any proper or adequate shelter over their heads, without any protection against sun and rain, without two square meals per day and with only dirty water from a nullah to drink, it is difficult how such a complaint can be thrown out on the ground that it is not violative of the fundamental right of the workmen. It is the fundamental right of every one in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullen's Case, to live with human dignity, free from exploitation.

The Courts have also given many leading decisions in the area of environmental protection; many of the actions were brought by renowned environmentalist M.C. Mehta.<sup>382</sup> He has been a diligent crusader in this area and his petitions have resulted in orders by the Courts for the protection of the environment.<sup>383</sup> In *M.C. Mehta v Union of India*<sup>384</sup> The petitioner M.C. Mehta, who was an active social worker brought the attention of the Supreme Court to the activities of tanneries (a place where people tan hides to make leather) by filing a petition among others for the issue of a writ/order/direction in the nature of mandamus to the respondents restraining them from letting out the trade discharge and emission to flow into River Ganga pending when they

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<sup>379</sup> (1984) 3 SCC 161

<sup>380</sup> As above. See also <http://indiankanoon.org/doc/595099/> (accessed December 14, 2013).

<sup>381</sup> As above.

<sup>382</sup> Balakrishnan (n. 358 above) 16.

<sup>383</sup> As above.

<sup>384</sup> (1987) 4 SCC 463.

put up necessary treatment plants for treating the trade discharge and emission in order to arrest the pollution of water on the said river.<sup>385</sup>

In his judgment Venkataramiah, J., held that the:<sup>386</sup>

State was under a Constitutional duty to protect and improve the environment “Environment” includes water, air and land and the interrelationship, which exists among and between water, air and land and human beings, other living creatures, plants, micro-organisms and property. [Section 2(a) of the Environment (Protection) Act, 1986.] and to safeguard the forests and wildlife of the country. Article 48-A of the Constitution of India.

A famous decision was made by the court when they were faced with a lot of evidence of increase levels of hazardous emissions because of the use of diesel as fuel by commercial vehicles in *M.C. Mehta v Union of India*.<sup>387</sup> The Supreme Court decided to make a crucial intervention in this matter and directed that government-run buses should shift to the use of Compressed Natural Gas (CNG), which is an environment-friendly fuel.<sup>388</sup> A similar order was made requiring ‘autorickshaws’ (three-wheeler vehicles which meet local transportation needs) to change to the use of Compressed Natural Gas (CNG).<sup>389</sup> This decision was unpopular then and was seen as a needless interference into the functions of the pollution control authorities, but this judicial intervention is now generally recognized as the reason for the reduction in air pollution in Delhi.<sup>390</sup>

Through judicial activism on public interest litigation the Indian Courts have adopted the strategy of awarding monetary compensation for Constitutional wrongs such as unlawful detention, custodial torture and extra-judicial killings by state agencies which was not

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<sup>385</sup> As above see also <http://www.angelfire.com/linux/prasun/cipe/mcmehta.html> (accessed December 15, 2013). ‘Respondent 1 was the Union of India, Respondent 7 — the Chairman of the Central Board for Prevention and Control of Pollution, Respondent 8 — the Chairman, Uttar Pradesh Pollution Control Board and Respondent 9 — the Indian Standards Institute. Respondents 14 to 87 and 89 were the tanneries near Kanpur’.

<sup>386</sup> As above.

<sup>387</sup> (1998) 8 SCC 648. Cited in Balakrishnan (n. 358 above) 16.

<sup>388</sup> As above.

<sup>389</sup> See Balakrishnan (n. 358 above) 16.

<sup>390</sup> As above.

specifically provided for in the Constitution.<sup>391</sup> For example, in *Bhim Singh v State of Jammu and Kashmir*.<sup>392</sup> The Court held that:

When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his Constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation. We consider this an appropriate case. We direct the first respondent, the State of Jammu and Kashmir to pay to Shri Bhim Singh a sum of Rs. 50,000 within two months from today. The amount will be deposited with the Registrar of this court and paid to Shri Bhim Singh.

Similarly, in *Nilabati Behera v State of Orissa*,<sup>393</sup> the Court observed that Article 32 imposes a Constitutional requirement on the Court to create such new tools, such as awarding monetary compensation which may be necessary for doing justice and enforcing fundamental rights as guaranteed by the Constitution.

