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Liberalization of the Rule on Locus Standi before Nigerian Courts: Lessons from India

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Abstract

In *Nworika v Ononeze-Madu*, the Nigerian Supreme Court upheld the decision of the lower court, denying the appellant standing to challenge the decision of the Imo State government. This highlighted the position of Nigerian courts on the rule of locus standi, which denies access to justice for many Nigerians who seek a court order to declare a law unconstitutional or to challenge the actions of the government or its agencies. This article examines the context of the application of the rule of locus standi before Nigerian courts and argues that the decision of the Supreme Court in *Adesanya v President of Nigeria*, which is the classic authority on the strict rule of locus standi in Nigeria, is outdated in the context of contemporary human rights development and that Nigerian courts can learn from the Indian courts that have discarded the strict application of the rule of locus standi through judicial activism.

Keywords

Locus standi, judicial activism, human rights, access to justice

INTRODUCTION

"Locus standi" is a Latin phrase, meaning the right or legal competence to challenge an act in court.[1] Traditionally, it implies that, to sue successfully

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1 See: Z Adangor "Locus standi: In constitutional cases in Nigeria - is the shift from conservatism to liberalism real?" (2018) 12/1 *The Journal of Jurisprudence, International Law and Contemporary Issues* 73 at 77; GF Michael and AV Raja "Effectiveness of environmental public interest litigation in India: Determining the key variables" (2010) 21/2 *Fordham Environmental Law Journal* 239 at 250–51; and A Wilson "Impact of unrestricted locus standi on access to justice" (2011), available at: <http://www.kenyaplex.com/resources/2039-impact of-unrestricted locus-standi-on-access-to-justice.aspx> (last accessed 15 December 2021).

in the public interest, seek a court order to declare a law unconstitutional or challenge the actions of the government or its agencies, an applicant must possess sufficient interest in the matter.[2] In most cases, the Nigerian courts apply the principle of locus standi strictly, as seen in the recent case of *Nworika v Ononeze-Madu and Others* (*Nworika*),[3] decided by the Nigerian Supreme Court on 25 January 2019. Nigerian courts grant standing to a person who demonstrates a personal interest in the matter or a person who is affected directly by the violation.[4] This restrictive viewpoint of locus standi limits the role played by non-governmental organizations (NGOs), human rights activists and advocates with regard to litigating socio-economic matters that affect the poor.[5] Public-spirited individuals and NGOs often have the resources and expertise to litigate issues that affect the poor but are denied the standing to sue on such issues,[6] thereby denying the poor access to justice. This contrasts remarkably with India, where locus standi has been liberalized through judicial activism. This article examines the application of the rule of locus standi before Nigerian courts in light of the recent decision of the Supreme Court to deny the applicant standing in *Nworika*. The article also draws lessons from the Indian courts that have rejected the strict application of the rule of locus standi through judicial activism.

LOCUS STANDI BEFORE NIGERIAN COURTS

The principle of locus standi has generated many problems in various jurisdictions.[7] While some jurisdictions have abandoned the strict interpretation of this principle and adopted a liberal approach to its application, Nigerian courts have mostly continued to apply it narrowly and strictly. In other words, locus standi is a condition that must be satisfied to enable the trial court to assume jurisdiction to entertain a matter brought before it by a plaintiff.

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2 Adangor, ibid.

3 [2019] SC 307/2008.

4 D Olowu *An Integrative Right-Based Approach to Human Development in Africa* (2009, Pretoria University Law Press) at 175.

5 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 5/13, 2009) at 4. See also D Juma "Access to the African Court on Human Peoples' Rights: A case of the poacher turned gamekeeper" (2007) 4/2 *Essex Human Rights Review* 1 at 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) 6 *European Human Rights Law Review* 686 at 687.

6 N Themudo "NGOs and resources: Getting a closer grip on a complex area" (2000) 5 *Documentos de Discusion Sobre el Tercer Sector* 5 at 7. See also J Beqiraj "The delicate equilibrium of EU trade measures: The Seals case" (2013) 14/1 *German Law Journal* 279 at 289.

7 EA Taiwo "Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision" (2009) 9/2 *African Human Rights Law Journal* 546 at 549.

