DENIAL OF ACCESS TO JUSTICE IN PUBLIC INTEREST LITIGATION IN NIGERIA: NEED TO LEARN FROM INDIAN JUDICIARY*

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Abstract

The reasoning and conclusion in *Olawoyin's* case which was adopted in *Adesanya's* case about forty years ago has continued to be the catalyst which denied access to justice in Nigeria within the realm of both private and public law. Such denial of access to justice in public law makes it difficult to challenge unconstitutional actions and inactions of the executive or legislative recklessness in Nigeria. It is against this backdrop that this work attempts to examine the rule of *locus standi* and public law interest in Nigeria with a view to showing that there is a need for Nigerian judiciary to move completely from the old narrow interpretation of the concept of *locus standi* in the determination of public interest litigations. This work is divided into three parts. The first part analyses the foundation and basis of *locus standi vis-a-vis* models available for access to justice in public interest litigation within both the common law and civil law jurisdictions. Part two critiques the practice and adaptation of narrow interpretation of *locus standi* in PIL cases by Nigerian courts while the third part discusses the Indian judiciary pragmatic adaptation and effective use of *locus stand*i in PIL cases by the Indian judiciary. The work, however, concludes with optimism that if Nigerian judiciary could take a leaf from Indian judiciary's broad interpretation of *locus standi* in PIL cases, access to justice will be enhanced and most unconstitutional actions or inactions of the government in Nigeria will be reduced to the barest minimum.

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I Introduction

USUALLY, STATUTES and rules of courts provide different ways by which real and potential litigants can vindicate their legal rights within the parameters of the legal systems. This is, however, subject to the resource constraints of the litigants and the societies where they belong. Undoubtedly, access to justice involves being able to access the courts, access legal representation of one's choice as well as access to judicial remedies. It also involves the rights of ordinary citizens to challenge administrative decisions affecting their legal rights, their access to legislative reforms through lobbying and the observance of the procedural requirement of *audi alteram partem.*[1] In order to solve problem related to access to justice, the contribution of many agencies are necessary. Such agencies include legal aid council, local communities, non-governmental organisations and most importantly, the judiciary.[2]

Within the legal system, enhancing access to justice is to the benefit of the general public, especially the poor and the vulnerable. The purpose is not just to enhance access to justice, but also to prepare a level playing ground for all as well as equal access to justice by all and sundry.[3] Although equal access to justice is paramount, however, it is recognised that absolute equality is unlikely to be achieved in any society due to factors like scarce resources and the need to achieve efficient allocation of such scarce resources.[4] The foundation of access to justice arose from a reaction against legal formalism and dogmatism[5] to a greater recognition of the complexity of human society.[6] The thrust of such reaction is aptly summarised by Cappellatti thus:[7]

> In the access to justice approach, the principal elements at the people (with all their cultural, economic and social peculiarities), the institutions, and process represent the elements from which law originates, lives and evolves. Moreover, the legal system is not seen as inseparable and integrative part of the more complex social system, a part of which cannot be artificially isolated from economic, ethics and politics.

1. Gary K.Y. Chan, "The Rights of Access to Justice: Judicial Discourse in Singapore and Malaysia" 2(1) *Asian J Comp L 1* (2007).

2. *Ibid*.

3. Ross Cranston, *How Law Works: The Machinery and Impact of Civil Justice* 36 (OUP, 2006).

4. Deborah L. Rhode, *Access to Justice* 20 (Oxford University Press, 2004).

5. See Mauro Cappellatti, "Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform" 109 *SALJ 23* (1992).

6. *Id*. at 25.

7. *Ibid*.

Many legal systems, particularly in common law and civil law jurisdictions, accord litigants access to courts to the extent that such litigants have acquired special or peculiar interest in the claim or that they have suffered or will suffer from the act to be impugned. This is commonly referred to as *locus standi* or standing to sue. This essay examines the Nigerian judiciary's attitude towards the principle of *locus standi*. It particularly considers the trends of interpretations given to *locus standi* (and indeed public interest litigation, PIL) in the last five decades with a view to assessing whether or not such interpretation is in line with modern trends in some jurisdictions whose interpretation of *locus standi* has been proactive and progressive. Therefore, the work is divided into three parts. Part I deals with historical conception of *locus standi*/ PIL. The examination of the practice of *locus standi* in Nigeria through case law is the focus of part 2 while part 3 analyses the adopted liberal interpretation of *locus standi* in India with a view to drawing references and lessons. The last segment is the conclusion and recommendations for Nigerian judiciary.

II Legal models for *locus standi* and public interest litigation

In the social sciences, a *model* is a simplified, often graphical, representation of the essential process of a particular variable or institution at a given point in time.[8] Legal scholars frequently use models to describe the functions and processes of the legal system. In this sense, a legal model deliberately captures the most essential components of the legal system in an attempt to account for the majority of outcomes. Most researches that deal with legal models, however, fail to explicitly recognize their purposes and inherent limitations. Understanding the following basic qualities of legal models is critical in interpreting and applying them correctly. First, a legal model is a *simplified* description of the legal system.[9] It deliberately attempts to capture the essential features of a system while excluding its insignificant features,[10] thereby helping scholars to understand the most important system outcomes. Second, a legal model *generalizes* the fundamental components of the legal

8. Chris H. Miller, "The Adaptive American Judiciary: From Classical Adjudication Class Action Litigation" 72 *Albany LR* 118 (2009).

9. David E. Van Zandt, "Introduction: The Relevance of Social Theory to Legal Theory" 83 *New Wale Uni LR* 10 (1989).

10. *Ibid.*

system.[11] In other words, legal models do not attempt to precisely describe the underlying process of every case in the system; rather, they explain how the system generally works, in most cases. Again, its fundamental purpose is *parsimony*—or the ability to describe a phenomenon economically.[12] Third, legal models are generally quiet *stable.* Their qualities of simplification and generalization beg the question of when a traditional model[13] insufficiently describes the essence of the legal system and merits the construction of a new model. Although identifying and reconstructing models is largely a subjective process, legal scholars generally favour longevity until a model clearly fails to account for important qualities and outcomes.[14] This requires scholars to carefully determine when the legal system has breached a recognizable threshold of change and avoid revolutionizing every minor or isolated system change. Fourthly, legal models can be either *descriptive* or *prescriptive.* The two models discussed in this paper are descriptive in nature, or attempt to objectively describe the most essential features of the legal system, regardless of whether the author views them positively or negatively. Prescriptive models, on the other hand, represent what a particular author believes the legal system *should* look like, in order to maximize benefits and minimize costs.[15] Even descriptive models, however, are only useful to the extent that they allow us to fully understand the advantages and disadvantages of a particular manner of legal procedures and suggest mechanisms for improvement. Indeed, nearly all legal models have normative underpinnings and their authors frequently articulate normative reactions and prescriptive suggestions to those models.[16]

In summary, a successful legal model illuminates the most essential features of the legal system and enables researchers to identify its strengths and weaknesses and suggest reforms to improve its quality. Scholars should, however, maintain awareness that the inherent properties of legal models prevent them from describing every feature and case of the system and should proceed with an adequate degree of attentiveness to particular

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11. *Id*. at 26-7.

12. "Parsimony" is defined as "the scientific principle that things are usually connected or behave in the simplest or most economical ways..." See Elizabeth J. Jewell & Frank Abate (Eds.), *The New Oxford American Dictionary* 1245 (New York, 2001).

13. *Supra* note 9 at 23.

14. See generally Frank B. Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance" 92 *New Wale Uni LR* 255-64 (1997).

15. Christine Jolls, Cass R. Sunstein & Richard Thaler, "A Behavioural Approach to Law and Economics" 50 *Stanford LR* 522 (1998).

16. Gregory C. Sisk, "The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making" 93 *Cornell LR* 894 (2008).

nuances and exceptional features. As Rubenstein notes:[17]

> A legal model is no doubt both under-drawn and overdrawn. It is under-drawn because it is just a sketch that needs further elucidation, application, and refinement. It is overdrawn because it is meant to be a model, crass, reductive, simplistic, but nonetheless recognizable. Surely all litigation has aspects of adjudication, management, and deal making. None of these models is clean, nor ever entirely explanatory or perfectly predictive of judicial behaviour. Yet, each model focuses our thinking and re-orients our imagination. All models are, 'of course, human creations, and thus, are not meant perfectly to reflect the real world, but rather to invite conversation and to appeal to the reader in a search for understanding.