### 3.3.2 The simplification of mode of commencement of public interest litigation in India

The Indian Courts have simplified the mode of commencement of public interest litigation by its non-adversarial nature, which the Court has differentiated from conventional litigation concerning two opponents in the following words.<sup>394</sup>

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<sup>391</sup> See Balakrishnan (n. 358 above) 15.

<sup>392</sup> (1985) 4 SCC 677. See also <http://indiankanoon.org/doc/1227505/> (accessed December 15, 2013).

<sup>393</sup> (1993) 2 SCC 746; D.K. See also <http://indiankanoon.org/doc/1628260/> (accessed December 15, 2013).

<sup>394</sup> PUDR, 1 S.C.R. 456. Cited in Sood (n. 348 above). See also *Bandhua Mukti Morcha v Union of India* AIR 802 1984 SCR (2) 67. The court held that: 'Public Interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights

Public interest litigation, as we conceive it, is essentially a cooperative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the Constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.

For this reason, the Indian Courts now allow letters written by public spirited individual to act as writ. In *SP Gupta v President of India*,<sup>395</sup> the Supreme Court intimated that the mere writing of a letter to a court or a judge may initiate proceedings in a court of law. In making this point the court stated that:

Where the weaker sections of the community are concerned...who are living in poverty and destitution...who are helpless victims of an exploitative society and who do not have easy access to justice...this court will not insist on a regular writ petition to be filed by the public spirited individual espousing their cause and seeking relief for them. This court will readily respond to even a letter addressed by such individual acting pro bono public.

Similarly, in *Sunil Batra v Delhi Administration*.<sup>396</sup> A letter was written by a prisoner who is in jail to a Judge of the Supreme Court complaining of a brutal assault committed by a Head Warden on a different prisoner. The Court accepted the latter and treated it as a writ petition, and, while issuing various directions, opined that: ‘...technicalities and legal niceties are no impediment to the court entertaining even an informal communication as a proceeding for habeas corpus if the basic facts are found’.

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meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution’.

The simplification relates to the fact that a mere letter to the judge will set in motion the process for litigation in PIL, instead of insisting that a litigation will commence by way of a writ of summons, petition or originating motion, where the weaker section is concerned. It does not however remove the need for liberal rules on locus standi, if there is restrictive locus standi, the litigant will also be stopped by the rule before the merits of the case is considered even if the mode of commencement is very simple.

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AIR 1982 SCC 149.

(1978) 4 SCC 494. See also *People’s Union for Democratic Rights (PUDR) v Union of India* PUDR, I.S.C.R.

456, ‘a 1983 judgment initiated by a letter describing the dismal conditions of bonded laborers working on construction projects for the Asia games, the Court noted, The State or public authority against whom public interest litigation is brought should be as much interested in ensuring basic human rights, Constitutional as well as legal, to those who are in a socially and economically disadvantaged position, as the petitioner who brings the public interest litigation before the court’. See Sood (n.348 above).

### 3.4 Locus standi before South African Courts

Before the emergence of the 1996 Constitution of South Africa, the Courts generally did not grant standing to a person who has not shown sufficient interest in the subject matter of the litigation.<sup>397</sup> A party seeking to litigate in the interest of the public, challenge an unconstitutional law or unlawful actions of the government and its agencies may not succeed unless he had fulfilled the requirements for granting standing. According to Baxter, the Courts required that for a person to have locus standi or standing to sue, he must have the needed capacity to sue; and a legally recognized interest in the act complained of.<sup>398</sup>

This requirement was established in *Dalrymple v Colonial Treasurer*<sup>399</sup> where the court held that:

No man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law.

The South African Courts did not always decline granting standing when actions of the authorities were challenged provided that the litigant showed an actual infringement of right or the suffering of damages. This was the case in *Director of Education, Transvaal v McCagie and others*.<sup>400</sup> The applicants who were the unsuccessful candidates in the appointment of two school principals by the Director General of Education succeeded in obtaining an order setting aside the appointment of the two school principals on the grounds that the appointments was illegal as the appointees did not meet the requirements for the appointment as advertised. The Director General argued that the applicants had no locus standi to institute the action. The Court held that the applicants were able to prove that their rights had been affected and that they have locus standi to bring the action.

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<sup>397</sup> See Ngcukaitobi (n. 344 above) 602.

<sup>398</sup> L Baxter 'Administrative law' *Kenwyn JUTA* (1984) 645-646.

