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COMMENT

The Propriety of *Locus Standi* Provision in Nigeria's Fundamental Rights (Enforcement Procedure Rules), 2009

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Abstract

Section 46(2) of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN 1999) empowers the Chief Justice of Nigeria (CJN) to make rules regulating the enforcement of human rights. In 2009, pursuant to the foregoing powers, the CJN made the Fundamental Rights (Enforcement Procedure) Rules (FREP Rules 2009). Item 3(e) of the FREP Rules 2009 conferred *locus standi* (LS) on persons other than those specified under section 46(1) of CFRN 1999 to institute fundamental rights enforcement suits. The issues arising are: Is *locus standi* a substantive or procedural matter? Whether or not by section 46(1), (3) and (4) of the CFRN 1999, the CJN has the vires to make rules on *locus standi*; what is the status of the FREP Rules 2009 vis-à-vis the Constitution? Through comparative methods, it is argued that *locus standi* is a substantive matter; hence, the CJN lacks the vires to make rules on it. The comparative experience in Kenya and South Africa is examined to draw lessons in promoting access to justice which is one of the sustainable development goals (SDGs). Since Item 3(e) of the FREP Rules is ultra vires, its nullification and amendment of section 46(1) of CFRN 1999 are suggested to encapsulate the expansion under the FREP Rules 2009 as leeway.

Keywords: Fundamental rights, *Locus standi,* Nigeria, SDGs, *Ultra vires*

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1. Introduction

Under the Constitution of the Federal Republic of Nigeria, 1999[1] (CFRN 1999) the Bill of rights is contained in Chapters 2 and 4.[2] Chapter 2 contains what is known as Fundamental Objectives and Directive Principles of State Policies while Chapter 4 contains the Fundamental Human Rights.[3] The main legal distinction between the two is that the former is regarded as non-justiciable while the latter is regarded as justiciable rights. Thus, as a rule, the provisions of Chapter 2 may not be enforced through court action in Nigeria save in limited recognised permissible instances while those of Chapter 4 are enforceable where there is a threat of breach or actual breach.[4]

Section 46(1) of the CFRN 1999 provides that where any of the rights contained in Chapter 4 thereof are threatened or breached, the victim is entitled to apply to a High Court within the State where the threat of breach

Frequently used acronyms

CFRN	Constitution of the Federal Republic of Nigeria
CJN	Chief Justice of Nigeria
FHR	Fundamental human rights
FRE	Fundamental rights enforcement
FREP	Fundamental Rights Enforcement Procedure
FRN	Federal Republic of Nigeria
NICN	National Industrial Court of Nigeria
LS	Locus standi
NA	National Assembly
SCN	Supreme Court of Nigeria

[1] Constitution of the Federal Republic of Nigeria Cap, C23 Laws of the Federation of Nigeria (LFN) 2004.

[2] Jacob A Dada (2012). "Impediments to Human Rights Protection in Nigeria" 18 *Annual Survey of International & Comparative Law* 85.

[3] Yakubu Ademola (2002). *Constitutional Law in Nigeria* (Ibadan, Demyaxs Law, 2003) 447

[4] *AG Ondo State v AG Federation* 9 NWLR (pt 772) 222.

or actual breach has occurred for redress.[5] Section 46(3) thereof, empowers the Chief Justice of Nigeria (CJN) to make Rules which are to regulate the practice and procedure for the enforcement of fundamental rights in Nigeria.[6]

Pursuant to this section, the then CJN, (Hon. Justice Idris Legbo Kutigi) in 2009 made the Fundamental Rights (Enforcement Procedure) Rules, 2009 (hereinafter referred to as FREP Rules 2009) to regulate the practice and procedure for the enforcement of the rights contained in Chapter IV of the constitution and other domestic human rights instruments (especially the African Charter on Human and Peoples Rights (Enforcement and Ratification) Act, 2004). The preamble of 3(e) of the FREP Rules 2009 deals with *locus standi* in fundamental rights enforcement suits and has bestowed same on a wide range of persons beyond the precinct of section 46(1) of the CFRN, 1999.

This expansive retinue of person invested with *locus standi* under the Rules raises certain salient issues. The first issue relates to the express provisions of section 46(1) of the CFRN 1999 which empowers "any person whose right under Chapter IV is being threatened or has been breached" to apply to a High Court within the state for enforcement. This raises the issue whether the Constitution has not expressly invested only the victim with *locus standi?* Other issues that arise are: (i) whether or not *locus standi* is not a substantive law matter which the CJN cannot make Rules on since the powers bestowed on him by section 64(3) relate to purely and mainly procedural matters? (ii) Whether the provision relating to *locus standi* is espousing or expanding of the provision of section 46(3)? (iii) Whether the FREP Rules 2009 ranks the same as the Constitution 1999 and the effect thereof?