Traditional model and *locus standi*

Beginning with Lon Fuller and Abram Chayes, legal scholars frequently describe legal system according to several prominent models. They also account for important changes by revising inherited models to more accurately reflect contemporary features of the legal system and provide an adequate framework for understanding and describing legal issues and processes. In 1978, *Harvard Law Review* posthumously published Lon Fuller's seminal article entitled "The Forms and Limits of Adjudication",[18] which is the standard text used by legal professionals to describe the traditional model of many legal systems. Fuller defines the traditional legal process as 'a process of decision that grants to the affected party a form of participation that consists of the opportunity to present proofs and reasoned arguments.'[19] His conception of traditional adjudication explicitly includes five essential elements: (1) an accuser, (2) an accused, (3) an adjudicator, (4) a legal charge, and (5) a principle condemning the alleged crime.[20]

According to this model, legal parties have clearly defined roles and participate in a dispute over a well-defined private issue.[21] Subsequently,

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17. William B. Rubenstein, "A Transactional Model of Adjudication" 89 *Georgian LJ* 437 (2001) quoting Andrew K. McThenia and Thomas L. Shaffer, "For Reconciliation" 94 *Yale LJ 1663 (*1985).

18. Lon L. Fuller, "The Forms and Limits of Adjudication" 92 *Harvard LR* 353 (1978).

19. *Id.* at 369.

20. *Id.* at 365.

21. Abram Chayes, "The Role of the Judge in Public Law Litigation" 89 *Harv LR* 1288 (1976).

several prominent scholars have commented and expanded on Fuller's conception and have contributed to the understanding of the traditional legal model. For example, Chayes describes the traditional model as follows: 'In our received tradition, the lawsuit is a vehicle for settling disputes between private parties about private rights.'[22] In summary, the traditional legal model has a unique feature. It essentially describes a party driven adjudicative process characterized by reasoned argumentation and reliance on common law precedence. As we shall see, however, this model eventually became obsolete following its inability to satisfactorily respond to new challenges and issues.

Traditional model, in its peculiar feature of party-driven, clearly identifies the plaintiff/claimant as the initiator of legal proceeding. It further assumes that such plaintiff would have suffered injury or anticipates injury which ultimately precipitate legal claim. In other words, such party is directly connected with certain injury and will benefit from the outcome of the litigation. That is, he must have *locus standi* to proceed with such claim. *Locus standi* or the law of standing is the set of rules which determine whether a person who initiates legal proceeding is a proper person to do so. *Locus standi* has its root in common law which was developed in England. The doctrine of *locus standi* has been argued to have developed in the first place, under both English[23] and Roman-Dutch law, to ensure that courts play their proper function of protecting rule of law among others.[24]

It has been contended, again, that doctrine of *locus standi* was developed, in a way, to prevent the floodgates from opening, where 'every Tom and Dick or busybodies, cranks and other mischief makers'[25] could take up any case and bring it before the court regardless of their interest in the matter or the outcome.[26] In a sense, the doctrine of *locus standi*

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22. *Id.* at 1282.

23. See *Gouriet* v. *Union of Post Office Workers* [1977] 3 All ER 70 (HL) (except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach of law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage to him.) This position is reiterated recently by the House of Lords in *X* v. *Dorset County Council* and *other Appeals* [1995] 3 All ER 353.

24. Tumai Murombo, "Strengthening Locus Standi in Public Environmental Litigation: Has Leadership Moved From the United States to South Africa?" 6(2) *LEDJ* 167 (2010).

25. *R* v. *Inland Revenue Commissioners:* Ex *parte National Federation of Self-Employed and Small Business Ltd.* [1982] AC 617.

26. *Wildlife Society of Southern Africa* v. *Minister of Environmental Affairs and Tourism of the Republic of South Africa,* 1996 (3) SA 1095.

was intended to save the gate of judiciary from being flooded. Most importantly, the doctrine was born out of the focus of private law litigation on the protection and vindication of private interest or rights. O' Regan J correctly brings this to focus when he observes that: 'existing common law rule of *locus standi* have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past event.'[27] This point, it has been canvassed, played a significant role in the highly individualized conceptions of civil liberties and human rights in the United States of America.[28] The same approach also bedevilled public law litigation in the United Kingdom, the birth place of the common law, and thus of the common law rule of *locus standi.*[29]

The doctrine of *locus standi,* in most private law litigations, flourished in almost all jurisdictions. For example, in many jurisdictions, neighbourhood disputes are regarded as property dispute; with result that parties enjoying *locus standi* are limited to those with sufficient interest in land.[30] In common law jurisdictions, the tort of private nuisance maintains close historical links with land and the protection of interest therein. In the leading case of *Malone* v. *Laskey,*[31] it was held that no principle of law can be formulated 'to the effect that a person who has no interest in property, can maintain an action in nuisance' in respect of neighbouring land uses. Thus, the principle of *locus standi* assumes that for any person to maintain action of nuisance in land (which in most cases concerns environmental disputes) such person must have interest *(locus standi)* in the property, otherwise he cannot maintain any action. Hence, the tort of private nuisance is available only to the complainant who has interest in the land. This principle has been reaffirmed in the case of *Hunter* v. *Canary Wharf*[32] by the House of Lords.

However, with the emergence of science and technology, adoption and ratification of international human rights instruments by many

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27. *Vryenhoek* v. *Powell,* 1996 (1) SA 984 para 229.

28. *Supra* note 24 at 168.

29. J.K. Bentil, "General Resources to the Courts for Environmental Protection Purposes and the Problem of Legal Standing: A Comparative Study and Appraisal" 11 *Anglo-American LR* 295 (1982).

30. Mark Wilde, "Locus Standi in Environmental Torts and the Potential Influence of Human Rights Jurisdiction" 12(3) *RECIEL* 284 (2003).

31. [1907] 2 KB 141, per Sir Gorell Barness at 151.

32. [1997] 2 All ER 426.

nations, inclusion of bill of rights in states constitutions as well as global economy, which started in early twentieth century, many supposed private law arenas gave way to public law. Consequently, litigations in public law took centre stage at the expense of private law litigations. Such litigations call for the interpretation of statutes, query activities of national and multinational corporations and question the actions and inactions of the government and its agencies. Apparently, the doctrine of *locus standi* seems to become a great obstacle to such litigations, albeit public law litigation, especially when parties are not "directly affected" by the act impugned and benefit of the suit. Lord Diplock was quick to realize this when he observed that: '...it would be a grave lacuna on our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rule of *locus standi* from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped.'[33] The failure of traditional model of litigation led to the conception of another model –public law model.

Public law model and public interest litigation

In his seminal article,[34] Abram Chayes argues that: 'We are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model.'[35] As noted, Chayes describes the antiquated traditional model as a system of settling well-defined legal disputes between two private parties.[36] In contradistinction, the emerging public law model features a judge-dominated system of negotiation with a 'sprawling and amorphous'[37] party structure, a 'wide range of outsiders,' and frequent attempts to administer ongoing collective relief.[38]

Regarding the historical underpinnings of this dramatic legal shift, Chayes argues that 'sometime after 1875, the private law theory of civil adjudication became increasingly precarious in the face of a growing body of legislation designed explicitly to modify and regulate basic social and

33. *Supra note* 25 at 922.
34. *Supra note* 21 at 1281.
35. *Id. at* 1282.
36. *Ibid*.
37. *Id. at* 1284.
38. *Ibid.*

economic arrangements.'[39] For example, political trends embodied in prominent reforms such as FDR's New Deal and Truman's Great Society precipitated a proliferation of regulatory legislation that extensively influenced both public and private lives in USA.[40] In response, litigants increasingly relied on the independent judiciary to seek injunctive relief against new government institutions that, in one way or another, failed to administer equitable entitlements, which people typically termed as a fundamental legal or constitutional right.[41] Although Chayes mentioned several points for the reform in the legal system, he argues that 'the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy.'[42]

Under public law, a fundamental question the courts have grappled with is: 'who should have access to the judicial system?' This question is dealt with by the doctrine of standing. Standing, along with such doctrines as mootness, ripeness, and political question, is a justiciability doctrine. Justiciability doctrines determine whether, when, and by whom significant public questions ought to be adjudicated, and, therefore, directly affect issues such as government accountability, public involvement in issues of social significance, and the proper policy-making authority of government.[43] In order to effectively answer the question, the doctrine of standing is widened to accommodate as many complainants as possible; even when such complainants are not the direct beneficiaries of the success of the litigation. As expected, the concept of PIL surfaces as the best answer.

PIL has been defined as cases in which 'a high court allows volunteer like lawyers or citizen petitioners to bring a case on behalf of some victimised group without sufficient means or access to legal services.'[44] It has also been defined by an Australian court as 'the public character to which the litigation relates; evidenced by properly bringing proceedings to advance a public interest; that proceedings contribute to the proper

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39. *Id*. at 1288.

