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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

Tunde I. Ogowewo*

I. INTRODUCTION

Is it possible for a legal system to have one rule of *locus standi*¹ applicable in all doctrinal contexts regardless of the cause of action or remedy sought? This surely must be the question that any perceptive observer of the Nigerian legal system is bound to ask. That legal system is the only one - to the knowledge of this writer - that has one rule of *locus standi* applicable in every area of public and private law in federal and state courts. Hence, there is now such a thing known as the Nigerian law of standing to sue. The provenance of this law is section 6(6)(b) of the 1979 Nigerian Constitution (now section 6(6)(b) of the 1999 Constitution).²

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1. The term "*locus standi*" is often used interchangeably with terms such as "standing to sue" or "title to sue." According to Sir Konrad Schiemann, the "obvious effect of *locus standi* rules in any legal system is to exclude some people from obtaining the assistance of the courts in declaring and enforcing the law in circumstances where others could obtain that assistance." See K. Schiemann, *Locus Standi*, P.L. 342 (1990); P. Cane, *The Function of Standing Rules in Administrative Law*, P.L. 303 (1980) (on the functions of standing rules). See also K.E. Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 HARV. L. REV. 645 (1973); T.A. CROMWELL, *LOCUS STANDI: A COMMENTARY ON THE LAW OF STANDING IN CANADA* 9-11 (1986).

2. Nigeria has had a checkered constitutional history. The Supremacy Clause of the 1979 Constitution (a constitution that was largely the product of an elected constituent assembly of citizens) was purportedly suspended by the military in the coup of December 31, 1983. When the military finally departed in 1999, this Constitution was abrogated, see Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No. 63, 1999, and a new document, termed the CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999, was imposed on the country by the military administration with the promulgation of the Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24 1999.

Ever since the standing rule was assumed to have been discovered by the Nigerian Supreme Court in *Adesanya v. President of the Federal Republic of Nigeria*,³ the law reports have become littered with cases on the standing rule.⁴ Consequently, the rule has attracted considerable academic ink.⁵ Its prominence even extends beyond legal circles. Nigerian newspapers are replete with stories of cases being thrown out of court for lack of standing.⁶ For this reason, the term "*locus*

Quite apart from the fact that this Constitution is not legitimate – it was not the product of a constituent assembly of elected citizens or the subject of a referendum – it is this writer's view that it is void for the following reason. A constitution is the expression of a people's will. This will, like a person's opinion, cannot be altered by fiat. When a decree purports to suspend the supremacy of a constitution, it purports to suspend the will of a people. This is a conceptual impossibility. Hence, the notion of suspension ought to be deconstructed. Doing that calls attention to the fact that what really happens when a decree purports to suspend the supremacy of a constitution is that it impairs the expression and enforcement of the will of the people to govern themselves in accordance with the constitution's terms. It is similar to the case of a foreign invader that invades a country and rules it. The will of the invaded people as to how they shall be governed does not disappear – it still remains – but the expression and enforcement of this will is impaired through superior force. When the invader leaves, the impediment to the expression and enforcement of the will disappears, and, therefore, the will (in the form of the constitution that was purportedly abrogated) reasserts itself. Accordingly, with the departure of the military in May 1999, the impediment to the enforcement of the 1979 Constitution disappeared. All that remains is for the courts to pronounce the 1979 Constitution as Nigeria's true constitution. This thesis is developed in a forthcoming article. See T.I. Ogowewo, *Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy* 44 J. AFR. L. 133 (2000). If a court strikes down the 1999 Constitution, it will, however, have no effect on the subject of this article, since the source of the standing to sue problem is the same in both the 1979 and 1999 Constitutions.

3. *Adesanya v. President of the Fed. Republic of Nig.*, 1 All N.L.R. (Part 1) 1 (1981).

4. Tobi J.C.A. observed that the rule, "in recent times has gained so much prominence in our legal system." *Busari v. Oseni*, 4 N.W.L.R. 557, 585D (1992). Kolawole J.C.A. said, "In recent times the courts have had to deal so frequently with questions of *locus standi*." *Bolaji v. Bamgbose*, 4 N.W.L.R. 632, 648A (1986). In fact, the law reports understate this phenomenon, since they report only appellate decisions.

