

Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision

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Summary

This article explores the scope of standing rules in section 46 of the 1999 Nigerian Constitution. It is observed that the section contains a restrictive and narrow provision on locus standi. The article finds that this narrow provision has the regressive effect of limiting access to court and it invariably constitutes an impediment or constraint on the enforcement of fundamental human rights in the country. Many common law countries, such as England, Australia, Canada, India and South Africa, have jettisoned this anachronistic position on standing for a more liberal and expansive interpretation. In contrast, the Nigerian Constitution still maintains restrictive and outdated rules of standing. This is inconceivable at a time like this when other common law jurisdictions are enthusiastically adopting a liberal approach to the concept.

1 Introduction

With the adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948 and the signing of the International Covenant

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on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, there has been a consistent global emphasis on human rights. The rights provided for in the International Bill of Rights have equally been reflected in regional human rights treaties and in national constitutions.¹ The 1999 Nigerian Constitution, for instance, provides for fundamental rights which everyone in the country is to enjoy.² To guarantee and promote the enjoyment of these rights, the Constitution vests in the courts the power of enforcement and protection. In terms of section 6 of the Constitution, the judicial power of the country is vested in the courts of law established for the federation and the states.³ The judicial power extends⁴

to all matters between persons or between government or authority and any person in Nigeria and to all actions and proceedings relating thereto,

¹ See A Govindjee 'Lessons for South African social assistance law from India: Part 1 — The ties that bind: The Indian Constitution and reasons for comparing South Africa with India' (2005) 26 *Obiter* 575-576.

² In this context, however, fundamental rights refer to civil and political rights (see secs 33-45, ch IV of the 1999 Nigerian Constitution). Economic, social and cultural rights are still non-justiciable under the Constitution. See secs 13-24, ch II of the Constitution, which set out the Fundamental Objective and Directive Principles of State Policy as non-justiciable. Sec 6(6)(c) of the Constitution renders ch II of the Constitution non-justiciable. It provides: 'The judicial powers vested in accordance with the foregoing provisions of this section 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 Objective and Directive Principles of State Policy set out in Chapter II of this Constitution.' The African Charter on Human and Peoples' Rights provides for civil and political rights and economic, social and cultural rights as justiciable rights. Nigeria has ratified and incorporated the provisions of this Charter as part of her laws through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation 1990. With this Act, the human rights provisions of the African Charter are part of Nigerian law and can be enforced through any of the rules of procedure of the courts. See *Ogugu v State* [1996] 6 NWLR (pt 316) 1 30-31, *per* Mohammed JSC. However, the Supreme Court held in *Gani Fawehinmi v General Sani Abacha* [2000] 6 NWLR (pt 660) 228 that the provisions of the African Charter cannot override those of the Constitution. In other words, the provisions of sec 6(6)(c) of the Constitution as to the non-justiciability of those rights remain.

³ See sec 6(1) of the 1999 Nigerian Constitution. Nigeria is a federation of 36 states with each state having separate/different courts but a similar/uniform court system. These separate courts' and states' judicial systems, however, meet at the federal level with appeals from these courts going to the Supreme Court via the Court of Appeal.

⁴ See sec 6(6)(b) of the Constitution. The Constitution vests judicial powers of the federation in the specific courts as well as other courts as may be established by the National Assembly or House of Assembly. The courts include the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, a High Court of a state, the Shari'a Court of Appeal of the Federal Capital Territory, Abuja, a Shari'a Court of Appeal of a state, the Customary Court of Appeal of the Federal Capital Territory, Abuja, a Customary Court of Appeal of a state. See sec 6(6)(5) of the Constitution.

for the determination of any question as to civil rights and obligations of that person.

The judicial power vested in the courts covers every type of action except those specifically excluded by the Constitution itself.⁵ In furtherance of this judicial power and in the enforcement of fundamental rights, section 46(1) of the Constitution provides that⁶

any person who alleges that any of the provisions of this Chapter [Chapter IV] has been or 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.

This section reinstates the common law concept of *locus standi* and incorporates it into Nigerian constitutional jurisprudence. The combined provisions of sections 6 and 46 of the Constitution give judicial power to courts of law for the determination of civil rights and obligations of any person in relation to another person, authority or government.⁷ Also, by the provisions of these sections, a person has access to court to challenge a violation or imminent violation of his or her rights.⁸

However, procedural rules as well as substantive law may, at times, impose some constraints which may have the effect of limiting a person's access to court. One such constraint is the concept of *locus standi*.⁹

⁵ However, judicial power is distinguishable from jurisdiction. 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 JO Akande *Introduction to the Constitution of the Federal Republic of Nigeria, 1999* (2000) 32; *United States v Arrendondo* 31 US 691 (1832); *Muskrat v United States* 219 US 346 361 (1911).

⁶ My emphasis.

⁷ See *Sofekun v Akinpelu & Others* (1981) 1 NCLR 135; *Tony Momoh v Senate* (1981) 1 NCLR 105.

⁸ See *Shugaba Darman v Minister of Internal Affairs* (1981) 1 NCLR 25; see also *Abdulkamid v Akar* [2006] 13 NWLR (pt 996) 127 149; MMA Akanbi 'Constitutional structure and the position of the judiciary: Fundamental rights' in *1990 Judicial lectures: Continuing education for the judiciary* (1991) 16 21.

⁹ The term *locus standi* defies precise definition. It is not an easy concept to define since it has been used to refer to different factors that affect a party's right to claim relief from a civil court. It determines the right to sue or seek judicial redress in respect of alleged unlawful action. This requires that a litigant should both be endowed with the necessary capacity to sue and have a legally recognised interest in the relevant action to seek relief. See GE Devenish 'Locus standi revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution' (2005) 38 *De Jure* 28. Many authors, scholars and jurists have attempted giving working definitions of the term. *Locus standi* is defined as 'the right to be heard in court or other proceedings'. See R Bird Osboorn's *Concise law dictionary* (1983) 209. In *Attorney-General of Kaduna State v Hazzan* [1985] 2 NWLR 483 497, the Nigerian Supreme Court, *per* Oputa JSC, explained that *locus standi* means 'the legal capacity to challenge an order or act. Standing confers on an applicant the right to be heard as distinct from the right to succeed in the action or proceeding for relief.' See also *Inakoju v Adeleke* [2007] 4 NWLR (pt 1025) 43 601-602; *locus standi* denotes the legal right of any person, group of persons, statutory bodies or government, to appear

The doctrine of *locus standi* is designed to adjust conflicts between two aspects of public interest, namely, the desirability of encouraging individual citizens to participate actively in the enforcement of law and the undesirability of encouraging a professional litigant and a meddlesome interloper to invoke the jurisdiction of the courts in matters that may not concern him.¹⁰ This concept, which is fundamental in the judicial process in any country, differentiates between ‘stranger’ and ‘aggrieved person’.¹¹ Standing is of inordinate importance as far as access to justice is concerned. It determines the justiciability of an action.¹² It also has a great impact on the jurisdiction of the court.¹³ *Locus standi* has traditionally been regarded as a preliminary or ‘threshold’ issue and is usually dealt with *in limine*, before the merits are dealt with.¹⁴

Locus standi has been an intractable concept for ages and has posed serious problems both to litigants and the courts. In Nigeria, the con-

before a court, or a tribunal constituted in such a manner as to secure its independence and impartiality and to have grievances adjudicated upon by the court. MAA Dzekhome *The Nigerian law locus standi* (1988) 82. The term *locus standi* denotes the legal capacity to institute proceedings in a court of law or tribunal to enforce a right recognised by law. It is the right to appear before a court to prosecute or defend an action affecting one’s legal right. According to Mubangizi, *locus standi* ‘deals with the right to approach a court of law to seek a remedy for the infringement of a right’. See JC Mubangizi *The protection of human rights in South Africa (A legal and practical guide)* (2004) 60.

¹⁰ See SA de Smith *Judicial review of administrative action* (1980) 409.

¹¹ As above. To be an aggrieved person, the plaintiff must establish his interest in the subject matter in disputes. It is the manifestation of this interest that will confer *locus standi* or standing on the plaintiff to bring an action and invoke the authority of the court. See MI Jegede ‘Problem of *locus standi* (standing to sue) in the administration of justice’ in TO Elias & MI Jegede (eds) *Nigerian essays in jurisprudence* (1993) 195.

¹² It is necessary to note that standing and justiciability are not the same. The latter addresses the issue as to whether a dispute is amenable to resolution by a court of law, whereas the former deals with the question of whether a litigant has sufficient interest to approach the court for relief. See Devenish (n 9 above) 36.

¹³ Thus, in *A-G Anambra v A-G Federation* [2007] 12 NWLR (pt 1047) 93-94, the Supreme Court of Nigeria, per Chuckwuma-Eneh JSC, held as follows: ‘... [*locus standi* or standing or title to sue ... like the issue of jurisdiction is a threshold action and has to be taken at the earliest ... the issue of *locus standi* is therefore linked with the issue of jurisdiction of a court to entertain a matter. It is a *sine qua non* to the exercise of jurisdiction because judicial powers are constitutionally limited to cases in which the parties have *locus standi*.’ If the plaintiff has no legal capacity or standing to institute the action, the court would have no jurisdiction to adjudicate on the matter. See *Mr W Alofoje v Federal Housing Authority & Others* [1996] 6 NWLR (pt 456) 559 567; *Gombe v PW (Nig) Ltd* [1995] 6 NWLR (pt 402) 402. The issue of *locus standi* is an indirect questioning of the jurisdiction of the court to adjudicate on a matter and can be raised at any time in the course of trial, even on appeal. See *Timothy Adeko Adefulu & 12 Others v Bello Oyesile & 5 Others* (1989) 5 NWLR (pt 122) 377 409 418; *Oloriode v Oyebe* (1984) 1 SCNLR 390.