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Nigerian courts have laid down two tests to decide who has standing to sue. One is that the subject matter must be justiciable, while the second is that there must be a disagreement among the parties.[8] If the traditional view on locus standi is followed to its logical conclusion, it could deny access to justice for many applicants; the trend now is for a shift away from a strict, narrow interpretation of locus standi because of the problems that poses.[9] Interestingly, the Nigerian courts have attempted to liberalize locus standi through the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREPR 2009), promulgated by the then chief justice of Nigeria, Idris Legbo Kutigi CJN (as he then was). This is pursuant to section 46(3) of the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution), which empowers Nigeria's chief justice to make rules concerning the practice and procedure for the enforcement of human rights in Nigeria. The FREPR 2009 outlines the process for enforcing fundamental human rights before Nigerian courts. Paragraph 3 of the preamble sets out the overriding objectives of the rules, with paragraph 3(a) urging the court to apply and interpret chapter IV of the 1999 Constitution as well as the African Charter "with the view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them". In paragraph 3(d) of the preamble, the FREPR 2009 also urges the courts to "pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented".

Paragraph 3(e)of the FREPR 2009 made a provision for the liberal application of the rule of locus standi as one of its overriding objectives. The rule states:

> "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."

The FREPR 2009 was made to address the injustice created by its predecessor, the FREPR 1979, and to simplify the procedure for the enforcement of rights in Nigeria. The FREPR 2009 was construed to liberalize the strict application of

8 See *Pacers Multi-Dynamics Ltd v The MV Dancing Sister* SC 283/2001 13; and *AG Federation v AG The 36 States of Nigeria* (2001) 9 SCM 45 at 59.

9 Y Ademola *Constitutional Law in Nigeria* (2003, Demyaxs Law) at 447.

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the rule of locus standi before Nigerian courts only in respect of public interest litigation in the human rights field and not in cases where government action is being challenged, as can be seen in *Nworika*. The FREPR 2009 possesses the same force of law as the Nigerian Constitution itself and supersedes the provisions of any other enactment that seeks to provide an alternative.[10] However, the FREPR 2009 cannot override the provisions of the constitution.[11] One of the tests that Nigerian courts have laid down to decide who has standing to sue, is that the subject matter must be justiciable.[12] It will seem that the provisions under paragraph 3(e) of the FREPR 2009 will conflict with section 6 (6)(c) of the 1999 Constitution[13] whenever an applicant seeks to challenge the actions of the government. It has been shown by some court decisions that public interest litigation against unconstitutional government actions is hindered by the provisions of section 6(6)(c) of the 1999 Constitution, as amended.

In *AG Ondo State v AG Federation*, the Supreme Court held, inter alia, that "courts cannot enforce any of the provisions of Chapter II of the Constitution except [sic] the National Assembly has enacted specific laws for their enforcement".[14] According to the Supreme Court in this case, chapter II of the 1999 Constitution (which provides guidance as to the constitutional policy of governance) continues to be a mere expression, "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".[15] This, however, means that public interest litigation against illegal or unconstitutional government actions may not be sustained in Nigerian courts, because the applicant will lack locus standi, since one of the tests set out by the courts for locus standi is that the subject matter must be justiciable.

In *Nworika*, the Supreme Court upheld the decision of the lower court denying the appellant standing to challenge the decision of the Imo State government to appoint the first respondent, a magistrate, to the position of chief magistrate of Imo State, claiming that the first respondent perpetrated fraud to obtain the appointment under false pretences. The Supreme Court agreed with the respondent, who relied on *Abraham Adesanya v the President of the Federal Republic of Nigeria* (*Adesanya*)[16] and argued that section 17 of the 1999 Constitution is not justiciable and that the appellant had not shown how

10 See *Abia State University Uturu v Chima Anyaibe* (1996) 1 NWLR (pt 439) at 660–61.

11 See 1999 Constitution, sec 1(1) and (3).

12 See *Pacers Multi-Dynamics v Dancing Sister*, above at note 8.

13 Sec 6(6)(c) 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."

14 (2002) 9 NWLR (pt 772) at 222.

15 Ibid.

16 (1981) 1 All NLR 1.

his rights under sections 36(1), 38 and 42 of the constitution had been or would be impacted negatively if the respondent were appointed a judge of the High Court of Imo State.