<sup>399</sup> (1910) TPD 372. Cited in TR Ramagoma 'Locus standi in environmental litigation: A South African perspective. *Unpublished LLM dissertation University of Natal 1997* 6.

<sup>400</sup> (1918) TS 616.

However, in *O'Brien v Amm*<sup>401</sup> the Court demonstrated that the party suing needs to show that he has sustained personal damages as a requirement for locus standi. In O'Brien's case, a medical practitioner registered under the Medical, Dental and Pharmacy Act instituted an action for an order restraining Amm, a dental surgeon, from using the title 'doctor' arguing that doing so contravened section 33(3) of the Medical, Dental and Pharmacy Act. The Court dismissed the application and held that the applicant has not shown that he had suffered or was likely to suffer any damages as a result of Amm's action.

Generally, the actio popularis or actions in the public interest never formed part of South African law.<sup>402</sup> The case of *Bagnall v The Colonial Government*<sup>403</sup> is one of the earliest cases in the public interest. In the Bagnall case the South African court completely denounced the idea of an action in the public interest. In this case the Honourable Chief Justice, De Villiers CJ remarked that:<sup>404</sup>

As to our law, I am not aware that any South African court has ever recognized the right of any individual to vindicate the rights of the public where he himself has not sustained any direct injury or damage from a breach of the law.

Due to the constraint of restrictive locus standi requirement, there was need for the liberalisation of the concept of locus standi hence the inclusion for an express provision that liberalised locus standi in the Interim Constitution and subsequently in the Constitution of the Republic of South Africa, 1996.

### 3.4.1 Locus standi under the Interim Constitution

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<sup>401</sup> (1935) WLD 68.

<sup>402</sup> Ramagoma (n. 399 above) 9.

<sup>403</sup> (1907) 24 SC 470. Cited in Ramagoma (n. 399 above) 9.

<sup>404</sup> As above.

In 1993 twenty-six political groups came together to draft a constitution to bring an end to the apartheid era.<sup>405</sup> Because these groups were mostly unelected, it was considered inappropriate to confer on them the power to draft a final constitution. Instead, the constitution which they drafted was to serve as an 'interim' constitution, pending the drafting of a constitution by a democratically elected Constitutional Assembly. This Interim Constitution was duly endorsed by the last Apartheid Parliament and became the Constitution of the Republic of South Africa, Act 200 of 1993.<sup>406</sup>

The Interim Constitution provided for the Bills of Rights in chapter three of the Constitution. International instrument played an important role in the drafting of chapter three of the Interim Constitution. International instruments such as the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the European Convention for the Protection of Human Rights and Fundamental Freedoms served as sources of inspiration.<sup>407</sup>

Section 7(4) of the Interim Constitution provided for a liberal understanding of locus standi. It says:

When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.

(b) The relief referred to in paragraph (a) may be sought by-

- (i) a person acting in his or her own interest;
- (ii) an association acting in the interest of its members;
- (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
- (iv) a person acting as a member of or in the interest of a group or class of persons; or
- (v) a person acting in the public interest.

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<sup>405</sup> J Dugard 'International law and the South African Constitution' 1 EJIL (1997) [www.ejil.org/pdf//1/1426.pdf](http://www.ejil.org/pdf//1/1426.pdf) (accessed March 9 2014) 78.

<sup>406</sup> As above.

<sup>407</sup> As above 79-83.



Concerning the provision of section 7(4), O'Regan J in *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* said:<sup>408</sup>

Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not affect people who are not parties to the litigation. In such cases the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all nonconstitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than of a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law.

### 3.4.2 Locus standi under the Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996, represents a liberal and modern legislation of the principle of locus standi. Section 38 of the South African Constitution highlights the criteria under which a person may be afforded locus standi. It provides thus:<sup>409</sup>

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The persons who may approach a court are —

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of

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<sup>408</sup> 1996 (1) SA 984 (cc); 1996 (1) BCLR 1 (cc).

<sup>409</sup> See section 38 of the Constitution of the Republic of South Africa 1996.

- persons;
- d) anyone acting in the public interest; and
  - e) an association acting in the interest of its members.