¹⁴ Devenish asserts that this, however, may be artificial and problematic in certain cases since an examination of the case law on *locus standi* indicates that, in practice, it is not always dealt with as a preliminary point in regard to the justiciability of the dispute, but the entire matter is scrutinised in order to reach a conclusion. See Devenish (n 9 above) 29.

cept has generated a considerable volume of interesting litigation in the past, and this is likely to continue in the future in view of the narrow and restrictive interpretation accorded the concept under Nigerian law.¹⁵ Determining the standing of a suitor is generally not an easy task. However, following decided cases, Nigerian courts have been able to lay down two tests to help in this regard.¹⁶ One of the tests is that the action must be justiciable, while the second one is that there must be a dispute between the parties.¹⁷ That is, the plaintiff must be able to establish a sufficient interest in the subject matter of a suit before he or she could be accorded standing; otherwise, he would be treated as a stranger and, as such, denied the right to maintain the action in court.¹⁸

In this article an attempt is made to examine the scope of section 46(1) of the 1999 Nigerian Constitution, which confers standing on citizens for the enforcement of their fundamental rights. Unlike some other constitutions, section 46 provides for a limited category of persons that can approach the courts for enforcement of fundamental rights.¹⁹ A restrictive interpretation of *locus standi* is capable of frustrating the enforcement of fundamental rights, while a liberal interpretation of the concept encourages public interest litigation and also facilitates the development of law in any country. The article therefore aims at

¹⁵ It is asserted that a narrow definition of standing will obstruct access, whereas a wide one will facilitate it. See Devenish (n 9 above) 29.

¹⁶ In ascertaining whether the plaintiff in an action has *locus standi*, the pleadings, that is, the statement of claim, must disclose a cause of action vested in the plaintiff and the rights and obligations or interest of the plaintiff which have been violated. See *Inakoju v Adeleke* [2007] 4 NWLR (pt 1025) 601-602; *Adefulu v Oyesile* (n 13 above) 410; *Thomas v Olufosoye* [1986] 1 NWLR (pt 18) 669 686; (1986) 1 ANLR (pt 1) 215; *Momoh v Olotu* (1970) 1 All NLR 117; *Oloriode v Oyebi* (n 13 above). The way to determine whether a plaintiff has the necessary standing to sue is to examine and reflect on the statement of claim and the writ of summons. When a party's standing to sue is made an issue of in a case, what has to be decided is whether that party is a proper party to request adjudication over a particular subject matter. See *Sir Olateru Olagbegi v Oba Ogunnoye II (Olowo of Owo) & Others* [1996] NWLR (pt 448) 332 352; *Sobie Ojimba & Others v Peter Ojimba & Others* [1996] 4 NWLR (pt 440) 32 39.

¹⁷ See *Attorney-General Federation v Attorney-General of the 36 States of Nigeria* (2001) 9 SCM 45 59.

¹⁸ In other words, the suitor must not be a stranger to the issue which constitutes the cause of action. He must have been aggrieved by the act or he must, one way or the other, be affected by the acts that constitute the cause of action. Anything falls short of this, he is deemed to be a stranger to the suit, a mere busy-body and an interloper who will not be granted *locus standi*. See *Emezi v Osuagwu* [2005] 12 NWLR (pt 939) 240 362; *Thomas v Olufosoye* (n 16 above); *Attorney-General Kaduna State v Hassan* [1985] 2 NWLR (pt 8) 483. See also *Senator Abraham Ade Adesanya v President of the Federal Republic of Nigeria* (1981) 2 NCLR 358, where Idigbe JSC said: 'The judicial power ... is invested in the court for the purpose of determining cases and controversies before it; the cases or controversies, however, must be justiciable.' See also PA Oluoyede *Nigerian administrative law* (1988) 504-505.

¹⁹ Sec 38 of the 1996 South African Constitution, eg, provides for a liberal view on *locus standi* and it allows a larger category of persons to approach the courts of law on the enforcement of the Bill of Rights guaranteed in the Constitution.

advocating a more expansive interpretation of the concept of standing to ensure the effective enforcement of fundamental rights in Nigeria.

2 *Locus standi* under common law

At common law, a person who approaches a court for relief is required to have an interest in the subject matter of the litigation in the sense of being personally adversely affected by the alleged wrong.²⁰ The plaintiff or the applicant must allege that his or her rights have been infringed. It is not enough for the plaintiff to allege that the defendant has infringed the rights of someone else, or that the defendant is acting contrary to the law and that it is in the public interest that the court grants relief.²¹ Thus, under the common law position, a person could only approach a court of law if he or she has sufficient, direct and personal interest in the matter.²² A plaintiff must in general show that he or she has some special interest or has sustained some special damage greater than that sustained by an ordinary member of the public.²³ The essence of *locus standi* at common law is to keep away meddling busybodies who have no interest whatsoever in the case before the court.²⁴ However, the common law position on *locus standi* has been criticised as rather restrictive.²⁵

The identity of parties to an action is very important to the sustenance of an action. It is a condition precedent that goes to the root of the case. *Locus standi* is fundamental and it has a lot to do with the competency and jurisdiction of the court to entertain an action. Failure to disclose *locus standi* is fatal; it is comparable to a failure to disclose

²⁰ See P Vrancken & M Killander 'Human rights litigation' in A Govindjee & P Vrancken (eds) *Introduction to human rights law* (2009) 251–257; I Currie & J de Waal *The Bill of Rights handbook* (2005) 80.

²¹ See *Massachusetts v Mellon* (1923) 262 US 447–448; Currie & De Waal (n 20 above) 81.

²² Many countries have followed this common law requirement of sufficient interest. Eg, in *Patz v Greene & Co* (1907) TS 427–433, Solomon J held: 'Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent upon the party complaining to allege and prove that the doing of the acts has caused him some special damage — some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the [community] by an infringement of the law.'

²³ Devenish (n 9 above) 30.

²⁴ See T Ngcukaitobi 'The evolution of standing rules in South Africa and their significance in promoting social justice' 2002 (18) *South African Journal on Human Rights* 590–591.

²⁵ See Mubangizi (n 9 above) 61.

a reasonable cause of action.²⁶ Thus, the requirement of *locus standi* is mandatory; the consequence of a failure to disclose *locus standi* is that the plaintiff's claim will be dismissed.²⁷ The issue of *locus standi*, like the issue of jurisdiction, can be raised at any time in the trial, even for the first time on appeal.²⁸

3 *Locus standi* under Nigerian law

Locus standi is one of the English common law concepts which were incorporated into Nigerian law during the colonial rule of the country. Nigerian courts still take the restrictive common law approach to standing.²⁹ Decided cases have followed this position and courts have consistently held that an applicant must have 'sufficient interest' in a matter before he or she could be accorded standing to sue. At the outset, it is necessary to mention that *locus standi* is particularly problematic and Nigerian courts have been inconsistent in their approach on the issue. While the majority of cases, especially from the apex court, have emphasised the requirement of the plaintiff showing sufficient interest, there are, however, other cases which maintain that in the interpretation of laws, the plaintiff need not establish personal interest. Most of the cases in this direction are the decisions of the lower courts and they do not constitute a binding precedent compared to Supreme Court and Court of Appeal decisions on the issue.

The first significant case on *locus standi* in Nigeria is the case of *Olayoyin v Attorney-General of Northern Region of Nigeria*.³⁰ In this case, the appellant applied to the High Court for redress, alleging that the provisions of the Children and Young Persons' Law, 1958, of Northern Nigeria, which prohibited political activities by juveniles and prescribed penalties for juveniles and others who may be parties to the offences therein specified, were unconstitutional. He maintained that he was a father of children whom he wished to educate politically, and that

²⁶ See also *Ajao v Sonola* (1973) 5 SC 119; *Okoye v Lagos State Government* [1990] 3 NWLR (pt 136) 125; *Sken Consult (Nig) Ltd v Ukey* (1981) 1 SC 6; *Gambioba & Others v Insesi & Others* (1961) All NLR 584.

²⁷ However, an action dismissed on the ground of *locus standi* may not constitute a *res judicata* in the subsequent trial in the sense that there would have been changes in the parties.

²⁸ See *A-G Anambra v A-G Federation* [2007] 12 NWLR (pt 1047) 4 93-94; *Emezi v Osuagwu* [2005] 12 NWLR (pt 939) 340 347; *Sobiee Ojimba & 4 Others v Peter Ojimba & 4 Others* [1996] 4 NWLR (pt 440) 32 39; *Oredoyin v Arowolo* (1989) 4 NWLR (pt 114) 172; *Obaba v Military Government of Kwara State* (1994) 4 NWLR (pt 336) 26; *Bronik Motors Ltd v Wema Bank Ltd* (1983) 1 SCNLR 303; *Adefulu v Oyesile* [1989] 5 NWLR (pt 122) 377.