The Nigerian courts' persistence in viewing locus standi limits the role that NGOs, human rights activists and advocates can play with regard to litigating matters that affect the poor. Public-spirited individuals and NGOs often have the resources and expertise to litigate issues that affect the poor, but are denied the standing to sue. This contrasts remarkably with the situation in India where the courts have adapted a liberal and broad view of the rule of locus standi despite provisions in section 37 of the Indian Constitution that are similar to section 6(6)(c) of the 1999 Constitution.

THE ORIGIN OF THE RESTRICTIVE APPLICATION OF THE RULE OF LOCUS STANDI BEFORE NIGERIAN COURTS

As stated above, the concept of locus standi is the set of rules that decide whether a person is a proper person to commence legal action. Locus standi has its roots in common law as developed in England,[17] to ensure, inter alia, that courts fulfil their proper function of protecting the rule of law.[18] It is one of the concepts of English common law that was integrated into Nigerian law during colonial rule in Nigeria.[19] Traditionally, the model of adjudication is party-driven, which clearly identifies the plaintiff as the initiator of legal proceedings. Additionally, it is assumed that the plaintiff will have suffered injury, which eventually triggers the legal claim, and that he will benefit directly from the outcome of the litigation. It follows that public interest litigation (litigation that volunteers such as lawyers, activists, NGOs or private citizens commence on behalf the poor who have no means or access to legal services) will be unsuccessful because the litigant will lack the standing to commence such action.

The first case that tested the concept of locus standi in Nigeria was *Olawoyin v AG Northern Region* (*Olawoyin*).[20] In this case, the applicant sought a declaration that, "Part VIII of the Children and Young Persons Law 1958 has been rendered void and unenforceable by the provisions of sections 7, 8 and 9 of the Sixth Schedule" of the Nigeria (Constitution) Order in Council, and that "directions be issued in accordance with section 245(1) of the Nigeria (Constitution) Order in Council to all Nigeria [sic] Police Officers" and all courts in the region that those provisions of the Children and Young Persons Law should no longer be enforced. Part VIII of the Children and

17 See *Gouriet v Union of Post Office Workers and Others* [1977] 3 All ER 70 (HL).

18 RK Salman and FJ Oniekoro "Death of locus standi and the rebirth of public interest litigation in the enforcement of human rights in Nigeria: Fundamental Rights (Enforcement Procedure) Rules 2009 in focus" (2015) 23/1 *IIUM Law Journal* 107 at 120.

19 Taiwo "Enforcement of fundamental rights", above at note 7 at 552.

20 (1961) 1 NSCC 165.

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Young Persons Law banned political activities by children and recommended penalties for children and others who contravened its provisions. The applicant maintained that he wished to educate his children politically and that, if the law were enforced, there would be a risk of their rights being violated. The Federal Supreme Court held that only a person whose rights had been affected or directly or immediately threatened by a statute may challenge its constitutional validity.

Likewise, in *Gamioba v Ezezi*, the applicant challenged a trust instrument as being inconsistent with the 1999 Constitution. Brett FJ, who delivered the court's judgment said, "where the plaintiff claims a declaration that a law is invalid, the court should be satisfied that the plaintiff's legal rights have been, or are in imminent danger of being, invaded in consequence of the law".[21] While referring to *Olawoyin*, Brett FJ further said, "the court has a duty to form its own Judgment as to the plaintiff's locus standi, and should not assume it merely because the defendant admits it or does not dispute it".[22] The court held that the plaintiff's locus standi in the case was not disclosed and, if he has none, his claim must be dismissed on that ground.

Adesanya[23] is widely regarded as the classical authority on the restrictive interpretation of the rule of locus standi in Nigeria, setting out the Supreme Court's understanding of section 6(6)(b) of the 1979 Constitution of Nigeria (1979 Constitution). The president of the Federal Republic of Nigeria and Justice Ovie-Whiskey, chief judge of Bendel State, were the first and second defendants respectively. The first defendant appointed the second defendant as the Federal Electoral Commission's chairman and sent that appointment to the Senate for confirmation. The Senate confirmed the appointment, but the applicant disagreed with the confirmation of the appointment, on the ground that it breached section 143(2) of the 1979 Constitution, which requires that anyone to be appointed to that office must not be employed in the country's public service. The second defendant was a chief judge of a state and, at that time, still in the public service of the Federation; as a result, the applicant approached the High Court seeking the nullification of the second defendant's appointment. The High Court ruled in the applicant's favour. However, the defendants appealed to the Court of Appeal, challenging the applicant's locus standi, and received judgment in their favour. The applicant further appealed to the Supreme Court, which upheld the Court of Appeal's judgment.