5. The plethora of academic writing is a post-*Adesanya* phenomenon. In fact, no article on the subject appeared in the Nigerian Bar Journal from its inception in 1957 until 1983, when B.A. Susu's article appeared in Vol. XIX, No. 2. The Nigerian Law Journal equally did not feature any article on the subject from its inception in 1964 until 1986 when Vol. 13 was published. This was also the case with The Nigerian Journal of Contemporary Law, which began life in 1970 – no article on the subject was published until Vol. 17, in 1993.

6. See *CJ Rules on Locus for Suit Against Nnamani Today*, June 21, 1999, POST EXPRESS (reading, "Enugu State Chief Judge, Justice Jacob Ugwu, would

standi" has even entered the lexicon of the layperson in Nigeria.⁷

Since it does not require any great feat of imagination to appreciate that the application of a single *locus standi* rule throughout the entire breadth of the law must inevitably lead to colossal problems,⁸ our notional observer is bound to ask whether Nigerian judges have somehow discovered the holy grail on the principle of standing. This is hardly the case. It will be seen that the rule is a gigantic conceptual mistake. Like General Sherman's march across Georgia, the rule has wreaked and is still 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. Although the rule bars representative standing,⁹ this arti-

today rule on the locus of a women's coalition in the state to file a suit, seeking to restrain Governor Chimaroke Nnamani from inaugurating an all-male State Executive Council.") More articles concerning *locus standi* are available at <http://www.postexpresswired.com>.

7. "Nigeria has no *locus standi* or moral right to insist on democracy when it is practising dictatorship." O. Ukeh, *Of Hypocrisy and the Sierra Leone Drama*, POST EXPRESS, June 16, 1997 (where the author shows his familiarity with the term "*locus standi*").

8. Schiemann, *supra* note 1, at 343. "The task of formulating general principles becomes more complex the more you seek to embrace by one rule, particularly if the rule has different objectives in different cases. The problem can only be solved by making the rules very complex or very vague. The problem is side-stepped to a degree by having different rules, if thought desirable, in different branches of litigation." *Id.* It will be seen that by applying one rule of standing in all branches of the law, considerable problems – which have neither been side-stepped nor solved – have been caused.

9. There is a distinction between those who seek to establish standing on the basis of their own personal interests (personal standing) and those who do so on the basis that they represent the interests of other identifiable individuals, or that they represent the "public interest" (representative standing). See P. Cane, *Standing Up for the Public*, P.L. 276 (1995). It will be seen that the Nigerian standing rule has a very narrow concept of personal standing (one that focuses on private legal rights) and no concept of representative standing. Hence, persons with a real interest in an issue of local or national importance invariably will be denied standing; even if what is assailed involves obvious illegality. See Adesanya, 1 All N.L.R. (Part 1) 1 (for a decision illustrating the narrow concept of personal standing); Nigerian Soft Drinks Co. Ltd. v. Attorney-General of Bendel State, 5 N.C.L.R. 656 (1984) (for a decision illustrating the absence of a concept of representative standing).

An analytical application of the standing rule should deny standing to non-governmental organisations (NGOs) that represent the "public interest," if their legal rights are not in question. This has serious implications for the enforcement of environmental law, an area where NGOs have a crucial role to play. See O.

cle shall employ the more egregious cases to demonstrate the rule's absurdity and the injustice that it causes. Postulate the following scenarios:

(a) Guidelines are published by the Ministry of Finance containing the conditions that are to be satisfied before a banking licence can be granted. An applicant complies with all the conditions. The Minister of Finance refuses to grant the licence on an extraneous ground. As Nigerian courts will view this as *ultra vires*,¹⁰ the applicant brings an application for judicial review under the Application for Judicial Review Procedure (AJR) contained in Order 46 of the Federal High Court Civil Procedure Rules.¹¹ Yet the court rules that the applicant has no *locus standi*. The court pronounces that this prevents it from looking into the merits of the case.¹²

(b) A company that intends to build a facility has a duty under the Environmental Impact Assessment Act of 1992 to carry out preliminary studies on the facility's environmental impact. An environmental activist resident in the area where the project is to be sited is not satisfied that the company has satisfactorily adhered to the provisions of the statute. He consequently institutes an action to restrain the company from carrying on with the project until a proper environmen-