²⁹ See the *locus classicus* cases in this regard: *Senator Adesanya v President of the Federal Republic of Nigeria & Others* (n 18 above); *Chief (Dr) Irene Thomas & 5 Others v The Most Reverend Timothy Omotayo Olufosoye* [1986] 1 NWLR (pt18) 669.

³⁰ (1961) AllNLR 269.

there was therefore a danger of his right being infringed if the law were enforced, even though no action of any kind had been taken against him under it. The Northern Nigerian High Court dismissed the action and held that, since no rights of the appellant were alleged to have been infringed, a declaration can not be made *in vacuo*. The Court held further that only a person whose rights had been affected by a statute may challenge its constitutional validity and that the person's rights must be directly or immediately threatened. The judgment was affirmed by the Federal Supreme Court.

Similarly, in *Gamioba v Ezezi*,³¹ the plaintiff sought to challenge a certain trust instrument as *ultra vires* and inconsistent with the Nigerian Constitution. Brett FJ, who delivered the judgment of the court citing *Olawoyin v Attorney-General, Northern Nigeria* held that, since the validity of a law is a matter of concern to the public at large, the court had a duty to form its own judgment as to the plaintiff's *locus standi*, and should not assume it merely because the defendant admitted it or did not dispute it. The court held that any person who invokes the judicial power of the court to declare a law or enactment invalid must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with people generally.³²

Also, in *Attorney-General of Bendel State v Attorney-General of the Federation and 22 Others*,³³ the Supreme Court held:³⁴

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

The case of *Senator Adesanya v President of the Federal Republic of Nigeria and Others*³⁵ is widely accepted as a *locus classicus on locus standi* in Nigeria. In that case, Abraham Adesanya, then a serving Senator in the National Assembly, instituted an action against the President of the Federal Republic of Nigeria challenging the appointment of Justice

³¹ (1961) AIINLR 584.

³² Thus, in *A-G Adamawa v A-G Federation* [2005] 18 NWLR (pt 958) 581 608, the Supreme Court held thus: 'It is not enough for a plaintiff to merely state that an Act is illegal or unconstitutional. He must show how his civil rights and obligations are breached or threatened.' See further *Oluokun v Governor of Oyo State* (1984) 3 NCLR 680; *Attorney-General of Eastern Nigeria v A-G Federation* (1964) 2 All NLR 224; *Onyia v Governor in Council & Others* (1962) 2 All NLR 174; *Adegbenro v AGF* (1962) 1 All NLR 432; *Usman Mohammed v Attorney-General of Kaduna State & Another* (1981) 1 NCLR 117.

³³ (1982) 3 NCLR 1.

³⁴ *Per Nnamani JSC* 114; See also *A-G Adamawa v A-G Federation* [2005] 18 NWLR (pt 958) 581 604.

³⁵ (1981) 2 NCLR 358.

Ovie-Whiskey as the Chairperson of the Federal Electoral Commission (FEDECO). The appointment had passed through the process of confirmation by the National Assembly. In the confirmation process, Senator Adesanya objected to the appointment, claiming that it violated certain provisions of the 1979 Constitution, but he was not successful as the Senate confirmed the appointment. He thereafter approached a Lagos High Court seeking a declaration and injunction. In its judgment, the court declared the appointment unconstitutional and held that Justice Ovie-Whiskey was not competent under the Constitution to be appointed a member and Chairperson of FEDECO at the time the appointment was made.

There was an appeal against this decision to the Court of Appeal. At the hearing of the appeal, the President of the Court of Appeal raised the question of whether or not Senator Adesanya had standing to have instituted the action, and he therefore invited both counsel to address the Court on the issue. In its ruling, the Court held that Senator Adesanya had no *locus standi* to have challenged the appointment. Aggrieved by this decision, he appealed to the Supreme Court. The Supreme Court dismissed the appeal and affirmed the judgment of the Court of Appeal on *locus standi*. The Court held further that Senator Adesanya, having participated in the deliberations of Senate in connection with the subject matter over which his views in Senate were not accepted by majority of his fellow Senators before instituting the suit, had no *locus standi* to challenge the constitutionality of the appointment in the court.

The Court conceded the importance and desirability of encouraging citizens to come to court to have the Constitution interpreted. It, however, held that it was a common ground in all the jurisdictions of common law countries that the claimant must have some justifiable interest which may be affected by the action or that he will suffer injury or damage as a result of the action. It emphasised that meddlesome interlopers, professional litigants and the likes should not be encouraged to sue in matters that do not directly concern them. The Court was of the view that to allow that is to open the floodgate to frivolous and vexatious proceedings and that such latitude is capable of creating an undesirable state of affairs.³⁶

³⁶ However, this case has been criticised and described as an obstacle in the enforcement of rights and a negation of a purposive interpretation of the Constitution. A Nigerian jurist, Ademola Adenekan JCA, described the judgment as a negation of purposive interpretation of the Constitutions as is going on in India and Pakistan. He said: 'I can hear a voice saying; but the Supreme Court in Nigeria or the High Court for that matter can perform those feats that have been credited to the courts in India and Pakistan. My view is that the Supreme Court cannot unless it removes an obstacle which it has placed in its own way. In my respectful opinion, it must overrule its decision in *Senator Abraham Adesanya v President of the Federal Republic of Nigeria*.' See A Ademola 'Human rights and national development' in MA Ajomo & B Owasanoye *Individual rights under the 1989 Constitution* (1993) 12 28.

The principle established in Adesanya's case was followed in *Irene Thomas and 5 Others v The Most Reverend Timothy Omotayo Olufosoye*.³⁷ 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. The facts pleaded in the plaintiffs' statement of claim did not, however, disclose that they had an interest in contesting the office of the Bishop of the Diocese. On the contrary, the plaintiffs contested that the process of the appointment of Rev JA Adetiloye contravened some provisions of the Constitution of the Church of Nigeria (Anglican) Communion. The defence, 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* as they did not disclose any legal right or any question as to their civil rights and obligations. According to the court:³⁸

The broad and general principle of law is contained in the old Latin maxim *ubi jus ibi remedium*. *Jus* here signifies the legal authority to do or demand something and *remedium* here means the right of action, or theme as given by law for the recovery or the declaration or assertion of that right. In other words, the maxim presupposes that wherever the law gives a right, it also gives a remedy. Conversely, wherever a plaintiff is claiming a remedy that remedy must be founded on a legal right. Applying the above broad definition of the maxim, the first hurdle for the plaintiffs to clear is to let their statement of claim reflect their legal authority to demand the declaration sought and their right which is likely to be injured and for the protection of which they need the remedy of an injunction.

The question will then arise who or what law invested the plaintiffs with a legal right to defend the Constitution of the Anglican Church in the Diocese of Lagos or does the mere fact that the plaintiffs are 'communicants of the Anglican Communion within the Diocese of Lagos' *ipso facto* and to quote, *mutatis mutandis*, the memorable words of my learned brother, Bello JSC in *Senator Adesanya v President of Nigeria* (1981) 2 NCLR 358 at 384 invest them with the right to play the role of archivists and build a shrine to preserve the sacred provisions of the Constitution of the Anglican Communion? Does it make them Sentries to ward off all those they suspect to be potential transgressors of the Constitution of the Anglican Communion? Does it further enlist them in the army to take up arms against all those they consider to be aggressors of the Constitution of the Anglican Communion? Or, are the plaintiffs merely constituting themselves into 'busybody' to perambulate the Diocese of Lagos suing and prosecuting all those they regard as constitutional (here Constitution of the Anglican Church) offenders? If the plaintiffs are a mere busybody, then they will have no legal right to

³⁷ n 29 above.

³⁸ *Per* Oputa JSC (n 29 above) 689-690.

bring this action. A busybody is a meddlesome person, a mischief-maker such a one has no legal right to do what he is doing ...

However, the Supreme Court took a more relaxed approach on the issue of *locus standi* in its remarkable judgment in *Chief Gani Fawehinmi v Col Halilu Akilu and Another*.³⁹ The decision in this case is rather a bold one in which the Supreme Court adopted a wide and liberal approach to standing, especially during the dark era of military rule in the country. The facts of this case are as follows: In October 1986, Mr Dele Giwa, a journalist and editor-in-chief of a weekly magazine, *Newswatch*, was killed by a parcel bomb in his Ikeja residence. The appellant, Chief Gani Fawehinmi, a friend and a legal adviser to late Dele Giwa, submitted to the Director of Public Prosecutions (DPP), Lagos, a 39-page document containing all the details of the private investigation he had conducted together with information indicting two army officers, Colonel Halilu Akilu, the Director of Military Intelligence, and Lieutenant-Colonel AK Togun, Deputy Director of the State Security Services, of the murder of Dele Giwa.