A significant ruling in *Adesanya* is Justice Mohammed Bello's judgment that interpreted section 6(6)(b) of the 1979 Constitution into the restrictive principle on locus standi. He held:

21 (1961) All NLR 548 at 584.
22 Ibid.
23 Above at note 16.

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> "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."[24]

This judgment has been accepted as a binding precedent by the courts that have applied it in most judgments made since *Adesanya*.[25]

A critical analysis of *Adesanya* reveals that the judges were not unanimous in ruling that section 6(6)(b) of the 1979 Constitution laid a test for locus standi in Nigeria. Fatayi Williams CJN (as he then was) disagreed with Bello on this point. He said:

> "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."[26]

Justices Nnamani and Idigbe aligned with Justice Bello, who interpreted section 6(6)(b) of the 1979 Constitution into the restrictive principle on locus standi. Justices Sowemimo and Obaseki were on the side of Fatayi Williams CJN. Justice Uwais would have resolved the deadlock but he took the view that the interpretation of section 6(6)(b) will depend on the specific situation of each case and that no hard and fast rule should be established.[27]

In *AG Kaduna State v Hassan*, Oputa JSC (as he then was) realized this lack of agreement in *Adesanya* when he said, "[i]t is on the issue of *locus standi*ng 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".[28] Interestingly, most subsequent court decisions did not consider this contention observed by Oputa JSC. However, in what looks like a lone opinion, Ayoola JCA (as he then was) stated in *FATB v Ezegbu*:

> "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

24 Id at 82.
25 O Ilofulunwa "Locus standi in Nigeria: An impediment to justice", available at: <http://lexprimus.com/Publications/Locus%20standi%20in%20Nigeria.pdf> (last accessed 15 December 2021).
26 See *Adesanya*, above at note 16 at 9.
27 Ibid.
28 (1985) 2 NWLR (pt 8) 483 at 521.

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> 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."[29]

Ayoola seems to be alone in this position, because other subsequent cases did not follow it.

However, some years later, Ayoola properly put section 6(6)(b) of the 1979 Constitution into perspective when he held in *NNPC v Fawehinmi* that:

> "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 [sic] questions ranging from *locus standi* to the most uncontroversial questions of jurisdiction."[30]

Ayoola's pronouncement appropriately captures the effect of section 6(6)(b) of the 1979 Constitution and nothing more. Section 6(6)(b) is not proposed to be an index for determining locus standi.

The Nigerian courts continued to maintain their position of applying locus standi strictly, despite Ayoola's viewpoint on section 6(6)(b). *Keyamo v House of Assembly, Lagos State*[31] is one example. Keyamo challenged the Lagos House of Assembly's panel's right to investigate the governor for allegations of forgery as unconstitutional. The High Court ruled that the plaintiff lacked locus standi to institute the action. The Court of Appeal upheld the ruling of the Lagos High Court. The Court of Appeal, per Galadima JCA, held:

> "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 … The appellant has simply not disclosed his interest in this suit."[32]

In a suit filed by SERAP and five other NGOs in 2010, *SERAP and Others v Nigeria*,[33] the plaintiffs sought an order compelling the Central Bank of Nigeria and the attorney general of the Federation to make public the details of the expenditure of a huge amount of money between 1988 and 1994. Additionally, they asked the court for an order to compel the defendants to prosecute anyone who was involved in mismanaging the "$12.4 billion oil

29 (1994) 9 NWLR 149 at 236.
30 (1998) 7 NWLR (pt 559) 598 at 612.
31 (2000) 12 NWCR 196.
32 Id at 196.
33 FHC/ABJ/CS/640/10 (unreported).

windfall". Finally, the plaintiffs also sought an order directing the defendants to make available sufficient compensation for those Nigerian citizens who had been deprived of their fundamental rights as a result of the defendant's inability to guarantee transparency and accountability while spending the "$12.4 billion oil windfall" between 1988 and 1994. The defendants challenged the plaintiffs' standing to sue. In the High Court ruling, Justice Gabriel Kolawole held that the plaintiffs did not have the standing to bring the action.