These clauses concerning locus standi in the South African Constitution allows potential victims to be represented by organizations with know-how, and sometimes more outstandingly, funds to conduct costly and time-consuming court cases.<sup>410</sup> As anticipated, the South African courts have interpreted this provision in a liberal way.<sup>411</sup> In *Ferreira v Levin NO*<sup>412</sup> the South African Constitutional Court held that when it comes to constitutional matters a liberal interpretation should be adopted.<sup>413</sup> The Constitutional Court also said that this is necessary in line with their mandate to uphold and protect the constitution.<sup>414</sup> The Court also held that the provisions in the constitution on ‘locus standi did not require that a person acting in his or her own interest had to be a person whose constitutional rights had been infringed or in danger’.<sup>415</sup>

A successful example of public interest lawsuit can be established in the case of *Minister of Health and Others v Treatment Action Campaign and Others*<sup>416</sup> in the Constitutional Court of South Africa. The Treatment Action Campaign found that the government has failed to provide Nevirapine, ‘a widely-recommended anti-retroviral drug used in reducing mother-to-child transmission, at all state health facilities’. The government made it available at two hospitals per province, and the most affected by this course of action were innocent babies. The Treatment Action Campaign applied to the Pretoria

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<sup>410</sup> See [http://citation.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/4/0/8/5/5/p408551\\_index.html](http://citation.allacademic.com/meta/p_mla_apa_research_citation/4/0/8/5/5/p408551_index.html) (accessed November 5 2013).

<sup>411</sup> As above.

<sup>412</sup> (1996) 1 SA 984 (CC). See also the case of *Wood and others v Ondangwa tribal Authority and another* (1975) 2 SA 294 that set a precedent in its liberal interpretation of locus standi. The court was of the view that ‘where the liberty of a person was at stake, the court should not narrowly construe such a person’s interests’. See B Mqingwana ‘An analysis of locus standi in public interest litigation with specific reference to environmental law; A comparative study between the law of the United State of America’ Unpublished LLM dissertation, University of Pretoria, 2011 17.

<sup>413</sup> See Taiwo (n. 37 above) 569.

<sup>414</sup> As above.

<sup>415</sup> As above.

<sup>416</sup> CCT 8/01, 2002 (5) SA 721 (c); 2002 (10) BCLR 1033 (cc) cited in V Jaichand ‘Public interest litigation strategies for advancing human rights in domestic system of law’ *International journal on human rights* 2004 128.

High Court on 14<sup>th</sup> December 2001, in the decision of the High Court, Judge Chris Botha ruled that it is the government duty to provide Nevirapine to all HIV positive pregnant women. The government appealed against this ruling so many times until the Constitutional Court heard the matter on 2nd and 3rd May 2002.<sup>417</sup> The Constitutional Court held that the 'government's program to prevent mother-to-child transmission was unreasonable' and ruled against the government.<sup>418</sup>

Similarly, in *Lawyers for Human Rights and another v Ministry of Home Affairs and another*,<sup>419</sup> the 2nd applicant was arrested and detained for 7 days without trial pursuant to Immigration Act 13 of 2002. The applicants challenged the constitutionality of some provisions of section 34(1)(2)(8)&(9) of the Immigration Act, which relates to how illegal foreigners were to be removed from the Country and treated pending deportation. The High Court found that section 34(8)<sup>420</sup> of the Immigration Act infringed the rights of freedom and security as guaranteed under section 12 of the Constitution and section 34(2)<sup>421</sup> of the Immigration Act to be irreconcilable with the provisions of the Constitution. In delivering the Judgment the Court held that 'in public interest matters the question was always whether the person bringing the proceedings was genuinely acting in the public interest.' The Court further noted that it was difficult to determine rules for the test of public interest standing...'each situation therefore require a thorough and careful consideration of the impact of the alleged violation upon the particular persons of group concerned.'

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<sup>417</sup> See Jaichand (n. 416 above) 129.

<sup>418</sup> As above 130.

<sup>419</sup> (2004) 4 SA 125 (CC).

<sup>420</sup> The section provides that: 'A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.'

<sup>421</sup> Which provides that: 'The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.'

### 3.5 Conclusion

The Courts in United Kingdom, Kenya, India and South Africa have moved in a very considerable distance away from the restrictive view of locus standi. This stems from the need to make the locus standi principle flexible so that a public spirited person or non-governmental organizations can apply for redress on behalf of the poor and weak persons and on behalf of the public or for judicial review of unlawful acts by the government.