The appellant requested the DPP to exercise his discretion under section 342 of the Criminal Procedure Law of Lagos state to decide whether or not to prosecute the said army officers and if he declined to prosecute, to endorse a certificate to that effect on the information submitted to enable him as a private prosecutor to prosecute. In November 1986 the appellant met with the DPP, who explained that he could not come to a decision whether or not to prosecute the said army officers until he received the report of the police investigation. Consequent upon this, the appellant filed an application in the High Court of Lagos for leave to apply for an order of *mandamus* to compel the respondent to decide whether or not to prosecute the two officers and if he decided not to prosecute, to endorse the information for private prosecution. The Lagos State High Court, *per* Ademola C Johnson CJ, heard the application for leave and dismissed it on the grounds that the DPP had not refused to perform his duty under section 342 of the Criminal Procedure Law, and that the DPP could not be forced to do so upon the limited materials before him. The Court of Appeal equally dismissed the appeal on the ground that the appellant had no *locus standi* in the death of Dele Giwa to bring the application he brought. It held further that the learned trial Chief Judge was right in refusing appellant's leave sought in the case.

The appellant subsequently appealed to the Supreme Court. In a considered judgment, the Supreme Court allowed the appeal and set aside the lower courts' judgments and granted the order of *mandamus*. The Court held *inter alia* that the appellant, as a person, a Nigerian, a friend and a legal adviser to Dele Giwa, had a personal and private

³⁹ [1987] 4 NWLR (pt 67) 797. See also *Col Halilu Akilu v Chief Gani Fawehinmi (No 2)* [1989] 2 NWLR (pt 102) 122 193.

right under the Criminal Procedure Law to see that a crime was not committed and, if committed, to lay a criminal charge for the offence against anyone committing the offence or in his view whom he reasonable suspected to have committed the offence. The Court held further that the Criminal Code and the Criminal Procedure Law (Lagos) did not by their provisions confine the complainant in respect of the offence of murder to a particular person or class of persons. Any person who has sufficient information in his possession to establish the crime and identify the accused person is entitled to lay the charge. Accordingly the Court, *per* Obaseki JSC, held as follows:⁴⁰

Criminal law is addressed to all classes of society as the rules that they are bound to obey on pain of punishment to ensure order in the society and maintain the peaceful existence of society. The rules are promulgated by the representative of society who form the government or the legislative arm of government for the benefit of the society and the power to arrest and prosecute any person who breaches the rule is also conferred on any person in the society in addition to the Attorney-General and other law officers for the benefits of the society.

The peace of the society in the responsibility of all persons in the country and as far as protection against crime is concerned, every person in the society is each other's keeper. Since we are all brothers in the society, we are our brother's keeper. If we pause a little and cast our minds to the happenings in the world, the rationale for this rule will become apparent.

There have been cases where brother assaults or kills brother, cases where a father assaults or kills his son, where a son kills his father, where a husband kills his wife and where a wife kills her husband. If consanguinity or blood relationship is allowed to be the only qualification for *locus standi*, then crimes such as listed above will go unpunished, may become order of the day and destabilise society. Can it be said that death of Dele Giwa is not as much a sad and bitter loss to his friend, lawyer and confidant as it is to his family? The answer to the first question, therefore, in my view, is in the affirmative, that is that the appellants have *locus standi*.

Kayode Eso JSC made his own contribution on *locus standi* in these words:⁴¹

My Lords, the issue of *locus standi* has always been held as one of the utmost importance, by the court for in effect, it is one that delimits the jurisdiction of the court, for in the interpretation of the Constitution, it is to be hoped that the courts would not possess acquisitive instinct and gather more jurisdiction than has been ascribed to it by the organic law of the land. It is this I think that has inhibited your lordships, and rightly too, in being careful, as your lordships should be, in threading carefully on the soil of *locus standi* ... In this instant appeal before this court, I think, with respect, that the lead judgment of my learned brother Obaseki JSC is an advancement on the position hitherto held in this court on 'locus standi'. I think, again with

⁴⁰ As above. See also G Fawehinmi *Murder of Dele Giwa: The right of a private prosecutor* (1988) 38-39.

⁴¹ Fawehinmi (n 40 above) 40-42. This judgment has been described as representing a new philosophy, that is, that an individual has a role to play in public law. Thus, an individual can vindicate the rights which he is entitled to have protected under public law. See L Atsegbua *Administrative law: An introductory text* (1997) 123.

respect, that it is a departure from the former narrow attitude of this court in the Abraham Adesanya case and subsequent decisions. My humbler view, and this court should accept it as such, is that the present decision of my learned brother, Obaseki JSC, in this appeal has gone beyond the *Abraham Adesanya* case. I am in complete agreement with the new trend, and with respect my agreement with the judgment is my belief that it has gone beyond the *Abraham Adesanya* case.

It is the view of my learned brother Obaseki, which I fully share with respect that 'it is the universal concept that all human beings are brothers and assets to one another'. He applies this to ground *locus standi*! That we are all brothers is more so in the country where the socio-cultural concept [s] of 'family' and 'extended family' transcend all barriers it is not right then for the court to take note of the concept of the loose use of the word 'brother' in this country? 'Brother' in the Nigeria context is completely different from the blood brother of the English Language ... As I have said, I accept our present decision as a happy development and advancement on what, with utmost respect to your Lordships, I have always considered a narrow path being trodden hitherto by this court on *locus standi*.

The liberal approach which the Court adopted in the *Fawehinmi* case constitutes an exception rather than a general rule on *locus standi* in Nigeria. This appears to be a policy decision bordering on crime prevention as opposed to civil matters in which courts have been maintaining a very restrictive view. Apart from the provision of the Criminal Procedure Law (Lagos), which permitted a private prosecutor,⁴² a further reason for this liberal approach could be deduced from the judgment of Obaseki JSC, where he held that the peace of society is the responsibility of all persons in the country and that, as far as protection against crime is concerned, every person in society is each other's keeper. Since we are all brothers in the society, we are our brother's keeper. The Court's liberal approach in this case was therefore based on the above reasoning.

4 Public interest litigation and constitutional interpretation

Public interest litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.⁴³ The fundamental principle of English law is that private rights can be asserted by individuals, but public rights can only be asserted by the Attorney-General as representing the public.⁴⁴ It is the Attorney-General who

⁴² It is interesting to note that, subsequently after this judgment; the Lagos state government through military edict amended the Criminal Procedure Law (Lagos) and removed the power of the private prosecutor.

⁴³ *Janata Dal v HS Chowdhary* AIR 1993 SC 892 (para 51); (1992) 4 SCC 305.

⁴⁴ As above.

could vindicate a public right.⁴⁵ Notwithstanding, however, any person whose legal rights are under threat from public authority has *locus standi* to seek remedies in court. Under Nigerian law, if a public right is under threat, a private person may seek remedies in two cases: first, if some private right of his is interfered with at the same time with public interest;⁴⁶ secondly, if he suffers special damages peculiar to himself from the interference with the public right.⁴⁷

However, in Britain there has been a relaxation on the principle that it is only the Attorney-General who could sue on behalf of the public. Now, every citizen has standing to invite the court to prevent some abuse of power and, in doing so, he may be regarded as a public benefactor rather than a meddling busybody or interloper.⁴⁸ This relaxation is based on the principle that public authorities have many duties of a general character, enforceable by no one unless by the ordinary citizen. The Attorney-General may appear not to concern himself with them and if the private citizen could not do so, then there would be a serious gap in the system of public law.⁴⁹ It is argued that there would be a grave *lacuna* in the public law system if a certain body or pressure group or even a single public-spirited tax payer is prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and to get the unlawful conduct stopped.⁵⁰

Nigerian courts have equally adopted a liberal approach to *locus standi*, especially in cases that concern the validity of legislation *vis-à-vis* the Constitution. There is a plethora of cases in this regard. In *Chief Isiagba v Alagbe and Others*,⁵¹ a Bendel State High Court gave a wider meaning to *locus standi*. In that case, the plaintiff sought in the Benin High Court a declaration that the defendants were members of the Bendel State House of Assembly from different constituencies from those who lost their seats in the Assembly Service Commission established by a law enacted by the Assembly in the exercise of its powers under section 94(5) of the 1979 Constitution.

⁴⁵ See *Gouriet v Union of Post Office Workers* (1978) AC 435.

⁴⁶ A good example is by obstruction of the highway which also obstructs access to his land.

⁴⁷ See *Boyce v Paddington BC* (1930) 1 ch 109; *Ekundare v Governor in Council* (1961) All NLR 149. See also HRW Wade *Administrative law* (1990) 690.

⁴⁸ Thus, in *R v Thames Magistrates' Court ex parte Greenbaum* (1957) 55 LGR 129, Parker LJ said: 'Anybody can apply for it (*certiorari*), a member of the public who has been inconvenienced, or a particular or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary where, however, it is made by a person who has a particular grievance of his own whether as a party or otherwise, then the remedy lies *ex debito justitiae* ...' See *Durayappah v Fernando* (1967) AC 337.

⁴⁹ Wade (n 47 above) 699-700.

⁵⁰ Wade (n 47 above) 704.

⁵¹ [1981] 2 NCLR 424.

The issue of *locus standi* was raised by a way of preliminary objection. The court, *per* Omosun J, held that any Nigerian taxpayer had sufficient interest in the observance of the provisions of the Constitution and consequently had *locus standi*. The court held:⁵²

The plaintiff is a citizen of Nigeria. He has alleged that the defendants have contravened the provisions of the Constitution. It is suggested he has no *locus standi*, that he is a meddlesome litigant and that he has no sufficient interest to enable him to bring the action. His interest cannot be quantified in terms of Naira and Kobo, but certainly like all Nigerians, he would like to see the provisions of the Constitution observed. To adopt the view that he has no sufficient interest would lead to chaos. I cannot contemplate what will happen if violations of the Constitution go unchecked. It means that anyone with impunity can violate the Constitution and no one can say so because his private rights have not been injured.