The provision of Order 3 Rule 6 of the FREP Rules 2009 has been hailed as a vanguard for access to justice considering the fact that it has the potential of enabling certain persons who ordinarily would not be able to approach the court maybe due to impecuniosity or incarceration. These potentials of the Rule have attracted sensational reactions against its interrogation.

The issues raised above are the core themes in this article. The analysis and arguments are framed and structured as follows: Section two examines the origin of human rights provisions in Nigeria's constitutional development, the FREP Rules under Nigeria civil jurisprudence and the nature of fundamental

[5] Eva Brems and Charles O Adekoya (2010). 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' 54 *Journal of African Law* 255.

[6] Zacchaeus Adangor (2018). "Locus standi: In constitutional cases in Nigeria - is the shift from conservatism to liberalism real?" 12(1) *The Journal of Jurisprudence, International Law and Contemporary Issues* 77

right enforcement proceedings. Section three examines the quagmire of *locus standi* under Nigerian law. Section four examines the propriety of the *locus standi* provisions under the FREP Rules, 2009. Section five discusses the position in Kenya and South Africa drawing lessons for Nigeria. The last section contains concluding remarks.

2. The Origin of FHR and the Nature of FRE Suit under Nigerian Civil Jurisprudence

From the 1960 Independence Constitution to the present CFRN 1999, human rights provisions continue to feature prominently.[7] The existence of human rights provisions in successive Nigerian constitutions is traceable and discoverable from her political history. Before its exit, the British colonial government introduced regional government in Nigeria.[8] The federal arrangement of 1954 wherein the major ethnic groups (Igbo, Hausa and Yoruba) dominated the political spaces of their various regions created serious tension.

This political venture was suspiciously received as minority groups in Nigeria, expressed justified apprehension of marginalisation and domination by the major ethnic groups. To inquire into this grave concern, in 1957, the colonial government set up Minority Commission to inquire into these concerns in the North, East and Western regions and make necessary recommendations.[9] The Willink Commission (as the Minority Commission was called) submitted its report in 1958.[10] To address the fears expressed by the minority ethnic groups, the Commission rejected the idea of creating more regions and recommended the inclusion of a Bill of Rights as Chapter III of the 1960 Independence Constitution.[11] The same was adopted under the 1963

[7] Anthony O Nwafor (2009). "Enforcing Fundamental Rights in Nigerian Courts - Process and Challenges" 4 *African Journal of Legal Studies* 3.

[8] Abiola O Sani (2011), "Fundamental Rights Enforcement Procedure Rules, 2009 as a Tool for the Enforcement of the African Charter on Human and Peoples' Rights" in 'Nigeria: The Need for far-reaching Reform'11 *African Human Rights Law Journal* 513.

[9] Dennis M Jemibewon (1998). *The Military, Law and Society: Reflections of a General* (Spectrum Books Ltd.) 109.

[10] Ben O Nwabueze (1973). *Constitutionalism in the Emergent states* (1973, C. Hurst & Co. 72.

[11] Chapter III, consisting sections 17-32, 1960 Constitution.

Republican Constitution under the nomenclature of Fundamental Rights contained in fifteen sections.[12]

The 1979 Constitution had a novel introduction as it introduced the Fundamental Objectives and Directive Principles of State Policy under Chapter II. This trend was replicated in the 1983 and now CFRN 1999 which this article focuses on. It is apt to note that the rights contained in Chapter II of the CFRN 1999 are non-justiciable rights by virtue of section 6(6)(c) thereof which sequestrate the judicial power vested in the judiciary from extending to or encompassing the provisions of Chapter II.[13] This has reduced the provisions of Chapter II to mere aspiration of unfulfilled utopian ideals in spite of citizens' expectation that the government will be faithful to direct its policies towards their actualization. This is not only bizarre but antithetical to democratic governance and impracticable to usher in comprehensive development which is direly needed in Nigeria.

The lack of procedural guide for the enforcement of the created fundamental human rights (FHRs) as well as several military incursion into Nigeria's political affairs made these rights inefficacious. Thus, it became imperative to promulgate Rules for the enforcement of these rights and the first was the 1979 FREP Rules, made by the then CJN, Fatayi Atanda Williams pursuant to Section 42(3) of the CFRN, 1979.[14] Owing to observed shortcomings in the 1979 FREP Rules, in 2009, the then CJN, made the FREP Rules 2009 which is the extant procedural law on the enforcement of human rights in Nigeria.

On the contrary, it is to be noted that the introduction of Bill of Rights into Nigeria's constitutional development and process (aimed at allaying the fears of marginalisation and domination expressed at the pre-independence period, has not been able to extinguish these concerns. Over sixty-three years post-independence, there are still complaints of marginalisation and dominance by several ethnic minorities in Nigeria. It is argued that it would require more than the enshrining of fundamental rights in the CFRN 1999 to address the issue of ethnic marginalisation and dominance.