In another case decided in 2012, *Femi Falana v National Assembly*,[34] the Nigerian courts again stopped the applicant from challenging the actions of the government. In that case, Falana challenged the powers of federal lawmakers to grant huge and scandalous salaries and allowances to themselves.[35] Falana sought from the Federal High Court a declaration that members of the National Assembly were not permitted to receive the salaries and allowances they allotted to themselves, over and above those fixed for them by the Revenue Mobilization and Fiscal Allocation Commission, whose function is to decide and fix the salary and wages suitable for political office holders, as well as National Assembly members.[36] The National Assembly challenged the applicant's standing to question the salaries of the lawmakers. Justice Ibrahim Auta of the Federal High Court ruled in favour of the respondents and held that the applicant lacked the locus standi to make the application, based on the authority of *Adesanya*.

The court took the same view in *Joseph Ebah v Nigeria*,[37] when it ruled that the applicant lacked the standing to institute his suit. In this case, the applicant sought an order preventing the Nigerian government from implementing the provisions of Same Sex Marriage (Prohibition) Act 2013, in particular sections 1, 2, 3, 4 and 5. Furthermore, the applicant asked the court to declare the act unconstitutional, null and void. In his opinion, the provisions of the act violated the fundamental rights of Nigerian citizens enshrined under section 37 and 40 of the 1999 Constitution (as amended) and articles 6 and 10(1) of the African Charter on Human and Peoples' Rights. The applicant was based in the UK and not a homosexual, but made his application in the interests of justice for the gay community in Nigeria.

In these cases, as well as in *Nworika*, to deny the applicants standing to sue, the court relied on the judgment in *Adesanya*, which is outdated in view of contemporary human rights development. The Supreme Court's interpretation of section 6(6)(b) of the 1979 Constitution in *Adesanya* to mean a

34 Unreported. See: "Court says Falana has no right to challenge lawmakers' jumbo pay" (23 May 2012) *Channels Television*, available at: <https://www.channelstv.com/2012/05/23/court-says-falana-has-no-right-to-challenge-lawmakers-jumbo-pay/> (last accessed 4 January 2022).

35 Ibid.

36 1999 Constitution, sec 70 provides that a "member of the Senate or of the House of Representatives shall receive such salary and other allowances as [sic] Revenue Mobilisation Allocation and Fiscal Commission may determine".

37 Suit no FHC/ABJ/CS/197/2014 (unreported).

restrictive principle on locus standi, was not unanimous: three justices (Sowemimo, Obaseki and Williams) out of seven had different opinions. This shows that section 6(6)(b) does not provide clearly for a restrictive rule on locus standi.

The Supreme Court ruled in *Nworika* that section 17 of chapter II of the 1999 Constitution is not justiciable. It is believed that public interest litigation against unconstitutional laws and government actions is hindered by the provisions of section 6(6)(c) of the 1999 Constitution, which states:

> "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 of 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."

It thus 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 Nigerian 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.[38] In *AG Ondo State v AG Federation* (*AG Ondo State*), the Supreme Court held, inter alia, that "courts cannot enforce any of the provisions of Chapter II of the Constitution except [sic] the National Assembly has enacted specific laws for their enforcement".[39] According to the Supreme Court in *AG Ondo State*, chapter II of the Nigerian Constitution (which provides guidance as to the constitutional policy of governance) continues to be a mere expression, "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".[40] The court also held that the contents of chapter II could be made justiciable by legislation. This, however, means that public interest litigation against illegal government actions or unconstitutional laws may not be sustained in the Nigerian courts, because the applicant will lack the locus standi to do so, since one of the tests set by the courts for locus standi is that the subject matter must be justiciable.

It is therefore obvious that chapter II is non-justiciable. However, there are ways in 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-justiciable. Thus, in *Federal Republic of Nigeria v Aneche and Three Others*, Justice Niki Tobi observed:

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38 GN Okeke and C Okeke "The justiciability of the non-justiciable constitution policy of governance in Nigeria" (2013) 7/6 *IOSR Journal of Humanities and Social Science* 9 at 9.