40. Henry G. Manne, "The Judiciary and Free Markets" 21 *Harv JL* & PP 23 (1997); see also Rohert J. Pushaw, "Partial-Birth Abortion and the Perils of Constitutional Common Law" 31 *Harv JL & PP* 578-79 (2008).

41. *Supra note* 8 at 123.

42. *Supra note* 21 at 1313.

43. Alexander M. Bickel, "The Supreme Court, 1960 Term- Foreword: The Passive Virtues" 75 *Harv LR* 40 (1960).

44. Modhurima Dasgupta, "Public Interest Litigation for Labour: How Indian Supreme Court Protects the Rights of India's most Disadvantaged Workers" 2 *Contemporary South Asia* 160 (2008).

understanding of the law in question; and having involved no private gain.'[45] The basic and crucial factor in PIL is the effect of the decision. That is, whether the action is instituted by individual, organisation or a class action, and even if the remedy will benefit the applicant directly, the litigation will still benefit the public interest and have impact on the wider public.[46]

Specifically PIL, which stems from the standing rule developed by UK courts and adopted by many jurisdictions, involves individual, corporation or group purporting to represent the public interest, and not the interest of any identified or identifiable individuals.[47] Any individual, group or corporation can bring action in order to protect the interest of public. Generally, the individual or group concerned will have to show a breach of a fundamental right of the public. In addition to that, a personal right could be at stake as well. In case of an individual claiming to protect the interest of the public, the breach of a fundamental right suffices. For a group or corporation, the court might examine the rules, procedure and the activities of the association to find out their personal link with the claim.[48] PIL has, among others, the following values; it provides effective judicial protection of weaker sections of the community; ensures access to justice; protects and sustains democratic governance and the rule of law;[49] and makes officialdom accountable.[50] The rule of standing (PIL) has been adopted in many jurisdictions with varying degrees in accordance with their socio-political situations.[51]

45. *Oshlack* v. *Richmond River Council* (1997) 152 ALR 83.

46. Gurdial Singh Nijar, "Public Interest Litigation: A Matter of Justice an Asian Perspective' *available at* : http://asianlawassociation.org/aGAdocs/malaysiapdf (visited on March 25, 2011).

47. Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* 270 (Kluwer Law International, London, 2004).

48. *Ibid.*

49. *Supra* note 46.

50. A Durbach, "Test Case Mediation: Privatising the Public Interest"6 *Austr DRJ* 238 (1995).

51. For varying degrees of practice and adoption of standing in various jurisdictions see Peter Cane, "Standing, Representation, and the Environment" in I. Loveland (Ed.), *A Special Relationship? American Influences on Public Law in the UK* (Clarendon Press, Oxford, 1995); Chris Himsworth, "No Standing Still on Standing" in Peter Leyland and Terry Woods (Eds.), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone, London, 1997); Carol Harlow, "Public Interest Litigation in England: The State of the Art" in J.Copper, and R. Dhavan (Eds.), *Public Interest Law* (Basil Blackwell, New York, 1986); Richard Gordon, *Judicial Review and Crown Office Practice* (Sweet & Maxwell, London, 1999); Jain and Jain,*Principles of Administrative Law* (Tripathi, Bombay, 1979); V. S. Deshpande, "Standing and Justifiability" 13 *JILI* 153(1971) ; and Y. Burns, and M. Kidd, "Administrative Law & Implementation of Environmental Law" in H. A. Strydom & N. D. King (Eds.) *Environmental Management in South Africa* (Juta, Cape Town, 2009).

III Adoption and practice of PIL in Nigeria

The last thirty-seven years of Nigerian fifty years of independence is characterised with incessant military rules[52] with its attendant breach of human rights,[53] election annulments,[54] police brutality[55] and denial of socio-economic rights[56] like water,[57] electricity[58] and education[59] among many. As expected, various individuals, NGOs and concerned citizens have made attempts to right the wrong through the instrumentality of judicial process.Thus, both individuals and NGOs have attempted to seek declaration in order to preserve the environment or fight for a

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52. Military governance in Nigeria spanned between 1966 with a bloody coup and lasted till 1999 when the fourth Republic came to being under the democratically elected President Olusegun Obasanjo. Although, there were interjections of civilian rules in 1979 and 1992, yet these civil rules were cut short by military coups.

53. See Philip C. Aka, "Prospect for Igbo Human Rights in Nigeria in the New Century" 48 *Howard LJ* 3 (2004); see also Saddiq Muhammed and Tony Edoh (Eds.), *Nigeria: A Republic in Ruins* 13 (Ahmadu Bello University Press, Zaria, 1986); Philip C. Aka, "Nigeria Since May 1999: Understanding the Paradox of Civil Rule and Human Rights Violations Under President Olusegun Obasanjo" 4 *San Diego ILJ* 266 (2003); and Okechukwu Oko, "Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regime" *Harv HR* 257 (1997).

54. For analysis of events subsequent upon cancellation of the election see Mahmud Saka, "The Failed Transition to Civilian Rule in Nigeria: Its Implication for Democracy and Human Rights" 40(1) *Africa Today* (1993).

55. See for example, Clement Nwankwo, *et. al.*, *Human Rights Practice in the Nigerian Police* (CRP, Lagos, 1993); Ogaga Ifowodo, *Annual Report 1996: A CLO Report on the State of Human Rights in Nigeria (*CLO, Lagos, 1997); CRP, *Human Rights Practice in Nigeria: July 1996 – June 1997* (Lagos: CRP, 1997); and CRP, *Nigerian Human Rights Reports: 2000* (CRP, Lagos, 2001).

56. See for example lecture series of Nigerian National Human Rights Commission by Tijjani Muhammed Bande, *Dimension of Human Rights in Nigeria* (NHRC, Abuja, 1998). The lecture series chronicles how social, economic and cultural rights have been grossly violated in Nigeria particularly between 1985 to 1998. See also Nnoli, O. "Deteriorating Conditions of the Nigerian Working Class" in O.Nnoli, (Ed.), *Dead-End to Nigerian Development* (CODESRIA, Dakar, 1993). The books gave statistical data of mass unemployment in Nigeria and how those who were employed were being underpaid; World Bank, *Nigeria: Strategy for Food and Nutrition Security* (1991) UN Report No. 9040 – UN The report shows that less than 25% of Nigerians have access to three square meal per day.

57.Federal Republic of Nigeria, *Water Supply and Sanitation Interim Strategy Note* 22 (FRN, Abuja, 2000).

58. Quadry Wasiu, *Solution to Nigeria Power Outrage: Power Problem In Nigeri Is Beyond Explanation But There Is No Problem Without Solution. Available at:* < http://www.booksie.com/all/all/quadri/solution-to-nigeria-power-outrage (visited on Jun. 15, 2010).

59. Federal Office of Statistic, *Annual Abstract of Statistics, 2003* (FOS, Abuja, 2004). The statistics shows that less that 20% of qualified student could gain admission into tertiary institutions in Nigeria.

better environment.[60] In any of these situations, public nuisance seemed to be appropriate for environmental litigations. This seems appropriate especially as it involves, for example, water pollution from an identified source and pursued by individual who has suffered over and above other class of people.[61] As plausible as this avenue seems, there remain two legal technicalities, that is, the damage suffered must be substantial and there should be a direct or close link between the damage and the nuisance. Because of these technicalities the chance of success will be reduced drastically.[62] Another suggested means of bringing a tort case in environmental litigation seems to be claims in the public interest. However, the clog against this, again, is the issue of *locus standi,* as any public interest claim needs to be brought by the Attorney-General. That is an individual can only bring action on behalf of others through the permission of Attorney-General, and where such permission is declined or not given on time, such an individual cannot proceed with the action. This is the common law doctrine of *locus standi* of England that has been inherited by Nigeria.

Rough beginning for application of standing rule

As expected the judiciary is thrown into developing strategies to solve the problem. Such strategies include means of providing access to justice to all citizens and adoption of liberal standing rules which takes cognisance of litigants (though not directly affected but yet) who may want to invoke the jurisdiction of court in PIL *via* application for judicial review in form of declaration and mandamus. Although, public interest litigation in Nigeria seldom comes up in court, yet over the years, Nigeria has witnessed the concept of *locus standi* interpreted and applied from narrow to liberal and from liberal to narrowest interpretations.[63] In this respect, the Nigerian judiciary initially started on a rough note by religiously adopting

60. As did by a council which was protecting the interest of the public from a development project which would cause grave environmental pollution to an area in India, See *Environmental Protection Council* v. *Union of India* (1986) 2 SC 231; see also *Bombay Environmental Action Group* v. *State of Maharashtra,* AIR 1993 SC 215. See also Nigerian case of *Hurilaws* v. *Nigerian Communications Commission.*(Unreported) Suit NO FHC/L/CS/39/2000 (In this case HURILAWS challenged the action of the government in setting up an inter-ministerial Committee to oversee the licensing of GSM operators contrary to the provisions of Nigerian Communications Commission Act 1992).