[12] Elijah A Taiwo (2009). "Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: A need for a more Liberal Provision" 9(2) *African Human Rights Law Journal* 548.
[13] *Okojie & Ors v. A. G. Lagos State* (1981) NCLR 218.
[14] Brems and Adekoya (note 5) 258.

3. Explicating the Quagmire of *Locus Standi* in Nigeria and Access to Justice

Nigeria was colonised by Britain which meant that laws and legal doctrines applicable in Britain were legally transplanted into Nigeria and other British colonies.[15] Thus, *locus standi* became part of Nigerian law due to this connection.[16] *Locus standi* means the legal right to institute an action in court.[17] The principle operates to ensure that only a person(s) with sufficient interest sets the process of the court in motion thereby preventing busybodies from instituting proceedings in court as the courts are established to adjudicate over disputes between varied parties.[18] There are several justifications for the subsistence of this doctrine; if instituting cases is left as an 'all comers things' litigious persons or persons seeking to annoy, embarrass or lampoon others, would use the process of the court to achieve this while desecrating the sanctity of the court.[19]

Two factors are considered in answering the *locus standi* debacle: the justiciability of the cause of action and where it is adjudged so, whether the plaintiff has sufficient interest which could be either that he/she has suffered injury, is suffering or under threat of suffering injury.[20] The judicial powers of the Federal Republic of Nigeria (FRN) is vested in the court under section 6 of the CFRN 1999 and this power is only exercisable upon the fulfilment of the *locus standi* precondition. This doctrine was received and operated in Nigeria in a restrictive manner; and accordingly only a person who has suffered, is suffering, or likely to suffer actual injury can maintain an action in court seeking for redress.

In *Onyia v. Governor-in-Council*[21] it was held that the applicant lacked the *locus* to challenge the constitutionality of the amendment of a law since he failed to show how that occasioned an injury to him over and above every member of the society. A similar conclusion was reached by the court adopting the restrictive interpretation and application of *locus standi* in

[15] *Ware v. Regent's Canal Co.* (1858) 3 De G & J 212.
[16] *Onyia v. Governor-in-Council* (1962) 2 All NLR 174
[17] Michael G Faure & Angara V Raja (2010). "Effectiveness of Environmental Public Interest Litigation in India: Determining the key Variables" 21(2) *Fordham Environmental Law Journal* 239, 250–251.
[18] *Peoples Democratic Party v. Lawal & Ors.* (2012) LPELR-7972.
[19] *AG Fed. v AG, 36 States* (2001) 9 SCM; *Alao v. ACB* [1998] 3 NWLR (Pt. 542) 339.
[20] *Pacers Multi-Dynamics Ltd v The MV Dancing Sister* SC 283/2001 13
[21] (1962) 2 All NLR 174

Olawoyin v. A. G. Northern Region[22] to hold that a member of the society could not maintain an action to void a section of the law that runs afoul of the Constitution.

The restrictive approach came to its crescendo in *Adesanya v. The President, FRN & Anor*[23] where the applicant sought to void the appointment and confirmation of the Hon. Justice Ovie-Whiskey as the Chairman of the electoral body after he had objected to same on the floor of the senate during confirmation hearing unsuccessfully. The Supreme Court held that the two lower courts were correct in striking the suit for want of *locus standi.* The justification was that the applicant had not shown sufficient interest either by demonstrating that he has suffered injury or likely to suffer owing to the breach or threat of breach of his right.[24]

Interestingly, this restrictive approach could be gleaned from the provision of section 36 and 46(1) of the CFRN 1999 and equivalent provisions under its predecessors in which only a person whose right is violated or under threat of breach is permitted to approach the court for redress.[25] This interpretation was sustained in *Keyamo v House of Assembly, Lagos State*[26] wherein the court held that the applicant lacks the *locus* to maintain an action seeking to compel the respondent to investigate the Governor over alleged forgery.

With this state of the law, it is certain that certain justiciable wrongs, will not be remedied due to several factors especially wrongs of a public nature which no one can claim to suffer over and above others to remove the roadblock of *locus standi.* This of course is an anathema to access to court which requires that the process of the court should aid and not obstruct adjudication of justiciable wrongs. Nigerian courts were soon confronted with the situation where the interest of justice required a temporary abandonment of the restrictive approach for the liberal as exemplified by the SCN (Supreme Court of Nigeria) decision in *Fawehinmi v. Akilu & Anor*[27] wherein the court upheld the *locus* of a private party to maintain a criminal action against the murder of a citizen especially when the government which ought to do so, has demonstrated unconscionable reluctance.