39 (2002) 9 NWLR (pt 772) at 222.

40 Ibid.

> "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." [41]

In *Bamidele Aturu v Minister of Petroleum Resources and Others*, the court observed:

> "By enacting the Price Control Act and the Petroleum Act and providing in section 4 and 6 of those Acts, 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." [42]

Clearly, section 6(6)(c) made chapter II non-justiciable, except as otherwise provided by the constitution itself. The act of the government appointing judges is provided under sections 270–84 of the 1999 Constitution, making that act of government justiciable in accordance with the provisions of section 6(6)(c). However, the Supreme Court has continued to rely on its archaic precedent in *Adesanya*. Can the judiciary go the way of judicial activism? What lessons can be learned from India?

LESSONS FROM INDIA

The idea of judicial activism has been described as a philosophy under which courts do not restrict themselves to judicious readings of law. Under this philosophy, courts interpret the Indian Constitution to reflect modern-day situations and ethics, especially where it is necessary to reform the law if the current law seems flawed.[43] Others see judicial activism as the inclination of judges to move away from preceding decisions, thus abandoning the doctrine of *stare decisis* [that requires courts to follow previous court decisions in later cases of a similar nature]. Meanwhile others see judicial decisions that nullified legislation as judicial activism.[44] Judicial activism can therefore be employed to move away from precedents that have become obsolete in view of contemporary developments.

41 (2004) I SCM P 36 at 78.

42 Suit no FHC/ABJ/CS/591/09 at 132.

43 EK Quansah and CM Fombad "Judicial activism in Africa: Possible defence against authoritarian resurgence?", available at: <http://www.ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf> (last accessed 15 December 2021).

44 I Imam "Rethinking judicial activism ideology: The Nigerian experience of the extent and limits of legislative-judicial interactions" (2014) 4 *International Journal of African and Asian Studies* 99 at 101.

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Judicial activism has shaped the legal system of some jurisdictions, such as India. The Indian courts applied the rule of locus standi strictly until the 1980s.[45] They regarded a person challenging government action as a total stranger (a "meddlesome interloper") and would not ordinarily entertain his petition.[46] Through judicial activism, the Indian courts have abandoned the strict application of locus standi and the complex procedural process that impeded access to the courts. Although article 32 of the Indian Constitution 1950 liberalized the rule on locus standi only for cases involving the violation of fundamental rights, the courts in India have, through judicial activism, liberalized the rule on locus standi in cases of public interest litigation: cases seeking a court order to declare a law unconstitutional or to challenge the actions of the government and its agencies.

Activists and lawyers pursued public interest cases in India to correct injustices and remedy the failure of government and its institutions,[47] and the Supreme Court of India has supported them in the area of easy access to the courts and justice. For example, in 1985 a lawyer named MC Mehta filed a series of public interest litigation cases in the Supreme Court of India.[48] These cases were later deemed to be landmarks in the history of public interest litigation in India[49] and opened the way for judicial intervention in governance in India.[50] The remarkable feature of public interest litigation in India is its liberalization of the traditional rule of locus standi. In a decision that has been welcomed as "a charter of public interest litigation",[51] the Supreme Court of India articulated the rule of locus standi as follows:

> "If such person or determinate class of persons is by reason of poverty, helplessness or disability or [sic] socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ … seeking judicial redress for the legal wrong or injury."[52]

45 A Bhuwania "Courting the people: Public interest litigation in post-emergency India" (2014) 34/2 *Comparative Studies of South Asia, Africa and the Middle East* 318.

46 See *JM Desai v Roshan Kumar* AIR 1976 SC 578.

47 RK Salman and OO Ayankogbe "Denial of access to justice in public interest litigation in Nigeria: Need to learn from Indian judiciary" (2011) 53/4 *Journal of the Indian Law Institute* 598 at 614.

48 See *MC Mehta v Union of India and Others*, writ petition (civil) 3727 of 1985; *MC Mehta v Union of India and Others*, writ petition (civil) 4677 of 1985; and *MC Mehta v State of Tamil Nadu and Others* (1996) 6 SCC 756.