61. Abdul Haseeb Ansari, "Environmental Protection Through Law of Torts: A Critical Appraisal" 4 *Malaysia* LJ lxxxii (2000).

62. *Ibid.*

63. Okey Ilofulunwa, "Locus Standi in Nigeria: An Impediment to Justice" *available at:* http://lexprimus.com/Publications/Locus%20standi%20in%20Nigeria.pdf (visited on Jul. 27, 2011).

traditional concept of *locus standi* in public interest litigation and holding that sufficient interest (over and above other members of the public) is a core factor in determining the locus of applicants in public litigations. The first case that tests the *locus standi* of a plaintiff in public interest litigation is the case of *Olawoyin* v. *A. G Northern Region*.[64] Here, the applicant challenged the constitutionality of an Act[65] which prohibited political activities by juveniles and prescribed penalties on juveniles and others who are parties to certain specified offences. The applicant contended that the Act is unconstitutional because it prohibited political activities by children of 15 years age or under on the ground that its provisions contravened sections 7, 8 and 9 of the sixth schedule of the 1954 Constitution. His contention was that he wished to give political education to his children but if the Act was enforced his rights and rights of other people of similar mind relating to freedom of conscience and freedom of expression will be infringed. His appeal to the Federal Supreme Court was also dismissed on the question of *locus standi* to institute public interest litigation. The Federal Supreme Court held that it is only a person who is in imminent danger of coming into conflict with a law, or whose normal business or other activities have been directly interfered with by or under the law, that has sufficient interest to sustain a claim for the infringement of his rights. The court further observed:[66]

> Now did the appellant in the High Court show that he had sufficient interest to enable him to apply for a declaratory judgement in accordance with the principles laid down in the case of the *Guaranty Trust Co of New York v Hannay* The appellant did not in his claim allege any interest but his counsel said that the evidence would be that the appellant had children whom he wished to educate politically. There was no suggestion that the appellant was in imminent danger of coming into conflict with the law or that there had been any real or direct interference with his normal business or other activities. In my view the appellant failed to show that he had a sufficient interest to sustain a claim. It seems to me that to hold that there was in interest here would amount to saying that a private individual obtains an interest by the mere enactment of a law with which he may in the future come in conflict: and I would not support such a proposition.

This decision and reasoning of the court have been re-affirmed

64. (1961) 1 NSCC 165.
65. Children and Young Persons Law, 1958 (Northern Region No 28 of 1958).
66. Per Unsworth, F. J in *Olawoyin* v. *A-G Northern Nigeria* (1961) 1 NSCC 165 at169.

in the celebrated case of *Adesanya* v. *President of the Federal Republic of Nigeria*[67] (commonly referred to as *Adesanya's* case). In this case, the appellant challenged the constitutionality of the appointment of a serving judge as Chairman of the Federal Electoral Commission by the President of the Federal Republic of Nigeria. At the high court, the appointment was declared unconstitutional. The respondent appealed against the judgement to the Court of Appeal which court ruled that the appellant had no *locus* to challenge the appointment. The appellant appealed to the Supreme Court and the Supreme Court held that the appellant had no *locus standi*. The court, while interpreting section 6 (6) (b) of Constitution of the Federal Republic of Nigeria, 1979 held that public right can only be asserted by the Attorney-General as representative of the public. In refusing to grant *locus standi* to the appellant, the court further held that the appellant cannot challenge the unconstitutionality of the appointment in a court of law after such appointment has been confirmed by the Senate. However, the court gave different principles on *locus standi* under the 1979 Constitution. The different principles in the case have elicited divergent or conflicting views and opinions from the Court on the principle of *locus standi* in public interest litigation and thereby bringing more confusion than clarification to practitioners and legal writers.[68] Specifically the minority[69] rightly held that an individual public spirited person can have

67. [1981] 2 NCLR 358.

68. For example, see N. J. Aduba, "A Critical Appraisal of Judicial Interpretation of the Principle of Locus Standi in Nigeria" A Paper presented at the1988 General Assembly of the Social Science Council of Nigeria held at NISER, Ibadan between 17- 19 Jul. 1988; Susu B. A., "Locus Standi, the Constitution (1979) and Confusion in the Courts" 40(2) *Nigerian BJ* 83 (1983); Akande, J.O., "The Problem of Locus Standi in Judicial Review" *Nigerian CLR* 53 (1982); and N. J. Aduba, "Judicial Interpretation Of The Principle Of Locus Standi In Matters Relating To Local Government In Nigeria" 4(3) *JUSTICE* 36 (1993).

69. Fatayi-Williams, CJN and Uwais JSC

locus standi to institute public interest litigation.[70] While the majority[71] were of the view that an individual plaintiff will not have *locus standi* to institute public interest litigation except he is personally and directly affected by the act complained off. The court, in its majority decision observed:[72]

> To entitle a person to invoke judicial power to determine the constitutionality of such action, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself. A general interest common to all members of the public is not a litigable interest to accord standing.

One step forward, two steps backward on the application of *locus standi*

The venom spewed by the Supreme Court in *Adesanyan's* case keeps on hunting the courts as well as many claimants for almost three decades. For, the decision becomes a *locus classicus* and foundation which served as basis upon which many genuine claims were thrown out of courts. Like General Sherman's march across Georgia, the rule has wreaked and is still

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70. Fatayi-Williams states "I take significant cognizance of the fact that Nigeria is a developing country with a multi-ethnic society and a written constitution, where rumour-mongering is the past time of the market places and the Construction sites. To deny any member of such society who is aware or believes, or he is led to believe, that there has been an infraction of any of the provision of the Constitution, or that any law passed by any of our Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of Law to air his grievances on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process." He goes further to emphatically state that "In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which law is not." He then concluded that "in my view, any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is civil right to see that this is so."

71. Per Sowemimo JSC; Bello JSC; Idigbe JSC; Obaseki JSC; and Nnamani JSC.

72. Per Bello, JSC at 382,383 He concludes that "A careful perusal of the problem would reveal that there is no jurisdiction within the common law countries where a general licence or a blank cheque – if I may use that expression, without any string or restriction, is given to private individual to question the validity of Legislative or Executive action in a Court of Law. It is a common ground in all the jurisdictions of the common law countries that the claimant must have some justiciable interest which may be affected by the action or that he will suffer injury or damages as a result of the action. In most cases the area of dispute, and some time, of conflicting decisions has been whether or not on particular facts and situation the claimant has sufficient justiciable interest or injury to accord him a hearing...".

wreaking havoc across the entire face of Nigerian law, colliding with and demolishing settled legal principles in its wake in different areas of public and private law.[73] The trend ranges for the first five years and claims involving private and public litigations were turned down on the basis that claimants lack *locus standi* to institute them.[74] However, there was a sudden and dramatic u-turn in another celebrated case of *Fawehinmi* v. *Akilu.*[75] In the case, the appellant applied for an order for leave to apply for an order of mandamus compelling the DPP to exercise its discretion whether or not to prosecute certain people for the murder of his friend, brother and client. The application was refused by the trial court. On appeal to court of appeal, the application was refused on the ground that the appellant lacks *locus standi* to institute the action. The appellant further appealed to Supreme Court and the court held that the appellant has *locus* to institute the action as a public spirited individual, amongst many other reason. The court noted thus:[76]

> 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 peace of the society is 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 brothers in the society, we are 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.... if consanguinity or blood relationship is allowed to be the only qualification for locus standi, then crimes such as are listed above will go unpunished, may become order of the day and destabilise society.

It is to be noted that the case involves criminal prosecution but yet the decision of the apex court marked a turning point in the realm of *locus standi* in public law litigation. The decision is a total departure from the strict interpretation of locus standi in the previous decisions of the Supreme Court. In fact the court is quick to point this out when it

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73. T. I. 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" 26 *Brooklyn JIL* 527 (2000).