It would appear that it was to give some sort of statutory backing to the limited but evolving liberalisation of *locus standi* that the CJN, in making the

[22] (1961) 2 SCNLR 5.
[23] (1981) 5 SC 112.
[24] *Okojie & Ors v. A. G. Lagos State* (1981) NCLR 218.
[25] *Gamioba v Ezezi* (1961) All NLR 548.
[26] (2000) 12 NWCR 196.
[27] [1987] 4 NWLR (Pt. 67) 797.

FREP Rules 2009, expanded the frontiers of *LS* beyond the person who has, is being or has suffered injury to interested third party even those who have no real connection to the cause of action as it were. Pursuant to the FREP Rules 2009, the SCN in *Centre for Oil Pollution Watch v. NNPC*[28] held that a Non-governmental Organization (NGO) has the locus to maintain an action to protect the environment on behalf of its members who have sustained injury due to the pollution caused by the respondent.

At the risk of repetition, we take the liberty to reiterate that the argument herein is not against the laudability of the *locus standi* considering its utilitarian value in promoting and protecting access to court. The grouse is however against the process adopted towards this paradigm shift which is through the instrumentality of subsidiary legislation that clearly run afoul to the express provisions of the CFRN, 1999. The argument is that a good cause, cannot and should not be attempted to be prosecuted through wrong means, because the outcome will be illegality and therefore, counterproductive.

The point must be made that *locus standi* (under the FREP Rules 2009) is an intrinsic matter in adjudication because it is a component of jurisdiction which itself is the life wire of adjudication. Thus, a court before which an action is instituted, must be vigilant in ensuring that a litigant has the requisite *locus* to litigate. Otherwise, the court may be on the fast lane of wasted time and judicial resources. The court of law is not a football pitch where live matches as well as training sessions are held for pure entertainment purposes. Eyongndi[29] has opined that the court of law is meant for serious business and serious business (adjudication) only hence, only litigants with right standing can ascend to the temple of justice to seek justice being dispensed by the courts.

4. The Propriety of *Locus Standi* Provision under FREP Rules

One of the notable shortcomings of the FREP Rules 1979 was the fact that *locus standi* had a restricted meaning and application; thus, for FHRs enforcement application to be made, the applicant must first seek and obtain the leave of court.[30] Aside this, only a person who is likely to or has suffered

[28] [2019] 5 NWLR (Pt. 1666) 518.

[29] David T Eyongndi (2021). "The Administration of Criminal Justice Act, 2015 as a Harbinger for the Elimination of Unlawful Detention in Nigeria" 21 *African Human Rights Law Journal* 281.

[30] Order 1 Rule 2(2) FREP Rules, 1979; *University of Calabar v Esiaga* [1987] 4NWLR (Pt 502) 719; *Madeibo v Nwakwo* [2001] 29 WRN 137; *A.G., Fed. v Ajayi* [200] WRN 105; *WAEC v. Akinkunmi* [2002] 7 NWLR (Pt 766) 327.

actual violation was clothed with requisite locus to approach the court with a view to ventilate the grievance.[31] Thus, when the CJN in 2009, promulgated the FREP Rules 2009, these roadblocks were commendably removed paving way for liberalism and cautious –but not unnecessary restraint– access to court.

Thus, the preamble to the Rules, Item 3(e) to encourage public interest litigation (PIL), invest locus on a varied category of persons including the person acting for and on his/her own behalf, on behalf of another, a member of a group or class of persons, an NGO, anyone acting in the interest of the public or an association suing on behalf of its members. By the foregoing provisions, the FREP Rules 2009 have expanded the ambits of *locus standi* beyond the hitherto restricted posture of its predecessor.

Despite the laudability of the foregoing, there are certain unsettling queries. One is whether this expansion accords with the phraseology of section 46(1) of the CFRN 1999 bearing in mind the definition of person in section 11 of the Interpretation Act[32] and 43(1) of the Companies and Allied Matters Act, 2020 (CAMA, 2020). Another issue relates to whether the expansion stated above (considering that it deals with a substantive law subject), can be legally implemented through the FREP Rules rather than an Act of constitutional dimension?

It is contended that *locus standi* is a substantive law issue which only the legislature can legislate upon. Substantive law is the main body of law dealing with a particular aspect of the law creating rights and obligation, laying down rules and regulations, approved behaviours and prohibitions as well as imposition of sanctions for infractions. Procedural law makes provisions which deals with the procedure (steps) which the courts are to follow to enforce rights and obligations, prohibitions and imposition of sanctions created by substantive law.[33] While most substantive laws are sets in statutes or its equivalents, procedural law on the other hand is contained in Rules.

Thus, within the field of criminal law, the substantive law will include the Criminal Code and Penal Code Acts while the Administration of Criminal Justice Act 2015, is the procedural law. The former sets of laws, create various offences and their punishments thereto. In the event that there is an infraction,

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[31] *UNILORIN v. Oluwadare* (2006) 45 WRN 145; *Egbuonu v BRTC* (1997) 12 NWLR (Pt 531) 29 50.