Similarly, in *Alhaji Adefalu and Others v The Governor of Kwara State and Others*,⁵³ the Kwara State High Court adopted a liberal approach on *locus standi*. In that case, the plaintiffs sought a declaration that the Local Government (Establishment) (Amendment) Law, 1981, was illegal, null and void and of no effect. The learned trial judge, Obayan J, granted the application. Also, in *Attorney-General of Bendel State v Attorney-General of the Federation and Others*,⁵⁴ Obaseki JSC observed as follows:⁵⁵

The Constitution has opened the gates to the courts by its provisions and there can be no justifiable reasons for closing the gates against those who do not want to be governed by a law enacted not in accordance with the provisions of the Constitution.

In *Akinpelu and 2 Others v Attorney-General, Oyo State*,⁵⁶ the plaintiffs for themselves and on behalf of other persons and residents of Akinyele local government area sued the Attorney-General of Oyo State, challenging the validity of a bill to further amend the Local Government Law of Oyo State 1978. Oloko J held that in a case such as this where the plaintiffs were challenging the validity or constitutionality of any enactment in court, they were relieved of showing special interest or *locus standi*. Also, in *Ejeh v Attorney-General of Imo State*,⁵⁷ it was held that any person who is convinced that there is an infraction of the provisions of the Constitution can go to court and ask for appropriate

⁵² 432.

⁵³ [1984] 5 NCLR 766.

⁵⁴ [1982] 3 NCLR 1.

⁵⁵ 88. Similarly, in *Tony Momoh v Senate of The National Assembly & Others* (1981) 1 NCLR 21, the provisions of sec 31 of the Legislative (Powers and Privileges) Act, Cap 102, LFN & Lagos, 1958, which provide that the court's process could not be served within the chambers or precincts of the legislative house while that house is sitting, were held inconsistent with the provisions of sec 42 of the 1979 Constitution and declared void.

⁵⁶ (1984) 5 NCLR 557.

⁵⁷ (1985) 6 NCLR 390.

relief if relief is required. The court held that when the cause of action is intended to keep the law and the constitution of the country serene and inviolate, it is wrong for the defendant to challenge the *locus standi* or capacity of the plaintiff to sue.

Further, in *Hon Godwin S Jideonwo and Others v Governor of Bendel State and Others*,⁵⁸ the Governor of Bendel State on the platform of the Unity Party of Nigeria (UPN) signed into law a bill dissolving and suspending the existing Local Government Councils in the state. The plaintiffs, representing both the Nigeria Peoples' Party (NPP) and National Party of Nigeria (NPN) members in the State House of Assembly, challenged the dissolution as unconstitutional. On the issue of *locus standi* raised by the defendants, Ovie-Whisky CJ held as follows:⁵⁹

If the legislature passes a law which is beyond its competence and which it has no jurisdiction to pass, whether or not it was passed by all members of the House, any member of the House or any member of the public who is affected by the law can challenge the law in court and nothing prevents the court from setting aside and declaring it *ultra vires* the legislature if in fact it is so.

It is important to mention that these cases were not directly involving the enforcement of fundamental rights, but rather dealt with the validity of some other laws within the constitutional context. The position of the court in this regard could not have been different since the Constitution itself proclaims its superiority and declares any law in conflict with it as null and void to the extent of its inconsistency.⁶⁰

5 *Locus standi* and enforcement of fundamental rights

It is asserted that fundamental rights are not to be enjoyed in semantics only or in their mere inclusion in the pages of the Constitution.⁶¹ Rights are meaningless unless there is also provision for access to an independent judiciary for their enforcement. Agbede posits that 'a right is no right if it cannot be vindicated by a prompt appeal to

⁵⁸ (1981) 1 NCLR 4.

⁵⁹ 15. See also *Prince Adeniji-Adele & Others v The Governor of Lagos & Others* (1982) 3 NCLR 698.

⁶⁰ See secs 1(1) & (3) of the 1999 Nigerian Constitution which provide: 'This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria ... 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.'

⁶¹ See MA Ajomo 'The development of individual rights in Nigeria's constitutional history' in MA Ajomo & B Owasanoye *Individual rights under the 1989 Constitution* (1993) 8.

the court'.⁶² It is for this reason that the Constitution confers a special jurisdiction on the High Court with respect to the enforcement of these rights.⁶³ The Constitution provides that any person who alleges that any provision of the chapter on the fundamental rights has been, is being, or is likely to be contravened to seek redress in any High Court, State or Federal.⁶⁴

The procedure for obtaining redress for a contravention or likely contravention of these rights is spelt out by the Fundamental Rights (Enforcement Procedure) Rules.⁶⁵ The Rules make provision for a speedier hearing of human rights cases than other civil cases by the courts. Under these Rules, court cases for the enforcement of human rights go through a two stage process like the process for enforcing prerogative writs. The first stage is an *ex parte* application for leave or permission to bring the proceedings, while the second stage for the substantive application is through motion on notice. In terms of the Rules, an aggrieved person is required to apply *ex parte* to any High Court for leave to apply for an order and, if granted, this should be followed by motion on notice or originating summons asking for a substantive order. The court thereafter has the power to make an appropriate order or relief.⁶⁶ The task of the courts in the adjudication of disputes and controversies concerning entrenched human rights is enormous. It is therefore asserted that the degree of liberty obtainable in any society depends ultimately on the attitude of the courts.⁶⁷

There has been a remarkable development since the Independence Constitution of 1960 in relation to the conferment of special jurisdiction to the courts for the preservation of fundamental rights.⁶⁸ Following

⁶² See IO Agbede 'The rule of law and the preservation of individual rights' in Ajomo & Owasanoye (n 61 above) 42.

⁶³ Ajomo & Owasanoye (n 61 above) 8.

⁶⁴ See sec 46(1) of the 1999 Nigerian Constitution.

⁶⁵ This was made pursuant to the 1979 Constitution by the Chief Justice of Nigeria and came into effect from 1 January 1980. The Rules have been amended and new ones put in place as Fundamental Human Rights (Enforcement Procedure) Rules 2008. See also sec 46(3) of the 1999 Constitution. In terms of the Fundamental Human Rights (Enforcement Procedure) Rules, it is only an issue bothering on ch IV of the Constitution that can be brought under the Rules. Thus, in *WAEC v Akinkunmi* [2008] 9 NWLR (Pt 1091) 154-155, the Nigerian Supreme Court held thus: 'In ascertaining the justiciability or competence of a suit commenced by way of application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, the court must ensure that the enforcement of the fundamental rights under chapter IV of the Constitution is the main claim and not ancillary claim. Where the main or principal claim is not the enforcement of a fundamental right, the jurisdiction of the court cannot be said to be properly invoked, and the action is liable to be struck out on ground of incompetence.'

⁶⁶ Ajomo & Owasanoye (n 61 above) 8.

⁶⁷ As above.

⁶⁸ See sec 31(1) of the 1960 Independence Constitution, sec 32(1) of the 1963 Republican Constitution, sec 42(1) of the 1979 Constitution and sec 46(1) of the 1999 Constitution.

much disputed controversies on the scope and ambit of the jurisdiction of the State High Court and Federal High Court, it is now settled that an infringement of fundamental rights is a matter within the concurrent jurisdiction of both the State High Court and the Federal High Court.⁶⁹

Section 46(1) of the 1999 Constitution provides that '[a]ny 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'. The scope of this section calls for examination herein. The section provides for three closely-knit but distinct sectors or limbs for the enforcement of fundamental rights by an aggrieved person. These are (a) when the fundamental right 'has been' contravened; (b) when the fundamental right 'is being' contravened; and (c) when the fundamental right 'is likely' to be contravened.⁷⁰

In the first category, it is submitted that the words 'has been' (in the past participle) mean that, as far as the aggrieved person is concerned, the act of contravention is completed and therefore he or she has an enforceable grievance.⁷¹ In *Chief Uzoukwu and Others v Ezeonu II, Igwe of Atani and Others*,⁷² the Nigerian Court of Appeal, while dealing with the equivalent provisions in section 42(1) of the 1979 Constitution, held:⁷³

Section 42(1) has three major limbs. The first is that the fundamental right in Chapter 4 has been physically contravened. In other words, the act of contravention is completed and the plaintiff goes to court to seek for a redress.

Of all three sectors, this is the easiest to prove. This is because the act of contravention, being completed, is tangible, and the plaintiff will have less difficulty proving the allegation than in the case of the other two limbs.⁷⁴

In the second category, the words 'is being' are in the present tense. According to the court,⁷⁵

the second limb is that the fundamental right 'is being' contravened. Here, the act of contravention may or may not be completed. But in the case of the latter, there is sufficient overt act on the part of the respondent that the process of contravention is physically in the hands of the respondent and that the act of contravention is in existence substantially.

⁶⁹ See *Senate of the National Assembly & Others v Tony Momoh* [1983] 4 NCLR 269; *Lt Col Combe v Lt Col Madaki* [1984] 5 NCLR 435; *Alhaji Tukur v Government of Gongola State* [1989] 4 NWLR (pt 117) 517.