74. See for example, *Oloriode* v. *Oyebi* (1984) 5 SC 1; *Thomas* v. *Olufosoye* (1986) 1 NWLR (pt. 18) 669; *AG Kaduna State* v. *Hassan* (1985) 2 NWLR (pt. 8) 483; *Orogan* v. *Soremekun* (1986) 5 NWLR (pt. 44) 688; and *Egbe* v. *Adefarasin* (1987) 1 NWLR (pt. 47) 1; and *Bolaji* v. *Bamgbose* (1986) 4 NWLR (pt. 37) 632.

75. (1987) 12 SC 136.

76. Per Obaseki, JSC at 181-182.

observed further thus: [77]

> I think, with respect, that the lead judgement of my learned brother Obaseki JSC is an advancement of the position hitherto held by this court on "locus standi." I think, again, with respect, that it is a departure from the former narrow attitude of this court in the Abraham Adesanya case and subsequent decisions.

The decision of the apex court in this case was applauded[78] (though denied by some)[79] as right decision at the right time. It was expected that the momentum will continue as it did in many other common law jurisdictions. However, this lasted for a while as the judiciary later locked the gate of public interest litigation opened in *Fawehinmi's* case. The judiciary did not only lock the gate, it also threw the key into dustbin thereby applicants of public interest litigation have to suffer, once again, from the shackle and bottleneck created in *Adesanyan's* case by the apex court.

The Nigerian judiciary in 2004 abruptly departed from the applauded case of *Fawehinmi* and somersaulted into complete regression in *A G Akwa Ibom State* v. *Essien.*[80] In *Essien,* the respondent commenced the action and sought determination of the constitutionality of some of the provisions of a state law[81] which was in conflict with a federal enactment.[82] The respondent further contended that as a voter and aspirant he needed to know the rationale behind the conflict between a state law and a federal law. Apparently, this is another public interest suit testing the rationale and constitutionality of a local law. Surprisingly, the court of appeal denied the respondent *locus standi* on the ground that a private individual has no standing to sue and seek declaration with respect to a matter of public importance unless the private right of such individual is fringed where the individual has suffered or sustained special damage

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77. Per Eso, JSC at 211.

78. See M.A. Owoade, "Locus Standi, Criminal Law and the Rights of the Private Prosecutor in Nigeria: *Fawehinmi* v. *Akilu and Togun Revisited*" 1(7) *JUSTICE* 103 (1990); L.A. Atsegbua, "Locus Standi: Beyond Section 6(6)(b) of the '79 Constitution", 2 *RADIC* 314 (1990); Y. Akinseye-George, "Locus Standi in Nigerian Constitutional Adjudication: Which Way Forward" 7(1) *JUSTICE* 39 (1990); and I.N.E. Worugji, "Individual Enforcement of Public Law and the Problem of Locus Standi in Nigeria" 3 *Calabar LJ* 142 (1990).

79. See for example, T.I. Ogowewo, "The Problem With Standing To Sue in Nigeria" 39 *JAL* 1 (1995) and T. I. Ogowewo, *supra* note 73 at 540.

80. (2004) 7 NWLR (pt. 872) 288.

81. Akwa Ibom State Independent Electoral Commission Laws, 2000 and 2002.

82. Electoral Act, 2001.

peculiar to him from the public right. The court reasoned that 'in order for a litigant to invoke the judicial power of the court in the realm of public law, he must show sufficient interest or threat of injury he will suffer from the infringement complained of.'[83] Thus, the court placed more emphasis on interest or injury as basis for sustaining public interest litigation as laid down in the earlier cases of *Olawoyin* and *Adesanya*.

In *Sehindemi* v. *Governor of Lagos State*,[84] certain open space square was being used as a recreational/children playing ground and youth development activities centre for quite a number of years. Suddenly, the space square was allotted to some group of people for residential purpose by the state governor who is assumed in law to be the owner of all land in the state. The appellants, who were landlords and residents of the adjoining open square, on behalf of themselves and others, sought a declaration that the proposed conversion of the open square from its present children playing ground/ youth development to residential housing scheme was unlawful, null and void and not in the overriding public interest. The trial court dismissed the appellants' claim on the ground that they lacked *locus standi* to institute the action. Aggrieved by the decision of the trial court, the appellants appealed to the court of appeal. Again, the court of appeal dismissed the appeal and held that the appellants lacked *locus standi* to institute the action. The court held that a plaintiff whose claim is in respect of a subject-matter that concerns the public at large is lacking in standing to maintain the claim. The court, in other words, infers that a general interest shared with all members of the public is not litigable interest to accord standing to some group of people, i.e. the interest and benefit of all supersede that of group of people even where their interest is negatively affected. The court poses the question that 'if the disputed land is vested, like any other land in Lagos State, in the Governor of the State in trust for all Nigerians, what then gives the appellants standing to question the grant to respondents who are themselves Nigerians for whose benefit the governor equally holds the land in trust?'[85] Holding the firm view that the appellants lacked *locus standi*, the court answered the question in the negative that 'the right which they claim as theirs is shared with all Nigerians. So far, the appellants have not shown any special interest over and above the generality of persons.'[86] Thus, the Nigerian

83. (2004) 7 NWLR (pt. 872) 288 per Ekpe, JCA at 321.
84. (2006) 10 NWLR (pt. 987) 1.
85. *Id*., per Salami, JCA at 26.
86. *Ibid*.

judiciary has accorded litigant *locus standi* in public interest litigation in one pathetic case and denied litigants *locus standi* in public interest litigation in other suits.

Locus standi concept in PIL cases: The need to borrow from other jurisdictions

As at present, the Nigerian judiciary has not maintained a position on circumstances which may warrant granting *locus standi* to applicant in public interest litigation. Neither has it given public interest litigation the necessary recognition and importance it deserves. The absence of these portends a bad omen for individuals, group of individuals and NGOs who may, in future, want to challenge the constitutionality of the executive or legislative actions and inactions. However, it needs to be reiterated that all hope is not lost as the judiciary itself has come to understand that there is need for it to depart from the narrow attitude, approach and interpretation of *locus standi*.[87] Before arriving at this pragmatic view, the court had the opportunity to determine the *locus standi* of an appellant (Chief Fawehinmi, a human rights activist, lawyer and social crusader) who challenged the constitutionality of the executive president paying a minister of the Federal Republic of Nigeria in foreign currency in violation of the provision of the Constitution.[88] While granting *locus standi* to the appellant, the court reasoned that it will definitely be a source of concern to any tax payer who watches the funds he contributes towards the running of the affairs of the state being wasted. The court, thus, held that such an individual has sufficient interest, albeit *locus standi*, of coming to court to enforce the law and to ensure that his tax money is utilised prudently.

The reasoning and conclusion of the court in this case deserves commendation. This is because, the court looks beyond the 'sufficient interest', 'direct damage' and 'relator action' principles which have bedevilled progressive application of *locus standi* in PIL. In fact, the court courageously suggests that there is need to extend to individual, group of individuals and NGOs the frontiers of *locus standi* to enforce or protect

87. See *Fawehinmi* v. *President, Federal Republic of Nigeria* (2007) 14 NWLR (pt. 1054) 275 where Aboki, JCA suggests that "it will be appropriate at this point to proffer that for this country to remain governed under the rule of law and in view of the controversies the problem of *locus standi* has generated especially in constitutional matters, it is suggested that any future constitutional amendment should provide for access to court by any Nigerian in order to preserve, protect and defend the Constitution."

88. *Ibid*.

the Constitution.[89] All these are indication that, in future, the Nigerian judiciary will accord individual, group of individual and non-governmental organisations the necessary *locus standi* to challenge unconstitutional actions of the executive or legislature even where they are not directly affected so long as such challenge is in the public interest. It must take lessons from India which has an ideal environment for PIL. In fact, it is said that Indian judiciary leads the world "as a guarantor of the legal protection of sustainable development and the environment."[90]

IV India: Champion in the course of liberal standing

The political context of the 1970s in India had a marked impact on the India legal system. A political crisis during the leadership of Indira Gandhi culminated in the declaration of emergency of 1975. Gandhi issued a presidential order suspending the rights of any person to move any court for the enforcement of rights conferred by the Constitution.[91] The emergency order received the blessing of the Supreme Court in *ADM Jabalpur* v. *Shivakant Shukla*[92] where the court gave recognition to the emergency order and denied the ability of the plaintiff to move the court for a *habeas corpus* challenging the legality of the detention order. The emergency order lasted till 1977 when general election took place; the election that ousted Gandhi with a period of significant change that followed. With the new ruling party in power, many rural Indians were

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89. Ibid. Aboki, JCA further elucidates that "the Attorney–General of the Federation is also the Minister of Justice and a member of the Executive Cabinet. He may not be disposed to instituting an action against the Government in which he is part of, it may tantamount to the Federal government suing itself.....I know of no reported case of any superior court in Nigeria where the Attorney-General of the Federation has instituted an action against the Federal Government on account of a violation of the provisions of the constitution or a legislation contrary to the provisions of the Constitution. The question now is who will approach the court to challenge the Government where it violates or fails to enforce any provisions of the Constitution or the Law where an Attorney-General will not? It can best be achieved by permitting any person to put the judicial machinery in motion in Nigeria whereby any citizen could bring an action in respect of public derelict. Thus, the requirement of locus standi becomes unnecessary in constitutional issues as it will merely impede judicial functions."*Id*. at 334 -36

90. Nicholas A. Robinson, "A Common Responsibility: Sustainable Development and Economic, Social and Environmental Norms" 4 *Asia-Pacific JEL* 195 (2000); see also Parvez Hassan & Azim Azfar, "Securing Environmental Rights Through Public Interest Litigation in South Asia" 22 *Va. ELJ* 215 (2000).