[32] Interpretation Act, Cap. 123 LFN, 2004.

[33] Murziq A Etti and Abubakri Yekini (2017), "Treatment of Procedural Irregularities in Nigerian Courts and the need for a Principled Approach: *Yaki v Bagudu* (2015) in Retrospect" 43, *Commonwealth Law Bulletin* 37.

it would become imperative for the suspect to be prosecuted by the State. In doing this, the provisions of procedural law will dictate the way and manner through which that is done because it lays down the procedure to be adopted in ensuring prosecution and none other will be adopted. The implication of this is that procedural law lay down the steps to be followed in effectuating substantive law.[34]

This argument becomes unassailable when the provision of section 46(3) that empowers the CJN to make rules for the enforcement of fundamental human rights (i.e. substantive provisions of the CFRN 1999) and the position in some jurisdictions is examined. The section empowers the CJN to make rule with respect to the "practice and procedure" of a High Court with regards to fundamental right enforcement.

The operational words "practice and procedure" in the subsection which deals with purely procedural matters or questions of "how," "when" and "where" are materially procedural in nature.[35] This will entail matters such as the processes and accompanying documents an applicant is expected to file in court, the time within which the respondent is expected to file a response, how the processes are to be served, consolidation of actions, etc. all these are procedural matters which are traditionally provided for by Rules of Court and not substantive laws.

Locus standi being a creation of statute just like the court itself, cannot be expanded through procedural action as has been purportedly done under Item 3(2) of the FREP Rules, 2009. In fact, the phraseology of section 46(1) of the CFRN 1999 seems to have limited an application for enforcement of FHRs to "any person who alleges that any provision of Chapter IV has been, is being or likely to be contravened in any state in relation to him" and does not contemplate the category of persons enlisted by the aforementioned provision of the FREP Rules, 2009. The provision in relation to *locus standi* as encapsulated in section 46(1), for all intent and purposes is restricted only to the animate person who is predisposed and capable of threat or contravention or actual contravention of her/his rights within the purview of section 33 to 45 of the CFRN, 1999.

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[34] Muiz Banire, "2009 Fundamental Rights (Enforcement Procedure) Rules: The Rights of Dependants and Corporate Actions in Nigerian Courts" Available at: https://mabandassociates.com/pool/PRE_EMPTIVE_REMEDIES_FOR_THE_PRESERVATION_OF_THE_RES.pdf

[35] Onyekachi Duru, "An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009" available online at<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156750> Accessed 24 November 2023.

Of course, the laudability of the Item 3(e) of the preamble of the FREP Rules 2009 is unmistaken and greatly beneficial. This notwithstanding, the good intention for doing a thing will not *ipso facto* –where the wrong procedure is adopted– make the thing valid because a legitimate product cannot emanate from an illegitimate process. We are not oblivious of the provisions of section 11 and 43(1) of the Interpretation Act and CAMA 2020 which provides that person includes animate and inanimate creation of the law such as juristic and juridical entities. The foregoing is inapplicable to Chapter IV since the SCN have held that Chapter IV is inapplicable to unnatural persons.

The preamble to the FREP Rules 2009 is instrumental in understanding the intendments of the Rules. The point must be underscored that it is an unusual practice for Rules of Court to have a preamble which is usual for substantive legislation. Sani[36] has stated that the FREP Rules 2009 will go down history lane as the first legal instrument in that category to have such an elaborate preamble beyond the usual straightforward peripheral introductory matters such as the source of power pursuant to which it is made. He[37] expressed the view that considering that a preamble is not a significant part of a legal instrument as it does not form its substantive provisions and therefore abstract being a statement of fact, there is no guarantee that it will be accorded substantial legal weight.[38] This conclusion is safe to draw when the persuasive decision of *Jacobson v Massachusetts*[39] where the court in the US held that the preamble has no legal power within the US Constitution.

The fact that a procedural law cannot be used to expand the province of a substantive law especially the CFRN 1999 beyond its express determinate limits has been captured by the Court of Appeal Coram Aboki JCA in *Ankpa & Ors. v. Maikarfi & Anor*[40] when it was held that no provision of any enactment is capable of expanding or subtracting from the elaborate provisions of the Constitution on any subject matter dealt with by the Constitution. This is so because the Constitution is the grundnorm. Even though we agree with the foregoing position, we argue that the constitution is not the grundnorm as opined by the court but the supreme law, as the grundnorms refer to an extra legal order that predates even the constitution itself.

[36] Sani, *supra* note 8 at 524.
[37] Ibid.
[38] Id., at 525.
[39] 197 US 11 (1905).
[40] (2008) LPELR-3776(CA) 18-19, paras. D-B.