In the United Kingdom, to challenge the unlawful actions of the government and its agencies, the claimant must have sufficient interest in the subject matter. It will be sufficient interest if his personal right or interest or legitimate expectation is affected. However, when it comes to administrative unlawful actions that affect the public, the Court may accord locus standi to any public spirited man or a representative body or a pressure group to challenge the unlawful administrative action, so far such public spirited man or representative body or pressure group must act in bona fide and not with malicious or ulterior motive.

Kenya's 2010 Constitution established some notable innovations and bolsters access to justice to the poor. In a remarkable departure from its predecessor, it made provision for the liberalisation of the rule on locus standi. Also notable is the liberalisation of the rule on locus standi in the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013 which regulates the procedure for the commencement of an action for the enforcement of fundamental human rights in Kenya.

Although, there is no specific provision for the liberalisation of the rules on locus standi in the India's Constitution, through judicial activism championed by Justice Bhagwati, the Courts in India have shifted away from the restrictive interpretation of locus standi especially in the public interest litigation. Public interest litigation in India has been a necessary instrument for social change it has been used to fight the atrocities common in the society and to bring justice to the common person in the society.

Similar to the Kenya's 2010 Constitution, the South African 1996 Constitution made specific provision for the liberalisation of the locus standi rule in section 38 of the Constitution of the Republic of South Africa 1996, permitting anyone acting in their own interest, on behalf of another person or in the public interest to approach a competent Court, alleging that a right has been infringed or threatened. These provisions in the South African Constitution allows potential victims to be represented by organisations with funds and know-how.

The experiences of the Courts in these countries point the way to the practical options available to the Courts in Nigeria who still have some grounds to cover in their desire to make justice accessible to the poor and the weak in the society.

## Chapter four

### Summary, recommendation and conclusion

#### 4.1 Summary

We have said that the Nigerian Courts still apply the principle of locus standi very strictly in most cases. The Courts in most cases maintain that the party approaching it must show that he or she has personal interest or cause of action in the subject matter of the litigation or he is directly affected by the violation complained of. This position hinders access to justice to the poor and have prevented the growth of public interest litigation and also made it impossible to challenge unlawful actions of the government and its agencies in Nigeria. It is believed that the origin of the position of the Nigerian Courts on locus standi principle can be traced to the decision of the Supreme Court in the Adesanya's case where Mohammed Bello JSC (as he then was) interpreted the provision of section 6(6)(b) of the 1979 Constitution of Nigeria into the law of locus standi. Most decisions on this issue by the Courts have followed the decision in Adesanya's as a binding principle.

The interpretation of section 6(6)(b) of the Constitution into the law of locus standi by Mohammed Bello has not been devoid of controversies. Apart from the fact that other judges in the Adesanya's case did not agree with him, some judges in subsequent cases, such as Ayoola JCA and Ogundare JSC think that the provisions of section 6(6)(b) of the Constitution is not relevant to the question of locus standi.

Although the Nigerian Courts in some cases have given a liberal interpretation to the principle of locus standi, this is done after considering the facts and circumstances of the matter. However, there is the possibility of the Court denying the applicant standing if in the opinion of the Court there is a reason to do so.

We have also said that the liberalisation of the rule on locus standi in the Fundamental Rights (Enforcement Procedure) Rules 2009 may have little or no effect on the approach of the Courts to the strict interpretation of locus standi; this is mainly because the provisions of the Fundamental Rights (Enforcement Procedure) Rules 2009 cannot supersede the provisions of the Constitution. Moreover, the provision for the liberalisation of the rule on locus standi is provided in the preamble to the rules and therefore, has no legal binding effect. This can be seen in the SERAP case cited above, decided in 2012, about two years after the FREPR came into effect, where SERAP was denied standing by the High Court. Although the judgment has been appealed by SERAP it will take years for the matter to be put to rest by the Supreme Court.

We have also compared the interpretation of the locus standi principle under the Courts in United Kingdom, Kenya, India and South Africa and have observed that the Courts in these countries were interpreting the principle of locus standi strictly but have moved from its strict interpretation to a more liberal interpretation of the principle. United Kingdom have achieved this through legislation reforms, Kenya and South Africa have been able to achieve this through the express provision in their Constitutions for the liberalisation of the principle of locus standi while India has been able to achieve this through judicial activism. This has led to the fledging growth of public interest litigation in these countries. Standing is now accorded to public spirited individuals, and NGOs to challenge the unlawful actions of the government and its agencies. It is believed that the successful departure of the Courts in these countries should spur the Nigerian Courts to also begin to depart from the strict and narrow interpretation of locus standi so as to make access to justice attainable to the poor.