91. Christine M. Forster and Vedna Jivan, "Public Interest Litigation and Human Rights Implementation: The Indian and Australian Experience" 3(1) *Asian JCL 3* (2008).

92. AIR 1976 SC 1207.

resisting feudal arrangement and the responsibilities and the authority of the state were in question.[93] In response, the Supreme Court moved to redefine the lines between governmental authority and citizen's rights, injecting into the Indian court system a kind of judicial activism.[94] Indeed, the Indian judiciary, considered to be the most active in the world, is credited to have been pivotal to the development of robust standing rule.[95]

In India, inspired by injustices perpetrated by the past government, lawyers pursued 'public interest' cases at the instigation of activists, in an attempt to remedy the failure of government, institutions and administrative bodies to adequately represent and address marginalised interest.[96] Therefore, the development was driven primarily in India by those seeking to protect the rights of socially and economically disadvantaged groups. Since the early 1980s, the Supreme Court of India and its state high courts have wielded enormous power in the areas of human rights and access to court, albeit access to justice. PIL claims have been used to defend the rights of the poor, illiterates and impoverished people of India.[97] Interestingly, the key feature of PIL in India is its liberalization of the traditional rule of *locus standi*, or standing, which requires litigants to have suffered a legal injury in order to maintain an action for judicial redress. In a 1980 decision that has been hailed as 'a charter of PIL,'[98] the apex court articulated the rule in the following words:[99]

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

However, the court made it clear, however, that 'the lowering of the

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93. S. Susman, "Distance Voices in the Courts of India: Transformation of Standing in Public Interest Litigation" 13 *Wisconsin ILJ* 65 (1994).

94. S.P. Sathe, "Judicial Activism: The Indian Experience" 6 *Wisconsin Univ JL & P* 29 (2001), Judicial activism is generally understood as describing situations when judges make law rather than merely interpreting the law.

95. S.P. Sathe, *Judicial Activism in India* 102 (Oxford University Press, New Delhi, 2002).

96. M. Gomez, "In the Public Interest" in *Essays on Public Interest Litigation* 60 (University of Colombo, Colombo, 1993).

97. Ranjan K. Agarwal, "The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India" 21 *Arizona JICL* 675 (2004).

98. *Janta Dal* v. *H.S. Chowdhary* (1992) Supp. 1 SCR 226, paras. 95-96 .

99. *Ibid.* See also *S.P. Gupta* (1982) 2 SCR 35, para. 17.

locus standi threshold does not involve the recognition or creation of any vested rights on the part of those who initiate the proceedings.'[100]

Justification for liberal standing approach by Indian Judiciary

The legal basis for the development of PIL actions is derived from article 32 of the Constitution of India.[101] Under article 32, the Supreme Court of India has original jurisdiction over all cases concerning fundamental freedoms enumerated in articles 14 to 25.[102] These fundamental freedoms include: equality of all persons before the law;[103] no discrimination for religion, race, caste, sex or place of birth;[104] freedom of speech, association, assembly, movement and residence location, and of career or occupation;[105] no deprivation of life or liberty 'without procedures established by law';[106] no bonded labour or slavery;[107] no child labour;[108] and freedom of religion.[109] The state high courts have similar jurisdiction.[110] Also, if a fundamental freedom has been allegedly violated, the complainant may seek redress directly from the Supreme Court of India. Article 32 specifically allows this method of redress. The Supreme Court has suggested that article 226 is broader and, as such, if the complaint is of a "legal wrong" the correct forum is the state high

100. *See Sheela Barse* v. *Union of India (1988) Supp. 2 S.C.R. 643, para. 11.*

101. *Also see People's Union for Democratic Rights* v. *Union of India (*1983) 1 SCR 456, para. 11.

102. The art. provides: (1) The right to move the Supreme Court by appropriate proceeding for the enforcement of the rights guaranteed by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

103. Art. 14.

104. Art. 15.

105. Art. 19.

106. Art. 21.

107. Art.23.

108. Art.24.

109. Art.25.

110. Art. 226.

court.[111] In *S.P. Gupta* v. *Union of India*,[112] the Supreme Court upheld this interpretation of these articles as gateways to PIL actions.[113] In addition to the fundamental freedoms outlined above, the Constitution also includes 'Directive Principles of State Policy.'[114] These principles are not enforceable in any court but they are fundamental to the governance of India and the legislature must apply these principles in making the law.[115] They include directions to the state to reduce inequalities in status and opportunity[116] and distribute society's resources to serve the common good.[117] Thus, Bhagwati J observed that it is these principles that are at the heart of PIL, and that they inspired judges to become social activists.[118]

Therefore, in contradistinction to traditional adversarial litigation, the court has described its position in PIL actions as follows: 'The 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.'[119] Through PIL orders, the court has asked the legislature to enact or reform laws, and has directed the executive to introduce new measures or more strictly enforce existing policies.[120] Equipped with these generous constitutional provisions, the Indian courts began to relax the rule and procedure governing standing. Hence the hitherto rigid rule inherited from British common law system was relaxed in order to provide ordinary people the opportunities to engage the legal system in the enforcement of their rights.[121] Indian's socio-economic situation, reflected

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111. The inclusion of the words "... and for any other purpose" in article 226 makes its application broader than article 32. Cottrell further expatiates that "in recent years the Supreme Court has on a number of occasions refused to entertain writ petitions, saying that they ought to be taken to the high court first. For this see Jill Cottrell, "Courts and Accountability: Public Interest Litigation in the Indian High Courts" *Third World Legal Studies* 200 (1992).

112. AIR 1982 SC 149.

113. *Supra* note 97 at 677.

114. Arts. 36 – 51.

115. See art. 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."

116. Art. 38 (2).

117. Art. 39 (b).

118. P. N. Bhagwati, "Judicial Activism and Public Interest Litigation" 23 *Columbia JTL* 569-70 (1985).

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

120. Avani Mehta Sood, "Part II Equality, Social Exclusion, and Women's Rights: Redressing Women's Rights Violations Through the Judiciary" 1 *Jindal GLR* 137 (2009).

121. *Supra* note 91 at 6.

in large scale poverty and general ignorance about law and human rights, 'rendered more acute many of the socio-economic problems that typically form the basis of the many public interest claims.'[122]

In effect, the judicial reaction to the cases brought in the public interest was a response to acute poverty and underdevelopment resulting from state repression, government maladministration, exploitation and denial of human rights.[123] The Supreme Court saw itself as having an obligation 'to secure justice for the poor and weaker sections of the community' and to 'promote or vindicate the public interest, which demands that violations of constitutional or legal rights of large numbers of the poor, the ignorant or those in a socially or economically disadvantaged position should not go unnoticed or unredressed.'[124] Bhagwati J summarised this innovation cumulatively as providing access to justice for large masses of the people who are denied their basic human rights and it can only be achieved if the court adopts innovative new methods and devises new strategies.[125] These strategies and methods have been coined to mean 'social action litigation' in India.[126] With these strategies and method in place, Indian judiciary has enacted guidelines 'to fill the vacuum in existing legislation,' as seen in *Vishakha* case study and in PIL actions challenging adoption and child labour practices in India.[127]

Furthermore, the Supreme Court has actively involved itself in administrative and regulatory matters by issuing detailed directives in PIL actions, as seen in recent cases on environmental protection and distribution of food to the needy.[128] Not only has the court granted standing on

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122. *Ibid*.

123. S.Jain, *Public Interest Litigation* 3 (Deep & Deep, New Delhi, 2002).

124. People's Union for Democratic Rights v. *Union of India,* AIR 1982 2 SCC 1109.

125. *S.P Gupta* v. *Union of India,* AIR 1982 SC 149.