In fact, there is no ambiguity in section 46(1) which may be said was sought to be clarified through the expansion by the FREP Rules, 2009. This objection has been noted by Banire[41] when he queried thus:

> the question, however, is whether the Chief Justice of Nigeria who authored the Rules within the confines of Section 46(3) of the 1999 Constitution, can expand the scope of locus beyond that contemplated by the Constitutional provision so as to enable such representative actions to be maintained.

The answer to this germane query is that the provision in question, in the light of section 46(1) of the CFRN 1999, is unconstitutional notwithstanding the fact that courts continue to patronise it. In fact, Kolawole J (as he then was) in *The Registered Trustees of SERAP & Ors. v. A.G., Fed. & Anor*[42] held that the expansion of *locus standi* under the FREP Rules 2009 beyond the clear stipulation of the CFRN 1999, is unconstitutional. It is important to note that this decision has not been appealed nor has it been set aside by the Court of Appeal or any court in Nigeria, and thus it remains subsisting and effective.

It should be noted that section 46(4) (a) of the CFRN 1999, empowers the National Assembly (NA) to make law conferring additional powers on the High Court to enable it exercise the jurisdiction conferred on it under section 46(1) thereof. According to Subsections (b) (i) and (ii) thereof, the law so made by the NA conferring additional powers on the Court or an independent one, can as well, make provision for the rendering of financial assistance to indigent citizens where his/her right has been infracted or to enable him/her retain the service of a legal practitioner to prosecute his claim.

These are the main thrusts of Item 3 (e) of the FREP Rules 2009 which are clearly within the legislative competence of the NA and not matters to be administratively legislated by the CJN under the instrumentality of FREP Rules as has been purportedly done. As questionable as this is, so is also the provision approving the application of unratified international human rights treaties despite the mandatory provision of section 12 of the CFRN 1999 on domestication of such treaties as a precondition for their binding effect and resultant application in Nigeria.

While one is not unaware of the Court of Appeal position in *ABSU v Anyaibe*[43] that the FREP Rules 2009 being a creation of the constitution, has the same force just like the Constitution itself. However, the fallacy in this position is, if this is true and correct, how come the amendment or alteration

[41] Banire, *supra* note 33, at 8.
[42] Unreported suit No. FHC/ABJ/CS/640/2010.
[43] (1996) 3 NWLR (Pt 439) 646.

of the FREP Rules, 1979 or 2009 does not follow the procedure laid down in section 9 for altering the CFRN 1999? Aside this, section 1(1) and (3) of the CFRN 1999 lay down its supremacy and the inconsistency rule. Subsection, 1 of section 46, precedes subsection 3 thereof. The implication is that Rules made on the authority of subsection 3, cannot by any stretch of imagination or legal gimmick, override the express provision of subsection 1. For all intent and purposes, the FREP Rules 2009 is an ordinary subsidiary legislation with no special status or stature. The conclusion reached on the case is with due respect, *per incuriam* or at best, an emotional resonance in defence of the person of the CJN. Even at this, one remains mindful of the existence, applicability of the doctrine of precedent and its seeming immutable effect under Nigeria's *corpus juris*.

In comparative terms, when the constitutionality of the National Industrial Court of Nigeria (NICN) became an issue bearing in mind that under both the CFRN, 1979 and 1999, it was conspicuously omitted in the list of superior courts of record (SCR). Under section 6(5), the statutory palliative measure of the NIC Act, 2006 which purportedly bestowed exclusive original civil jurisdiction on the NICN notwithstanding the jurisdiction of the Federal and State High Courts under sections 251, 257 and 272 respectively, was declared unlawful as the NIC Act, 2006, was a violent and an unpardonable affront on the CFRN, 1999.[44]

Thus, the only way the quagmire was resolved, as argued by Eyongndi[45] was through the enactment of the CFRN 1999 (Third Alteration) Act, 2010 which amended the principal legislation, listed the NICN as one of the SCRs under section 6(5).[46] The question now is: if an Act of the NA could not expand the express provision of the CFRN (in this case, the NIC Act 2006), would Rules of Court (in this case, the FREP Rules 2009) be able to do this? We conclude that it will be easier for the camel to go through the eye of the needle than this happening because it is a legal impossibility.

The issue here is reiterating the aphorism that whatever is worth doing, is worth doing well. The fact that the constitutionality of Item 3(e) of the preamble of the FREP Rules 2009 has not taken the front burner as a live issue before Nigerian court is not solace but an imminent issue that is bound to happen sooner than later. One is not unmindful of the hardship which the SCN

[44] *Kalango v. Dokubo* [2004] 1 NLRR (Pt. 1) 180.

[45] David T Eyongndi (2022). "The Imperative of Engendering an Egalitarian Legal Framework for the Protection of Female Employees' Rights in Nigeria" 14(1) *African Journal of Legal Studies* 9.