⁷⁰ See *Chief Uzoukwu & Others v Ezeonu II, Igwe of Atani & Others* [1991] 6 NWLR (pt 200) 708; See also Ajomo & Owasanoye (n 61 above) 55.

⁷¹ Ajomo & Owasanoye (n 61 above) 55.

⁷² n 70 above.

⁷³ 784.

⁷⁴ Ajomo & Owasanoye (n 61 above) 55.

⁷⁵ *Uzoukwu v Ezeonu II* (n 70 above) 784.

It is submitted, however, that it is difficult to draw the factual line in this sector. However, it will be more in line with the intention of the drafters to say that what is anticipated is less of a completed act but more of an uncompleted act.⁷⁶

The third limb, the words 'is likely' convey an anticipatory situation. The provision is futuristic contextually and in content. The plaintiff has cause to think that from the initial conduct of the defendant, his fundamental rights could be in danger of being contravened and he could not therefore afford to wait until he becomes a victim of the conduct of the defendant.⁷⁷ The Court of Appeal interpreted this third sector in *Chief Uzoukwu and Others v Ezeonu II, Igwe of Atani and Others* as follows:⁷⁸

In the third limb, there is likelihood that the respondent will contravene the fundamental rights or rights of the plaintiff ... by the third limb, a plaintiff or applicant need not wait for the last act of contravention. It might be too late to salvage the already damaged condition. Therefore the third limb gives him the power to move to court to seek for redress immediately he senses some move on the part of the respondent to contravene his fundamental rights. But before a plaintiff or applicant invokes the third limb, he must be sure that there are enough acts on the part of the respondent aimed essentially and unequivocally towards the contravention of his right. A mere speculative conduct on the part of the respondent without more, cannot ground an action under the third limb.

This is the most difficult to prove of all the three limbs. The evidence in the court could be mostly speculative and a plaintiff or applicant has a fairly difficult duty to prove to the satisfaction of the court that his fundamental right is likely to be contravened.⁷⁹

The pertinent issue in the article is: Does the provision of section 46(1) of the Constitution confer *locus standi* on any other person or category of persons other than a person whose fundamental right 'has been', 'is being' or 'is likely' to be contravened? Put differently, apart from this category of person or persons, has any other person *locus standi* to bring an action for the enforcement of fundamental rights under section 46(1) of the Constitution?

As explained in the earlier part of the article, it is an established position of law in Nigeria that before a person can invoke the jurisdiction of courts of law, he or she must have 'sufficient interest' in the matter.⁸⁰ The law generally requires a litigant to personally have a direct and material interest in the relief sought. This restrictive approach has had

⁷⁶ Ajomo & Owasanoye (n 61 above) 56.

⁷⁷ As above.

⁷⁸ n 70 above, 784.

⁷⁹ Ajomo & Owasanoye (n 61 above) 57.

⁸⁰ A sufficient interest is not an objective term, it is rather subjective. The question of what constitutes sufficient interest will depend on the circumstances of each case. See *Namibian National Students Organisation v Speaker of the National Assembly of SWA* 1990 1 SA 617 (SWA) 627B-E.

the effect of curtailing the rights of people who might otherwise be entitled to bring an application to court.⁸¹ The concept of *locus standi* has been severally criticised as constituting an artificial barrier between the litigant and the court. It is described as a major constraint on the legal protection and enforcement of human rights in Nigeria in the sense that it limits access to courts.⁸² Before a person can maintain a suit, he or she must disclose his or her personal interest in the matter.⁸³ Obiagwu and Odinkalu assert:⁸⁴

There are two major obstacles posed by the strict interpretation of *locus standi* [in Nigeria]. First, a human rights NGO or an individual activist can not 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.

Agbede submits that 'the court has created an artificial barrier between the litigant and the court by the notion of *locus standi*'.⁸⁵ He questioned its rationale thus:⁸⁶

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 suggests that the concept of *locus standi* should not apply when a statute is being challenged for its unconstitutionality.⁸⁷

However, in most common law jurisdictions, a liberal position on *locus standi* has been adopted.⁸⁸ In this regard, the history of the

⁸¹ See L Seafield 'The interdependence of all human rights' in AA An-Na'im (ed) *Human rights under African constitutions* (2003) 295 305.

⁸² See C Obiagwu & CA Odinkalu 'Combating legacies of colonialism and militarism' in An-Na'im (n 81 above) 211 233.

⁸³ As above.

⁸⁴ As above. See also T Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39 *Journal of African Law* 9; T Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of a law of standing to sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 527.

⁸⁵ Agbede (n 62 above) 42.

⁸⁶ As above.

⁸⁷ Agbede (n 62 above) 43.

⁸⁸ Examples include countries such as Australia and South Africa. See eg sec 38 of the 1996 South African Constitution. See also *Ferreira v Levin* NO 1996 1 SA 984 (CC), where the South African Constitutional Court was called upon to determine whether the applicants had standing to challenge the validity of sec 417(2)(b) of the Companies Act 61 of 1973 on the ground that it was in conflict with sec 25(3) of the interim Constitution (providing for the right to a fair trial). The Court held that a broad approach should be adopted to the issue of standing in constitutional cases. This,

Indian Constitution is relevant in relation for its liberal and innovative approach to *locus standi*. From 1976, the Indian Supreme Court began to pursue a demonstrably more progressive and innovative approach to the question of standing, abandoning the traditional restrictive rule inherited from English jurisprudence. This applies in particular to those persons or class of persons who, as a result of historical and social disadvantage or disability, were incapable of complying with the traditional requirements.⁸⁹ This was a pioneering development in which Bhagwati CJ played a decisive, imaginative and perceptive role.⁹⁰

According to Saharay:⁹¹

It is well established that where a legal wrong or a legal injury is caused to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reason of poverty, helplessness of disability or socially or economically disadvantageous position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art[icle] 226 of the Constitution of India, and in case of breach of any fundamental right of such person or determinate class of persons, in the Supreme Court under Art[icle] 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

Even in England, where the Nigerian common law position on *locus standi* originated, courts have abandoned the restrictive approach and embraced a liberal interpretation of the concept. In England, new rules were introduced in 1977 for applications for review against public bodies. In terms of these rules, application for judicial review has to undergo two stages. First, an applicant had to seek leave to apply for judicial review. If leave is granted, the application would be heard. Before the court could allow an applicant leave to apply for judicial review, it has to be satisfied that he or she has *locus standi* to challenge the exercise of public power. The court will find that an applicant has

according to the Court, would be consistent with the mandate given to it to uphold the Constitution and would serve to ensure that constitutional rights enjoyed the full measure of the protection to which they were entitled (paras 162-164). It was further held that the constitutional provision 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 threatened. The constitutional challenge could be brought by anyone and the Court would decide what constituted sufficient interest in the circumstances (para 168). A similar position was adopted in *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N).

⁸⁹ See *SP Gupta v Union of India* (1982) 2 SCR 365 520.

⁹⁰ See Devenish (n 9 above) 50; see also C Loots 'Standing to enforce fundamental rights' (1994) 10 *South African Journal on Human Rights* 50.

⁹¹ HK Saharay *The Constitution of India: An analytical approach* (2002) 339.

standing if it is satisfied that the applicant has a 'sufficient interest' in the matter.⁹²

Interpreting the words 'sufficient interest' in the Rules in *Inland Revenue Commissioners v National Federation of Self-employed and Small Business (Ltd)*,⁹³ the court held that an applicant for judicial review did not need to have a direct legal or financial interest. However, a mere busybody would not have sufficient interest. According to Lord Wilberforce,⁹⁴

[i]t 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 tax payer was 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 ...

Writing on standing rules under English law, Lord Denning stated:⁹⁵

The tendency in the past was to limit to persons who had particular grievance of their own over and above the rest of the public. But in recent years there has been a remarkable series of cases in which private persons have come to the court and have been heard. There is now a much wider concept of *locus standi* when complaint is made against a public authority. It extends to anyone who is not a mere busy body but is coming to court on behalf of the public at large.

An important factor to be taken into account when considering the issue of standing is the merits of the challenge. The applicant may not necessarily have a personal interest in the dispute.⁹⁶ Other significant factors the court will consider are the importance of vindicating the rule of law, the importance of the issues raised, the likely absence of any other responsible challenger and the nature of the breach of duty against which the relief is sought.⁹⁷

Another country that emulates this liberal approach is Canada. In *Minister of Justice of Canada v Borowski*,⁹⁸ it was held:⁹⁹

To establish status as a plaintiff in a suit seeking a declaration ... a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the court.

⁹² See Order 53 r 3(5) of the Rules of Supreme Court 1977 (UK); sec 31(3) of the Supreme Court Act 1981 (UK).

⁹³ [1982] AC 617.

⁹⁴ 644.

⁹⁵ See Lord Denning MR *The discipline of law* (1979) 117. See also *R v COP of the Metropolis, ex parte Blackburn* (1968) 2 QB 118.

⁹⁶ See *R v Secretary of State for Foreign and Commonwealth Affairs; ex parte World Development Movement Ltd* [1995] WLR 386.

⁹⁷ See Ngcukaitobi (n 24 above) 599.

⁹⁸ (1982) 130 DLR (3d) 588.