126. See Upendra Baxi, "Taking Human Suffering Seriously: Social Action Litigation Before the Supreme Court of India" in N. Tiruchelvan & R. Coomaraswamy (Eds.), *The Role of the Judiciary in Plural Societies* (St Martin's Press, New York, 1987).

127. *Vishakha* v. *State of Rajasthan,* 3 SCR 1997 404 para. 2; see *Lakshmi Kant Pandey* v. *Union of India* [1984] 2 SCC 244 (establishing regulations for adoption); Shubhankar Dam, "Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong" 13 *Tul JICL* 117(2005); and S.P. Sathe, *supra* note 95 at 85.

128. Shubhankar Dam, *id.* at 118 (discussing Court's "super-executive" role)*;* S. Susman*, supra* note 93 at 79-80 (providing examples of court's "detailed prescriptive remedies" in PIL cases); Armin Rozencranz & Michael Jackson, "The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power" 28 *Columbia JEL* 225 (2003) (discussing court's "usurping" of "the authority of enforcement agencies designed to handle air pollution problem"); and"Right to Food Campaign, Legal Action for the Right to Food: Supreme Court Orders and Related Documents" *available at*: http://www.righttofoodindia.org/orders/interimorders.html (visited on May 27, 2011).

environmental cases, it has also granted standing to a professor of political science to challenge the improper implementation of the constitutional provisions.[129] Also, a registered society with no personal connection with the matter was given standing to file a petition seeking a ban on the collection, storage and supply of blood in blood banks operating in India because of their defective mode of operation.[130] A standing was granted to a lecturer to challenge the appointment of lecturers without the prescribed qualifications on the basis of 'genuine' interest in the standard of education.[131] An advocate (a spirited individual) of the India Supreme Court was once granted standing to file petition seeking a *mandamus* to compel the Municipal Corporation of Delhi to remove and dispose garbage in the city.[132] He was also granted standing to file a petition seeking for an order that vendors cease using recycled plastics.[133] In another instance, he was granted standing seeking reactivation of government drug price control mechanisms to stop increasing prices for medicines[134] as well as petition seeking order to prevent Delhi University from re-employing retired teachers and paying them both pension and salary.[135] However, it must be understood that the court has refused to grant standing to litigants acting for personal gain or acting to protect private property.[136] It has also refused to grant standing to litigants with pure political motivation[137] or a personal grudge.[138] This shows the extent of flexibility, relaxation and adaptation of *locus standi* rule in public interest litigation or 'social action litigation.' From the discourse so far, application of standing rules in India has brought to fore certain unique features of PIL that is peculiar to Indian judiciary. These features are discussed in the next segment.

Features of PIL in India

It is a genuine observation that PIL is characterized by a unique bundle of procedures. These range from procedural flexibility, relaxed rules of standing, an activist interpretation of fundamental freedoms, remedial flexibility, to ongoing judicial participation and supervision

129. *D C Wadhera* v. *State of Bihar* AIR 1987 SC 579.
130. *Common Cause* v. *Union of India* AIR 1996 SC 929.
131. *Meera Massy* v. *S R Malhotra,* AIR 1998 SC 1153.
132. *Dr. B L Wadhera* v. *Union of India,* AIR 1996 2 SCC 594.
133. *Dr. B L Wadhera* v. *Union of India* [1998] HC CWP 4447.
134. *Dr. B L Wadhera* v. *Union of India* [1999] HC CWP 3813.
135. *Dr. B L Wadhera* v. *Union of India* (1999) HC CWP 9710.
136. *Raunaq International Ltd* v. *IVR Construction Ltd*.,AIR 1999 SC 393.
137. *SP Gupta* v. *President of India,* AIR 1982 SC 149,
138. *Chetriya Pradhushan Mukti Sangharsh Smiti* v. *State of UP,* AIR (1990) SC 2060; see also *Subhash Kumar* v. *State of Bihar,* AIR 1991 SC 420.

among many.[139] Some of these are considered in this work.

Flexibility of commencement procedure

Initiating procedures or the means of lodging a public claim can and has a significant impact on the development and effectiveness of public interest litigation. In particular, the means by which actions are commenced will impact relatively on access to the judicial process by dictating the level of resources and expertise required for pursuing such actions. To this extent, the Supreme Court of India has been flexible regarding the rules of procedures in PIL actions. To broaden access to justice, actions may be commenced by a formal petition or by just writing a letter to the court. The motivation behind allowing this epistolary jurisdiction is fairness; that is, a person acting *pro bono* needs not incur personal expenses for the preparation of a regular petition that seeks to guarantee the rights of the poor.[140] The acceptance of petitions in such varied forms is legally justified, according to the Supreme Court, by article 32 of the Constitution.[141] Judges have been known to encourage and even invite public interest actions. For example, in *Mukesh Advani* v. *State of Madhya Pradesh,*[142] the court accepted a clipping of a newspaper story about bonded labourers as the basis for a PIL action.

Building on this principle of access to justice, the courts have established legal aid as a fundamental right in criminal cases and courts often waive fees, award costs, and provide other assistance to public interest lawyers.[143] Further, the courts have established socio-legal committees or commissions of inquiry when facts are difficult or expensive to uncover. For example, in *S.R.Wangla* v. *Union of India,*[144] the Supreme Court appointed a special committee to investigate the quality of imported butter shortly after the Chernobyl nuclear disaster. Though defendants challenged these innovations as violations of the canons of procedure, the Supreme Court upheld them as necessary for the protection of fundamental freedoms: 'The constitution-makers deliberately did not lay down any particular forms of proceedings for enforcement of fundamental rights nor did they stipulate that such proceedings should conform to any

139. Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *American JCL* 498 (1989).

140. P. N Bhagwati, *supra* note 118 at 571.

141. M. Rao, *Public Interest Litigation: Legal Aid and Lok Adalats* 28 (Eastern Book Company, Lucknow, 2004).

142. AIR 1985 SC 1368.

143. Jamie Cassels, *supra* note 139 at 500.

144. 1988 SCALE 118.

rigid pattern or straight-jacket formula.'[145]

Relaxed rules of standing

The traditional rules of standing require that the participants have some real interest in the action in order that the "truth" will be properly revealed through the legal proceedings.[146] Often, this "real interest" is property and other financial interests. As early as 1976, the Supreme Court of India relaxed the rule of *locus standi*.[147] Academics, journalists, social activists and NGOs have initiated public interest actions. As Bhagwati CJI noted in *S.P. Gupta*:[148]

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

In a bid to faithfully show commitment to this principle, the Supreme Court and each of India's state high courts have upheld this proposition without exception. Examples of these relaxed rules of standing are numerous. In *Umed Ram Sharma* v. *State of Himachal Pradesh,*[149] members of an impoverished caste living in the snow-bound state of Himachal Pradesh were given standing to pursue an action in respect of public expenditure on projects such as highway construction.[150] Even broader, the Supreme Court of India recognized a lawyer's challenge to the inadequate censorship of a film on the grounds that the film was detrimental to communal and ethnic harmony in India.[151] Environmental groups, social workers, and journalists have all enjoyed standing before India's courts on a variety of issues. Further, the Supreme Court has awarded costs to these varied petitioners as an expression of the community's appreciation.[152]

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145. *Bhandua Mukti Morcha* v. *Union of India,* AIR 1984 SC 802.
146. *Supra* note 97 at 27.
147. *See for example, Maharaj Singh* v. *State U.P*, AIR 1976 SC 2602.
148. *Supra* note 125 at 189.
149. (1986) 2 SCC 68.
150. *Supra* note 97 at 27.
151. *Chotatal Dalai* v. *Union of India* (1988) 1 SCC 668.
152. *In Rural Litigation and Entitlement v. Uttar Pradesh* (1986) Supp. SCC 517, and *Sheela Barse* v. *Union of India* (1986) 3 SCC 596, the petitioners were awarded ten thousand rupees as costs of the proceedings

Purposive interpretation of statutes

Another unique feature brought by PIL and adopted by the India judiciary is the purposive interpretation of the Constitution and other relevant statutes. Through PIL, the Indian courts have broadened their interpretation of the fundamental freedoms protected by the Constitution. For example, the right not to be deprived of life and personal liberty in the Constitution[153] has been given activist interpretation through PIL. Before the inception of PIL in India, the Supreme Court understood this provision as only procedural in *A.K. Gopalan* v. *State of Tamil Nadu.*[154] According to the court, the state only has to demonstrate that its interference with the individual is in accordance with the procedure laid down by a properly constituted law.[155]

With the inception of PIL however, the Supreme Court in its landmark 1978 judgment, held that any state action interfering with life or liberty must be 'right, just and fair' in addition to procedurally authorized.[156] Further, in *Olga Tellis* v. *Bombay (Municipal Corporation)*[157] the court held that the right to life 'is wide and far reaching' and includes the right to a livelihood. Also, in *Bhandua Mukti Morcha*[158] the court found that the right to life includes the right to be 'free from exploitation' and that 'protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.' These decisions demonstrate the court's willingness to convert a formal guarantee in the Constitution into a positive human right.[159]

Nature and flexibility of awardable remedies

The scope of remedies, both in term of what is offered and to whom they are awarded, is an important aspect of potential impact of PIL strategies on implementation of public litigation and human rights.[160]

153. Art.21 states: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

154. AIR 1950 SC 27.

155. See for example, *ADM Jabalpur* v. *Shivakant Shukla* (1976) 2 SCC 521.

156. *Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597.