[46] *Skye Bank Plc. v. Iwu* [2017] 7 SC (Part 1) 1.

decision in *Okafor v. Nweke*[47] in which the court held that pursuant to section 2 and 24 of the Legal Practitioners Act, 1961 only a legal practitioner who has been called to the Nigerian Bar can frank legal document hence, a legal document franked in the name of a law firm, is incompetent as same is deemed to have been franked by a legal practitioner unknown to law. Prior to this decision, the trend was to have legal documents franked in the name of a law firm despite the existence of the law to the contrary. However, this usual but abnormal and unlawful trend became a live issue when a lawyer raised same. The Nigerian legislature and other stakeholders should forthwith rise to the occasion and save the situation.

5. Lessons from Kenya and South Africa

Nigeria is not the only jurisdiction where the quagmire of *locus standi* has been addressed along the lines of liberalisation. However, unlike Nigeria, the practice in Kenya and South Africa are remarkably different as the expansion of *locus standi* prerequisite was done by the substantive law and not ordinary Rules of Court meant to regulate practice and procedural matters. The practice in these jurisdictions *vis-à-vis* Nigeria is herein examined.

5.1 Kenya

Prior to the enactment of the 2010 Kenya Constitution, the *locus standi* requirement had been given a restrictive interpretation and application by Kenyan Courts based on the lack of an express provision in the 1963 Kenya Constitution as well as the influence of common law being a British colony, hence *LS* is one of British colonial judicial relics in Kenya.[48] In *Wagaari Maatha v. Kenya Times Media Trust*[49] the Applicant filed a suit to stop the respondent from completing a high rise building in a public park alleging breach of Local Government regulation and public interest. The Respondent filed an objection contending that no cause of action has been disclosed and the applicant lacked requisite *locus* to sue. The Court held that the applicant's suit had not disclosed any reasonable cause of action, she lacked the *locus standi* to bring the suit as only the Attorney General could bring action on public interest basis.

[47] [2007] 10 NWLR (Pt. 1048) 521.

[48] Brain YK Sang (2013). "Trending towards Greater Eco-Protection in Kenya: Public Interest Environment Litigation and its Prospects within the New Constitutional Order" 57 *Journal of African Law* 31.

[49] Civil Case No. 5403 High Court at Nairobi

This situation persisted until 2010 when the Kenya Constitution, 2010 was enacted. Article 22(1) empowers anyone (whose right is contained under the Bill of Rights) to apply to the court for redress in the event of threat to or actual breach thereof. Article 22(3) empowers the Chief Justice to make Rules for the enforcement of the rights guaranteed under the Constitution. Not being oblivious of the restrictive posture of *LS* under the previous constitution and the need to encourage PIL, Article 22(2) thereof, in addition to the person whose right is threatened or breached and could therefore maintain action for redress, expansively liberalised *LS.*

This is done by empowering others (aside the person who has or is likely to suffer injury) to maintain fundamental right action on behalf of others.[50] It bestows *LS* on others who can sue on behalf of the injured person who is unable to do so; a person acting as a member of a group or in the interest of the group/class, a person acting in the interest of the public; and an association acting in the interest of one or more of its members. From the foregoing, the expansion of the *locus standi* provision in Article 22(1) being a substantive matter, could only be restricted or expanded by a substantive law and in this instant, the constitution itself.

In fact, it is argued that an ordinary Act of the Kenyan parliament would be legally invalid to expand the provision of Article 22(1) of the Constitution as only an Act of constitutional dimension can expand or restrict the provision of the constitution. Thus, Constitution of Kenya (Protection of Rights) Practice and Procedure Rules, 2013 (CKPRPP Rules 2013) (which is the equivalent of the FREP Rules 2009) made by the Chief Justice of Kenya sequel to Article 22(3) 23 and 165(3) (b) of the Kenya 2010 Constitution, merely reproduced the provisions of Article 22(3).

Based on the foregoing, in *Mong' are v. A.G. & 3 Ors*[51] wherein the Applicant challenged the constitutionality of Section 23 of the Sixth Schedule of the Kenya, 2010 Constitution and the Vetting of Judges and Magistrates Act, 2011. The respondents objected to the applicant's *LS* to maintain the action wherein the High Court held that based on the provision of Article 22(2)(c) of the 2010 Kenyan Constitution, he had the requisite *locus* to institute the action in the interest of the public. The same position was taken in *Mwau & 3 Ors. v. A.G. & 2 Ors.*[52]

Thus, the expansive *locus standi* provision under Rule 4 (1) and (2) of the CKPRPP Rules 2013, is mere rehash, emphatic repetition or amplification of

[50] See Article 22(2) (a)-(d) 2010 Kenya Constitution.
[51] High Court of Nairobi Petition No. 146 of 2011.
[52] High Court of Nairobi Petition No. 123 of 2011 & 185 of 2011 (2012) eKLR.

what has been provided by the constitution and not its creation as it is the case under Item 3(e) of the Preamble of the FREP Rules 2009 of Nigeria.