49 A Bhuwania *Courting the People: Public Interest Litigation in Post-Emergency India* (2017, Cambridge University Press) at 50.

50 Ibid.

51 *Janta Dal v HS Chowdhary* (1992) supp 1 SCR 226, paras 95–96.

52 Ibid.

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Similar to the Nigerian Constitution, the Indian Constitution also includes "directive principles of state policy",[53] which are not enforceable in Indian courts.[54] Thus, Bhagwati J observed that these principles are at the core of public interest litigation and that they motivated judges to become social activists.[55] This is evident in a number of Indian cases. For example, in *Indira Ghandi v Rajnarain*, the court declared as void a planned constitutional amendment that would bar the judiciary from determining the validity of disputed elections.[56] Similarly, the Indian Supreme Court held in *Maharaj Singh v Uttar Pradesh* that, where there is an offence against the public interest, locus standi will not impede an individual from pursuing the offender in court.[57] Thus the court has described its position in public interest litigation actions as follows: "[t]he court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for the organisation of the proceedings, moulding of the relief and supervising the implementation".[58]

Furthermore, in *Bandhua Mukti Morcha v Union of India*, the Supreme Court stated that the courts are now confronted with the poor's problems, which are different from those that the courts had been facing, hence there is the need to change the judicial approach: "[w]e have therefore to abandon the *laissez faire* approach in the judicial process, and forge new tools, devise new methods and adopt new strategies".[59]

In *Hussainara Khatoon v State of Bihar*,[60] a huge number of men, women and children were in prison, awaiting trial. Some of the alleged offences were trivial, such that a conviction would not merit a sentence of more than few months, or a year or two, and yet they remained incarcerated, denied their freedom, for as much as ten years without trial. A newspaper *The Indian Express* commenced a series of articles that uncovered the dilemma of these victims in the state of Bihar and an advocate filed a plea in the interest of the prisoners, bringing to the court's notice the horrendous plight of these prisoners. The Supreme Court acknowledged that the advocate had standing to institute the petition. In its subsequent pronouncement, the court ordered that the right to a speedy trial was considered an important part of safeguarding life and personal liberty.

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53 See Indian Constitution, secs 36–51.

54 See id, sec 37, which states: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

55 PN Bhagwati "Judicial activism and public interest litigation" (1985) 23 *Columbia Journal of Transnational Law* 556 at 569–70.

56 AIR 1975 SC 2299.

57 AIR 1976 SC 2602 at 2609.

58 See *Sheela Barse v Union of India* (1982) 2 SCR 35, para 12.

59 (1997) 2 SCR 67, para 40.

60 AIR 1979 SC 1377.

In *Upendra Baxi (Dr) v State of Uttar Pradesh*,[61] two renowned law professors at Delhi University filed petitions in the Supreme Court seeking enforcement of the constitutional rights of inmates living in a protective home under cruel and undignified conditions in violation of article 21 of the Indian Constitution. The professors also pointed out various abuses of the law, including a long wait for a court trial, the use of children for homosexual purposes, trafficking of women, and the non-payment of salaries and wages to labourers. The Supreme Court granted the professors locus standi to represent the people who were poor and suffering, and issued directions and orders that significantly improved the conditions of these people.

Thus the Indian Supreme Court has been vigorously involved in administrative and regulatory matters by issuing specified orders in public interest litigation. For example, the court granted standing to a professor who challenged the improper implementation of constitutional provisions.[62] Another professor was also granted standing to challenge the appointment of lecturers without the recommended qualifications, on the basis of "genuine" interest in the standard of education.[63] And an advocate of the Indian Supreme Court was granted standing to file a petition seeking an order to prevent Delhi University from re-employing retired teachers and paying them both a pension and salary.[64]

Accordingly, the previously rigid rule on locus standi was relaxed in order to provide ordinary people with the opportunity to engage the legal system in the public interest. In effect, the judicial response to the cases brought in the public interest was because of the prevailing severe poverty and underdevelopment resulting from government misadministration and exploitation. The Supreme Court saw itself as having an obligation to provide access to justice for the common people and to promote public interest litigation. This demands that the government's unconstitutional actions and violations of constitutional or legal rights of the poor should not go unaddressed. This was achieved because the court adopted inventive methods and developed new approaches to fill the vacuum in existing legislation.