157. (1985) 3 SCC 545.

158. *Supra* note 145 at 812.

159. See Jamie Cassels, *supra* note 139 at 505 where he identifies other formal rights that have been converted into positive human rights by the Supreme Court of India.

160. *Supra* note 91 at 19.

Whereas the traditional understanding of judicial remedies requires finality, short lawsuits, and no supervision of the ongoing matter, courts in India have pushed forward the boundary of this power. By so doing, the Indian courts have flexibly interpreted their inherent power to do justice in three distinct ways. Firstly, the courts have adopted a flexible array of remedies in PIL matters. For example, armed with article 142,[161] the court has awarded damages to compensate the victim and punish the wrongdoer. Further, the courts have issued orders to ensure the children of prostitutes are educated[162] and in another instance ordered that health checks and nutritious food should be provided for children employed in the carpet industry.[163]

In *M.C. Mehta* v. *Union of India,*[164] a chemical plant was closed after a gas leak. The apex court allowed it to reopen only after the plant satisfied a number of conditions. The apex court ordered specific technical, safety and training improvements on the recommendation of four separate technical teams appointed by the court. An independent committee was established to visit the plant biweekly and a government inspector was ordered to make surprise visits once a week. It went so far as to suggest that the government establish an Ecological Sciences Resource Group to assist the court in future environmental actions.[165] Bhagwati J argues that existing remedies intended to deal with private rights situations were inadequate, thus demanding these innovations.[166]

Secondly, in some instances, the courts' judgments, orders and directions are made to be quasi-legislative in nature. This is because such judgements, orders and directions are intended to and have the status of law. For example, in the landmark case of *Vishakha,* the sexual harassment code produced by the Supreme Court was given 'legislative status' until legislation was enacted after a more severe criticism.[167] Another typical example of such legislative judgment which came before *Vishakha's* case was delivered in *Laximi Kant Pandy*[168] Here, the directions made by the apex court spelt out, in details, the procedures and precautions to be followed in matters involving the adoption of Indian children by foreign

161. Art. 142 gives the Supreme Court the power to issue decrees and orders for the purpose of " doing complete justice in any cause or matter pending before it"

162. *Gaurav Jain* v. *Union of India*, AIR 1997 SC 3021.

163. *Supra* note 145.

164. AIR 1986 SC 965.

165. *Supra* note 97 at 28.

166. *Supra* note 118 at 575.

167. See *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

168. AIR 1987 232.

adopted parents. The direction attained the status of law until the enactment of inter-county adoption laws. The courts have also created regulations governing the caloric intake of mental patients.[169]

Thirdly, the courts of India extended the binding nature of their judgments beyond the parties of a suit. Ordinarily, a court order binds only the parties to a matter and the court delivers a remedy to the successful litigants. However, in Indian context, some parties who are not parties to the suit are normally bound by the judgements, orders and directions of the court. The reason for this, according to the courts, is that most of the PIL suits are brought by litigant who may not be direct recipients of any remedy. And since these suits are intended to right the wrong, the wrong doers who are not parties to the suits must be bound by the outcome of the suits. This issue was considered and clarified in the celebrated case of *Gopi Aqua Farms* v. *Union of India.*[170] A decision of the Supreme Court banned certain types of shrimp cultures in the coastal areas of India on the basis of their negative effects on the ecosystem and their contribution to pollution. Some shrimp breeders challenged the order arguing that the court order should not bind them since they are not parties to the litigation. The court ruled that the principle of *res judicata* did not apply to PIL suits; hence all shrimp breeders were bound by the judgment.

However, it must be stated that the India judiciary is aware of the political framework and its constitutional limitation. To this extent, the judiciary has limited its interpretive power in some cases. For example, it has refused to force the state to enact legislation to protect fundamental freedoms or the directive principles.[171] This makes Cassels to note that: 'The true measure of judicial activism in India, therefore, is found less in the rhetoric of rights definition than in the remedial strategies deployed and actual outcomes in PIL cases.'[172] These boundaries established by the court suggest that it is sensitive to its role in India's political framework but, at the same time, is willing to push the limits of its constitutional

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169. *Laximi Kant Pandy* v. *Union of India*,AIR 1984 SC 549.

170. AIR 1997 SC 811.

171. See for example, *Olga Tellis* v. *Bombay (Municipal Corporation),* AIR 1986 SC 180 and *Himachal Pradesh* v. *A Parent of a Student of Medical College (Simla),* AIR 1985 SC 910. In *Medical College* case, a court-appointed committee recommended that the state enact legislation to prevent the ragging of freshers by senior students in the state's post-secondary institutions. The High Court of Himachal Pradesh ordered the state government to report to it regarding this recommendation. The Supreme Court of India, on appeal by the state, vigorously criticized the high court for its attempt to compel the state to enact legislation

172. Jamie Cassels, *supra* note 139 at 505.

powers to secure basic human rights for India's people.[173] Also, PIL in India in particular has received severe criticism by many scholars and as a result of these the Indian judiciary at times became conscious of when and when not to grant *locus standi* in PIL.[174] This notwithstanding, these and many other judicial strategies aimed at simplifying *locus standi* especially in PIL have earned India judiciary the name "champion of public interest litigation."[175] These strategies are adorable and as such deserve adoption by many jurisdictions whose *locus standi* in public law has not been liberalised.

V Conclusion

The traditional test for standing (*locus standi*) has its origin in the hypothetical question of who would have had title to sue had this been a private law action for damages. The traditional requirement gives standing only to those who are directly aggrieved; it is inappropriate in a public law context. The restrictive rule on standing is a serious impediment to access to justice. The poor and the ignorant can neither establish their *locus standi* nor have the ability to engage powerful advocates on their behalf. In order to achieve distributive justice, the UK and USA judiciary redefined the concept of public interest litigation to remedy inadequacies of traditional standing. This had been adopted, in varying degrees, by many jurisdictions –which includes South Africa, Australia and India.

Nigerian judiciary, though adopted the standing rule in public law in a confusing manner though, has adopted narrow interpretation of standing rules in public litigation. Not only that, Nigerian courts have not been consistent in their pronouncement regarding rule of standing in public law litigation. Inevitably, this position has denied the under-privileged and the 'public spirited individual' the access to justice. Again, unlike other jurisdictions, Nigerian courts have not taken active steps to introduce specific rules and procedure to facilitate and promote group litigation. Further, there are no special procedures in place dealing with case management and the payment and allocation of cost and benefits for public litigation.

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173. Ranjan K. Agarwal, *supra* note 97 at 30.

174. In *Bhandua Mukti Morcha*, *supra* note 145 at 843, Pathak J conscious of public criticism on the courts' adoption of liberal *locus standi* and PIL, observed: "In the area of judicial functioning where judicial activism finds room for play, where constitutional adjudication can become an instrument of social policy forged by the personal political philosophy of the Judge, this is an important consideration to keep in mind."

175. *Supra* note 118 at 570.

Indian judiciary, unlike Nigerian judiciary, adopted the most liberal interpretation and application of standing in public interest litigation. This type of activism by judges is necessary partially because judges owe duty to do justice with a view to creating and moulding a just society and partially because a modern judiciary can no longer obtain social and political legitimacy without making a substantial contribution to issue of social justice. This social justice is inevitable in all developing countries. Hence, these are right steps in the right direction which Nigerian judiciary should emulate. Emulation of such judicial activism by Nigerian judiciary will not only promote access to justice to the poor and 'voice of suffering', it will also reduce the recklessness of both the executive and the legislature. Until such measures are taken by the Nigerian judiciary, the question of adequate access to justice in Nigeria will remain unanswered to the satisfaction of all and sundry.