⁹⁹ 606. See also *Finlay v Minister of Finance of Canada* (1986) 146 DLR (3d) 704.

Thus, the Canadian courts will grant standing to a plaintiff who establishes that (i) the action raises a serious legal question; (ii) the plaintiff has a genuine interest in the resolution of the question; and (iii) there is no other reasonable and effective manner in which the question may be brought before the court.¹⁰⁰

Section 38 of the Constitution of the Republic of South Africa, 1996, represents such a liberal and modern approach on *locus standi*. The section provides for the category of persons that has the right or standing to challenge a breach of rights in chapter 2 of the Constitution. It provides:

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.

The above provision is very wide compared to the common law restrictive position which only allows a person to approach a court of law if he or she has sufficient, direct and personal interest in the matter. As expected, courts have given this provision the wide and liberal interpretation it deserves.

In *Ferreira v Levin NO*,¹⁰¹ the South African Constitutional Court held that a broad approach should be adopted on the issue of standing in constitutional cases. According to the Court, this would be consistent with the mandate given to it to uphold the Constitution and would serve to ensure that the constitutional rights enjoyed the full measure of the protection to which they were entitled. The Court further held that the constitutional provision 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 threatened.¹⁰² The Court stated further that the constitutional challenge could be brought by anyone and the Court would decide what constituted sufficient interest in the circumstances.¹⁰³

¹⁰⁰ See Devenish (n 9 above) 46; Ngcukaitobi (n 24 above) 596-597.

¹⁰¹ n 88 above.

¹⁰² Paras 162-164 1082.

¹⁰³ Para 168 1084; also, in *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others* 2002 6 SA 66 (T) para 27, the court held that a voluntary association was entitled to bring a dispute on behalf of residents who 'are mostly indigent and are unable to individually pursue their claims because of that fact'. See also *Permanent Secretary, Department of Welfare, Eastern Cape & Another v Ngxuzza & Others* 2001 4 SA 1184 (SCA); *Lawyers for Human Rights & Another v Minister of Home Affairs* 2004 4 SA 125 (CC) paras 15 & 17; *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N).

The cumulative effect of section 38 of the South African Constitution is that any person or organisation is empowered to enforce rights encapsulated in the Bill of Rights, irrespective of whether that person or organisation is prejudicially affected by circumstances that allegedly give rise to an infringement of such rights.¹⁰⁴ This constitutes a significant reform and a meaningful adaptation of the common law position on standing.

Advocating a liberal approach on standing in *R v Greater London Council, ex parte Blackburn*,¹⁰⁵ Lord Denning held as follows:¹⁰⁶

I regard it as a matter of high constitutional principle that if there is a good reason 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 anyone 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.

This liberal approach, the learned counsel for the appellants in *Olufosoye's* case, Mr HA Lardner, SAN, commended very strongly to the court, but the court rejected his submission. In rejecting the submission, the court, *per* Obaseki JSC, who delivered the lead judgment, said:¹⁰⁷

This court does not make law. Its function is to administer and interpret the law. As the law stands, there is no room for the adoption of the modern views on *locus standi* being followed by England and Australia. The adoption of those views in England has found support in the statute law of England.

The restrictive approach on *locus standi* was further affirmed by the Supreme Court in *Josiah K Owodunni and Others v Registered Trustees of Celestial Church of Christ, Nigeria Diocese*.¹⁰⁸ The Court affirmed the position in *Olawoyin*,¹⁰⁹ and held:¹¹⁰

I think the interest or injury test applied by the Federal Supreme Court in *Olawoyin v A-G of Northern Region (supra)* should remain the yardstick in determining the question of *locus standi* of a complainant and this is to be determined in the light of the facts or special circumstances of each case. I do not think that test is affected by section 6(6)(b) of the Constitution.

As the law stands now in Nigeria, in order to have standing to commence an action (including the enforcement of fundamental rights), the plaintiff must have a sufficient interest in the matter. The term 'sufficient interest' is broad and generic. It is not an objective term;

¹⁰⁴ See Vrancken & Killander (n 20 above) 257; Devenish (n 9 above) 48.

¹⁰⁵ [1976] 1 WLR 550.

¹⁰⁶ 559.

¹⁰⁷ 680-681; (1986) 2 SC 325, *per* Obaseki JSC 352-353.

¹⁰⁸ (2000) 1 WRN (Vol 2) 29.

¹⁰⁹ n 30 above.

¹¹⁰ *Per* Ogundare JSC, 50; see *Adediran v Interland Transport Ltd* (1991) 2 NWLR (Pt 214) 155.

it is rather subjective.¹¹¹ The term is vague and nebulous, and lacks a precise and apt legal meaning. It has to be determined in relation to the facts and circumstances of each case.¹¹² Over the years, however, Nigerian courts have examined the ambit of the expression 'sufficient interest'.¹¹³ Sufficient interest is described as an interest which is peculiar to the plaintiff and not an interest which he shares in common with members of the general public.¹¹⁴ If a person will be affected or aggrieved or is likely to be affected or aggrieved by the outcome of a court proceeding, he would be held as having a sufficient interest and he will be accorded *locus standi*.¹¹⁵

6 The roles of the judiciary, politicians and civil society in ensuring a flexible interpretation of standing rules

On the enforcement of fundamental rights, the Nigerian Constitution still adopts a narrow approach which invariably limits the category of person that can approach the court on the issue. The phrase 'in relation to him' as appears in section 46 of the 1999 Constitution is said to be too restrictive. This phrase equally appeared in section 42(1) of the 1979 Constitution. The limiting effect of this phrase has since been discovered and the phrase was recommended for review in preparation for the 1989 Constitution.¹¹⁶ Thus, towards giving the country a new Constitution in 1989, a Constituent Assembly was inaugurated by the then President of the Country, General Ibrahim Babangida, on 11 May 1988. The Assembly was saddled with the responsibility of amending the 1979 Constitution and preparing a more acceptable Constitution for the country. Its Committee 6 on Fundamental Rights dealing with clause 44(1) of the Review Constitution (same with section 46(1) of the 1999 Constitution) recommended the following amendment:¹¹⁷

Any person who alleges that any of the provisions of this Chapter [Chapter IV on Fundamental Rights] has been, is being or is likely to be contravened

¹¹¹ See *Namibian National Students Organisation v Speaker of the National Assembly of SWA* (n 80 above).

¹¹² *Ajomo & Owasanoye* (n 61 above) 57.

¹¹³ See *Hon Justice Ovie-Whisky v Chief Olawoyin* [1985] 6 NCLR 156; *Prince Maradesa v Military Governor of Oyo State* [1986] 3 NWLR (pt 27) 125.

¹¹⁴ See *Mohammed v Attorney-General, Kaduna State* (1981) 1 NCLR 117.

¹¹⁵ See *Chief O Emeka Ojukwu v Governor of Lagos State & Others* [1985] 2 NWLR (pt10) 806; *Arch-Bishop Anthony Olubunmi Okogie v Attorney-general Lagos State* [1981] 1 NCLR 218.

¹¹⁶ This Constitution never came into operation due to the aborted transition of power to civilians by the military government of General Ibrahim Babangida.

¹¹⁷ See the Report of the Constituent Assembly, Vol II (1989) 154. See also N Tobi *Under-standing the 1989 Constitution better* (1992) 3-7.

in any State or in the Federal Capital Territory Abuja may apply to a High Court having jurisdiction in that area for redress.

In presenting the Report of the Committee to the Assembly, the Chairperson of the Committee¹¹⁸ said:¹¹⁹

Section 44 tells us that a person is now free to defend the right of another person even when he suspects that somebody is going to contravene any of the provisions of Chapter IV that is any of the provisions which came under the examination of the Committee 6. It was stated in the Review Constitution that it authorises the person to fight for himself. We have removed 'himself' making the provision a general one so that any Nigerian citizen could fight for the right of any other citizens if he feels that citizens' rights have been contravened.

However, the Constituent Assembly did not see its way clear in adopting the amendment recommended by Committee 6 and so dropped it.¹²⁰

Though a restrictive interpretation of standing rules is not without its advantages, however, the global trend now is towards a broad and expansive interpretation of standing.¹²¹ A liberalised *locus standi* position has the important advantage of facilitating greater access to justice. It also encourages and promotes the practice in which interested individuals and organisations can approach the court for enforcement of fundamental rights on behalf of the less privileged and disadvantaged in society.¹²² Although the courts have inherent power to invite *amicus curiae*¹²³ in a matter of constitutional importance and public interest,

¹¹⁸ Dr JE Henshaw.

¹¹⁹ See Report of the Constituent Assembly (n 117 above) 148.

¹²⁰ See Ajomo & Owasanoye (n 61 above) 60.

¹²¹ Hogg, eg, explains that restrictions on standing are intended to accomplish six main objectives, namely, (i) to avoid opening the floodgates to unnecessary litigation; (ii) to ration scarce resources by applying them to real rather than hypothetical disputes; (iii) to place limits on the exercise of judicial power by precluding rulings that are not needed to resolve disputes; (iv) to avoid the risk of prejudice to persons who would be affected by the decision but are not before the court; (v) to avoid the risk that the case will be inadequately presented by parties who have no real interest in the outcome; and (vi) to avoid the risk that a court will reach an unwise decision of a question that comes before it in a hypothetical or abstract form, lacking the factual context of a real dispute. See P Hogg *Constitutional law of Canada* (1992) 1263.