JUDICIAL ACTIVISM AS A PANACEA TO LIBERALIZING LOCUS STANDI BEFORE NIGERIAN COURTS

The Nigerian legislature has missed several opportunities (in drafting the 1999 Constitution and amending it in 2011) to liberalize locus standi in the Nigerian Constitution. Until the 1999 Constitution is amended to liberalize the principle, the only leeway will be through judicial activism. In Nigeria, the legality of the concept of judicial activism can be traced to the

61 1983 2 SCC 308.
62 See *C Wadhera v State of Bihar* AIR 1987 SC 579.
63 See *Meera Massy v SR Malhotra* AIR 1998 SC 1153.
64 Ibid.

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constitutional provisions in section 6(6)(a), which provides that the judicial powers conferred on the courts shall extend "to all inherent powers and sanctions of a Court of law". The court further affirmed this in *Okolo v Union Bank Ltd*, when it said that a court's jurisdiction is "the main pillar upon which the validity of any decision of any Court stands and around which other issues relates [sic]".[65] The doctrine of judicial precedent, *stare decisis*, requires courts to follow and be guided by their own past and established decisions when dealing with a similar case, to ensure certainty, permanency, fairness and consistency in judicial decisions. However, the court may not follow a mistaken decision, which is erroneous or null. Judicial activism resulting from the departure from *stare decisis* is justified in the words of Aderemi JSC in *Dapianlong v Dariye*:

> "We are infallible because we are final, but we are final because we are infallible. Let it be said that as we are all mortals, infallibility can never be our virtue. From time to time, as human beings, we must make mistakes, but let those mistakes be genuine and honest, let them be seen to reflect the limit of our human knowledge."[66]

Evidently, a court can depart from a precedent that is erroneous or null. In *Alao v ACB Ltd*, the applicant sought an order to set aside *ex debito justitiae* [on account of justice] the judgment of the Supreme Court, delivered on 27 February 1998 dismissing his appeal against the judgment of the Court of Appeal dated 16 May 1994.[67] The Supreme Court noted that it could reconsider its judgment so as to correct any clerical mistake or error that occurred from an accidental slip or omission. The Supreme Court took a similar decision in *Olorunfemi and Others v Asho*.[68]

In these cases, the courts have shown their desire to depart from precedent if the judgment is erroneous. Some Nigerian judges have started to show their willingness to depart from the classic authority of *Adesanya*, which can be seen in some judges' opinions and judgments,[69] as well as in the fact that the chief justice was willing to liberalize the principle of locus standi in the FREPR 2009 in cases involving human rights violations. This could be a starting point for Nigerian judges to begin to liberalize the principle of locus standi through judicial activism.

65 (2004) 1 SC (pt I), para 22.
66 (2007) SC 39/2007, para 18.
67 (2000) 9 NWLR (pt 672) 264.
68 (1999) 1 SC 55.
69 See *Bamidele Aturu*, above at note 42. See also *Governor of Ekiti State v Fakiyesi* [2010] All FWLR (pt 501) 828; *Gani Fawehinmi v President of the Federal Republic of Nigeria* [2007] 14 NWLR (pt 1054) 275; *Gani Fawehinmi v Akilu* [1987] 4 NWLR (pt 67) 797.

CONCLUSION

Public interest litigation is an important constituent of administrative justice and human rights enforcement. However, the restrictive application of the rule of locus standi has placed constraints upon the use of public interest litigation in Nigeria; the development of locus standi in Nigeria has been in a weak position after years of military rule and the wrong conception of *Adesanya*. The court's current view is archaic, has inhibited public interest litigation and has constrained access to justice for a long time. It is clear that the present view of the locus standi principle in Nigerian courts is not necessarily attached to the text of the Nigerian Constitution and there are opportunities for the courts to steer away from the strict, narrow view of the rule of locus standi through judicial activism. Although the FREPR has liberalized the rule on locus standi, that is limited to public interest litigation concerning the violation of the fundamental human rights protected under the Nigerian Constitution. It is time for a relaxation of the principle that it is only the attorney-general who can 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. The courts may, through judicial activism, as the Indian courts have done, begin to liberalize the rule of locus standi to reflect modern-day practice.

CONFLICTS OF INTEREST

None

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