## **4.2 Recommendations**

The provisions in the Fundamental Rights (Enforcement Procedure) Rules 2009 removing the locus standi restriction by the Chief Justice of Nigeria shows the desire of the Chief Justice of Nigeria to shift from the strict interpretation of locus standi to a more liberal one, a view which is shared by other judges, this is evident in some of the

judgments given by some judges. In view of the fact that the current position of the Court originate from the interpretation of section 6(6)(b) of the Constitution given by Justice Mohammed Bello in the Adesanya's case and which in the opinion of most judges the section in question does not have anything to do with locus standi, the Courts may, through judicial activism begin to give a liberal interpretation to the rule of locus standi just as the Courts in India did. The Courts in India have consistently interpreted the provisions of the Indian Constitution in favour of public interest litigation. They have actively given liberal interpretation to the principle of locus standi. The Nigerian judges should note that out of the seven Justices that decided on Adesanya's case it was the opinion of Mohammed Bello JSC which Nnamani JSC and Idigbe JSC concurred that construe section 6(6)(b) to be the test for locus standi, the decision of other Justices of the Supreme Court does not support Mohammed's position. As soon as this is noted by the judges, the coast will be open for the Courts to apply a better approach to the rule of locus standi similar to other jurisdiction.

In order to make access to justice realistic the Nigerian Courts should relax the complexity of the mode of commencement of action provided in Order II rule 3 & 5 of the Fundamental Rights (Enforcement Procedure) Rules 2009. The Courts should adopt the practice in India where a mere letter from an individual act as a writ and may initiate Court proceedings.

It is also recommended that the overriding objective of the Fundamental Rights (Enforcement Procedure) Rules 2009 should be removed from the preamble and moved to the substantive part of the Rules and a similar provision specifically for the liberalisation of the rule on locus standi be made in the Nigerian Constitution similar to that which is provided in the Kenya's and South African's Constitutions. It is important to have an express provision for the liberalisation of the locus standi rule in the Nigerian Constitution so as to ensure clarity on the requirements for locus standi.



### 4.3 Conclusion

Public interest litigation is an important constituent in administrative justice and human rights enforcement. However, rules of locus standi have placed restraints upon the use of public interest litigation in Nigeria; the development of locus standi in Nigeria has been in a weak position by years of military rule and the wrong conception of the Adesanya's case.<sup>422</sup>

Although there has been some criticism against public interest litigation, one of them is that it takes away the Constitutional principle of separation of powers by allowing the Courts to subjectively get in the way with policy-choices made by the legislature and pass instructions that may be difficult for the administrative agencies to put into practice.<sup>423</sup> It has been argued also that the liberalisation of the condition of locus standi has opened up the 'floodgates for frivolous cases that either involve the litigant's private interests or are vehicles for gaining publicity rather than seeking justice for disadvantaged groups'.<sup>424</sup> It is opined from the standpoint of the judges, 'that quite often there are no checks against decisions or orders that amount to judicial overreach or judicial populism'.<sup>425</sup>

Despite the fact that all of these criticisms have been presented by much-admired scholars, senior practitioners and judges as well, there is a much more convincing case in defence of the use of Public Interest Litigation.

The traditional locus standi principles was developed long before civil rights and environmental movements and therefore are not in line with modern legal thinking that is supported by the principle of access to justice, rule of law and sustainable development. Most jurisdictions have long shifted from the traditional interpretation of locus standi.

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<sup>422</sup> See Institute for human rights and development in Africa (n. 24 above) 24.

<sup>423</sup> See Balakrishnan (n. 358 above) 5,6.

<sup>424</sup> As above.

<sup>425</sup> As above.

It is clear that the view of the locus standi principle in the Nigerian Courts is not necessarily attached to the text of the Nigerian Constitution and there are opportunities for the Courts to use interpretative tools to move away from an approach that is archaic and has inhibited public interest litigation and constrained access to justice for a long time.

It is perhaps time for a relaxation on the principle that it is only the Attorney-General who could sue on behalf of the public. Every citizen should have locus standi to apply to the court to avert some abuse of power or wrongful act by the government and its agencies.

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