¹²² Nigerian human rights activists have contended that *locus standi* constitutes an impediment to the enforcement of human rights by the NGOs on behalf of the citizens. See Obiagwu & Odinkalu (n 82 above) 233.

¹²³ The phrase *amicus curiae* means friend of the court. It is employed to refer to a barrister who represents a party to an action at the request of the court. In the Nigerian context, the term is used to refer to a person with a strong knowledge or views on the subject matter of an action, who the court invites to file briefs (as friend of the court or in order to furnish the court with his knowledge) in the suit concerning matters of broad public interest.

however, it is submitted that a liberalised view of standing will further promote its use under Nigerian law.¹²⁴

The present position on standing in Nigeria is anachronistically restrictive. There is a need for a drastic revision of this position to facilitate meaningful and pro-active enforcement of fundamental rights in the country. Thus, in the interest of the realisation of the importance of human rights, this narrow position has to change. The reason why this change is of seminal importance is that Nigeria is a developing state in which a large number of citizens are illiterate and living in abject poverty. Many people in the country whose fundamental rights are violated may not be in a position to approach the court for relief. For instance, they may be emotionally and intellectually unsophisticated or indigent and, in effect, they may be unable to enforce their fundamental rights. A regime of liberal standing will indeed permit any person, human rights activists or non-governmental organisations (NGOs) to approach the court on behalf of all those persons.¹²⁵

Unlike the South African constitutional provisions on *locus standi*, the scope of section 46(1) of the Nigerian Constitution is narrow. Under the South African Constitution, the categories of persons that can approach the court include persons acting in their own interest, persons acting on behalf of another person, persons acting as a member of a group or class of persons, persons acting in the public interest and associations acting in the interest of their members.¹²⁶ The provision allowing persons to act in the public interest under this Constitution is wide and this will facilitate the adequate enforcement of fundamental rights. This wide provision is recommended for Nigeria. An amendment of section 46 of the Constitution may be required to accommodate this liberal approach. One hopes that the current National Assembly Subcommittee on Justice will take up the call for a liberal provision on *locus standi* as recommended by Dr James Henshaw's Committee 6 of the 1988 Nigerian Constituent Assembly.¹²⁷ Fortunately enough, moves are now on in the National Assembly for the review or amendment of the 1999 Nigerian Constitution and this will afford the opportunity for such a liberal provision. The Nigerian Bar Association and the Attorney-

¹²⁴ Access to justice will obviously be facilitated if *amici curiae* are permitted to place before the courts (not until when invited) arguments on matters of constitutional importance by representative organisations which are not parties to the action. See also Devenish (n 9 above) 50.

¹²⁵ It is observed that the present regime in the enforcement of fundamental human rights does not countenance representative action. It, however, behoves human rights activists or NGOs to obtain the consent or instructions of the victims of human rights violations to institute actions in the victim's name. It is submitted that this is sometimes practically impossible where the victim is held incommunicado, and there is nobody who can give the requisite instructions on his or her behalf. See AN Nwazuoke *Introduction to human rights law* (2006) 186-187.

¹²⁶ See sec 38 of the South African Constitution.

¹²⁷ See the Report of the Constituent Assembly (n 117 above) 148.

General of the Federation may have to play a leading role in this respect. However, before such amendment is carried out, the bulk of the work rests on the judiciary to accommodate a liberal position on *locus standi* through a purposive and expansive interpretation of section 46 of the Constitution.

7 Constraints on the enforcement of human rights

Not all the rights provided for under the Nigerian Constitution are absolute. Rights are inconceivable without some limitations. Thus, any right or freedom has its limitations and the beneficiaries also, at times, have special responsibilities. One major deficiency in the Bill of Rights in chapter 4 of the Constitution is that the chapter contains several claw-backs or grounds for derogation. Section 45 of the 1999 Nigerian Constitution provides circumstances under which the state could restrict the rights to private and family life, freedom of thought, conscience and religion, expression and the press, peaceful assembly, association and movement. These rights may be derogated by 'any law that is reasonably justifiable in a democratic society for the interest of defence, public safety, public order, morality, or public health; or for the purpose of protecting rights and freedom of other persons'.¹²⁸

Also, the right to life and personal liberty can be lawfully restricted in a period of emergency or war.¹²⁹ The right to life can be limited for reasons of defence of persons and properties; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained or for suppression of a riot, insurrection or mutiny.¹³⁰ The right to personal liberty may similarly be limited for the purpose of securing an individual's extradition or alien repatriation, or for effecting a person's arrest on suspicion of having committed a capital offence.¹³¹

In terms of section 46(4) of the Constitution, the National Assembly is required to make law to provide for financial assistance to any indigent citizen whose fundamental rights are violated, with a view to enabling him or her to engage the services of a legal practitioner. However, no such law has been made and no effective legal aid programme exists in Nigeria. The existing legal aid scheme is deficient and limited in scope. Initially, the Legal Aid Act provided legal assistance in respect of capital offences and serious criminal cases.¹³² It has, however, been amended to cover 'cases involving the infringement of fundamental

¹²⁸ See secs 45(1)(a) & (b) of the Constitution.

¹²⁹ See sec 45(2) of the Constitution.

¹³⁰ See sec 33(2) of the Constitution.

¹³¹ See secs 35(1)(c) & (f) of the Constitution.

¹³² See Legal Aid Act 1976, Cap 205, LFN 1990.

human rights under the Constitution'.¹³³ Nonetheless, the Legal Aid Council is mandated by law to provide legal representation to indigent persons. The definition of 'indigent' under the Act is unrealistic in that it excludes many Nigerians below the poverty line who are genuinely unable to afford legal services.¹³⁴ It is submitted that the Legal Aid Act does not adequately fulfil the intention of section 46(4) of the Constitution. Also, the Council is grossly under-funded and lacks the required personnel complement to fulfil the demands placed upon it under the Act and the Constitution.¹³⁵

Apart from standing rules, other constraints on the protection and enforcement of fundamental rights in Nigeria include deficiencies in the substantive provisions of the Bill of Rights and other laws as well as inadequate procedural rules for the enforcement of rights.¹³⁶ The non-justiciability of economic, social and cultural rights in chapter II of the 1999 Nigerian Constitution is one example of such deficiencies.¹³⁷ The provisions of these rights are important in the enjoyment of civil and political rights. In a country with a predominantly poor population such as Nigeria, these rights are fundamental to the well-being of the average person and for the effective enjoyment of other rights in the Constitution.¹³⁸ Other constraints include the complexity, technicalities and high expense involved in bringing action for the enforcement of rights. Other procedural requirements, such as pre-action notices, limitation periods and ouster clauses, have the effect of limiting access to court for the enforcement of rights. Court congestion and a delay in trial, which now characterise the Nigerian judicial system, also constitute formidable constraints on the enforcement of rights in the country. Other enduring impediments to the enforcement of human rights in Nigeria are executive lawlessness and a failure to obey court orders. In some instances, judicial summonses and court orders have been ignored with impunity.¹³⁹ For the proper enforcement of fundamental rights in Nigeria, we recommend that there should be concerted efforts targeted at removing the constraints and obstacles identified above. In addition, a culture of constitutionality and respect for the rule of law is also essential.

¹³³ See UA Hassan Baba 'Report on the Operation of the Legal Aid Council of the Federal Republic of Nigeria' presented to the Annual General Conference of the Nigerian Bar Association, Abuja, 21-25 August 2000 6.

¹³⁴ See Obiagwu & Odinkalu (n 82 above) 225.

¹³⁵ It is admitted that the Council does not have enough lawyers to provide a responsive customer service. See Hassan Baba (n 133 above) 13.

¹³⁶ See Obiagwu & Odinkalu (n 82 above) 230.

¹³⁷ See n 2 above.

¹³⁸ See Obiagwu & Odinkalu (n 82 above) 230.

¹³⁹ See *Ojukwu v Governor of Lagos State* [1986] 5 NWLR (pt 18) 15.

8 Conclusion

This article explores the scope of standing rules in section 46 of the 1999 Nigerian Constitution. It is observed that the section contains a restrictive and narrow provision on *locus standi*. The article found that this narrow provision has the effect of limiting access to court and it invariably constitutes an impediment or constraint on the enforcement of fundamental human rights in the country. Many common law countries, such as England, Australia, Canada, India and South Africa, have jettisoned this anachronistic position on standing for a more liberal and expansive interpretation. On the contrary, the Nigerian Constitution still maintains restrictive and outdated rules of standing. This, however, is inconceivable at a time like this when other common law jurisdictions are enthusiastically adopting a liberal approach to the concept.

Since the paramount object of any law (including the Constitution) is to promote fairness and social justice, the article therefore advocates a more flexible interpretation of standing rules in Nigeria. The Nigerian judiciary has a significant role to play in this regard. While it is accepted that the constitutional provisions are limited in this regard and needing review, it is, nevertheless, submitted that the Nigerian judiciary should, through judicial activism, relax the restrictive rules of standing by giving section 46 of the Constitution a more expansive and purposive interpretation. This liberal interpretation will accommodate a larger category of persons in the enforcement of fundamental rights.