5.2 South Africa

Prior to the enactment of the Republic of South Africa Constitution Act, No. 108 of 1996, the courts in South Africa (SA) were not inclined to granting standing to a person who has not demonstrated significant/sufficient interest in a matter of litigation explicating the right to sue.[53] This would require predisposition to violation of a right or its actual violation with a resultant injury suffered.[54] Thus, in *Dalrymple v. Colonial Treasurer*[55] the court held that only those who are likely to suffer or have suffered injury can sue.

However, the Interim Constitution of 1993 per Article 7(4) (b) thereof, liberalised *locus standi* by empowering persons other than someone whose right is under threat or has been breached. It permits persons to sue in the interest of the public, an association on behalf of a member(s), a person on behalf of another who is incapacitated or lacks the wherewithal to sue; or a person acting on behalf of a group or class of persons.

The foregoing provisions were retained in article 38 of the Constitution of the Republic of South Africa, Act No. 108 of 1996. In *Minister of Health & Ors. v. Treatment Action Campaign & Ors,*[56] the South African Constitutional Court held that the decision of the Pretoria High Court that the Respondents had the *locus* to bring the action in the interest of the public (which seeks an order compelling the government to provide an important antiretroviral drug to pregnant women in all the provinces) was valid pursuant to section 38(e) of the RSA Constitution, 1996. Like Kenya, the expansive *locus* provisions in SA are not creation of the Rules of Court made by the Chief Judge or any head of court. Interestingly, the provisions of the FREP Rules 2009 are the same as the RSA 1996 Constitution.

6. Conclusion

As discussed above, the Bill of Rights became part of Nigeria's constitutional history owing to the apprehensions expressed by minority ethnic groups

[53] Tobias P van Reenen**,** "Locus Standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective" 2 *South African Journal of Environmental Law and Policy* (1995) 122.

[54] Thendo R Romogoma, "Locus Standi in Environmental Litigation: A South African Perspective" *Unpublished LL.M Dissertation* submitted to Faculty of Law, KwaZulu Natal University, 1997) at 5-7.

[55] (1910) TPD 372.

[56] CCT 8/01, 2002 (5) SA 721 (c).

against possible marginalisation and domination by the three major ones. The observance of these rights is the hallmark of a civilised society as when they are breached, seeking legal redress becomes imperative. Thus, Section 46(1) and (3) enjoin persons whose rights contained in Chapter IV of the CFRN 1999 to seek redress from the court in the event of threat of or actual infraction and as well as empowers the CJN to make Rules for the enforcement of the Chapter. Thus, the then CJN, made the FREP rules 2009 to regulate practice and procedure of the court in fundamental rights enforcement proceedings which are *sui generis* proceedings. The 2009 Rules, unlike its 1979 predecessor, sought to expand the scope of *locus standi* whose utility is to maintain the sanctity of the court by ensuring that only those who have real connection to a justiciable dispute, can institute cases before the court to avoid using the court as an avenue to harass, annoy or even hurt others.

While the good intention of the CJN and the laudability of the 'unusual paradigm' shift is unmistaken, its procedural impropriety is apparent, as the FREP Rules, being a subsidiary legislation, cannot override, restrict or expand the provision of the CFRN. Only the legislature is constitutionally vested with the power to so do. Law does not thrive on emotions or sentiments. Thus, Item 3(e) of the FREP Rules 2009 being inconsistent with section 46(1) of the CFRN 1999, is by virtue of section 1(1) (3) thereof, null and void to the extent of its inconsistency.

Thus we argue that the National Assembly –as it was done to address the jurisdictional quagmire of the NICN (highlighted in Section 4)– should amend the provision of section 46(1) of the CFRN 1999 to incorporate persons mentioned under Item 3(e) of the FREP Rules, 2009. This will accord with the approach and practice found in Kenya and South Africa where the expansion and liberalisation of *locus* in these jurisdictions is constitutionally provided and not via a subsidiary legislation irrespective of the status of the maker. In the event that the legislature expresses reluctance in amending the CFRN 1999 to incorporate the provisions of the FREP Rules to give them legality, it is recommended that human rights organisations and civil society, should carry out massive sensitisations and stakeholders engagement towards the realisation.

Despite the sanctioning of Item 3(e) of the FREP Rules 2009 by the Court of Appeal and the Supreme Court and the subsistence of judicial precedent as one of the pristine doctrine of Nigeria's adjectival law, this doctrine is neither absolute nor untrammelled. It is displaced where a precedent was reached *per incuriam.* Thus, since it is obvious that decisions approving this concerned provision of the Rules as discussed fall under this exception, it is recommended that the High Court should be moved to declare the provision unconstitutional. ■

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