Ogbalu, *Environmental Regulation in Nigeria*, 6 O.G.T.L.R. 163, 166 (1992). It has been suggested that environmental NGOs may enforce the law only by suing the Federal Environmental Protection Agency (F.E.P.A.) pursuant to § 29 of the F.E.P.A. Act. See O.A. Bowen, *The Role of Private Citizens in the Enforcement of Environmental Laws*, in ENVIRONMENTAL LAWS IN NIGERIA INCLUDING COMPENSATION Ch. 11 (J.A. Omotola ed., 1990). This is doubtful. Indeed, Bowen does acknowledge that, "[t]o the extent that section 29 merely implies but does not specifically grant a general right to sue to individuals, it does not provide a reliable basis for citizen enforcement." *Id.* at 163. Even if the provision granted a general right to sue, it is likely that the existing standing rule will force the courts to strike down the provision as unconstitutional, on the ground that it purports to give standing where the constitutional threshold has not been reached. See *infra* text accompanying notes 67-68.

10. See *Iwuji v. Fed. Comm'r for Establishments*, 1 N.W.L.R. 497 (1985); *Stitch v. Attorney-General of the Fed'n*, 5 N.W.L.R. 1007 (1986).

11. The court with jurisdiction in respect of this matter is the Federal High Court. Order 46 of the Federal High Court (Civil Procedure Rules) Act 1999 deals with the "Application for Judicial Review" (AJR) procedure. It is based on Order 53 of the Rules of the Supreme Court of England. State High Courts also have an AJR procedure. See High Court of Lagos State (Civil Procedure) Law (1994), Cap. 61, Order 43.

12. The Supreme Court recently pointed out that, "[i]t must be remembered that the issue of *locus standi* is not dependent on the success or merits of a case." *Adesokan v. Adegorolu*, 3 N.W.L.R. 261, 278H (1997).

tal impact assessment has been conducted. The court rules that the plaintiff has no *locus standi*.

(c) There is political violence and a person is killed. The suspects are prosecuted, but the Governor of the State instructs the Solicitor-General to enter a *nolle prosequi*. The father of the deceased, incensed that justice is being thwarted, enlists the engine of the law to declare the *nolle* unconstitutional. This is because the Constitution provides that only the Attorney-General of a State can enter a *nolle prosequi*. The court, however, rules that the father has no *locus standi* to challenge the unconstitutional entry of the *nolle*.

(d) A shareholder in a registered private company is excluded by his fellow shareholders from the management of the "quasi-partnership." The shareholder is naturally aggrieved because his expectations have been thwarted.¹³ Under most systems of Anglo-company law, including Nigerian company law, the shareholder will be unable to bring an action because, in the absence of a shareholders' agreement to the contrary, a shareholder has no original right to participate in management.¹⁴ The only way that the shareholder will be able to sue is by using an oppression remedy.¹⁵ Hence the aggrieved shareholder petitions the court for relief under section 311 of the Companies and Allied Matters Act of 1990, on the ground that he has been treated in an oppressive manner. Under this jurisdiction, a court can intervene even though the shareholder's legal rights have not been infringed upon by the company. So in trekking to court, the shareholder is confident that his petition will be heard. Yet the court rules that he has no *locus standi*.

(e) There is a public nuisance and a million homes are trivially affected. A million plaintiffs individually file suit at once. The tortfeasor argues that the plaintiffs lack *locus standi* and that the appropriate plaintiff is the Attorney-General, since a public nuisance is a public wrong. This argument is rested on the ground that a principal reason for the principle of stand-

13. Such as the expectation of directorial influence and remuneration, especially where the company, as in the case of most quasi-partnerships, follows a policy of not declaring dividends but instead pays out the profits of the company in the form of directors' fees.

14. A personal action is impossible because the shareholder's personal rights have not been infringed. A derivative action is also impossible since none of the company's rights have been infringed.

15. See, e.g., § 459 of the British Companies Act 1985.

ing is to prevent the courts from being overwhelmed in such a situation; hence, the Attorney-General, as the protector of the public interest, should bring suit on behalf of the litigants. To be sure, the common law of England, as applied in Nigeria,¹⁶ recognizes this role of the Attorney-General.¹⁷ Yet the court rules that all one million litigants have *locus standi*, with the result that the court is overwhelmed and only a few see justice done.

(f) Where the defendant in the High Court has not questioned the plaintiff's standing, the defendant can raise the issue either in the Court of Appeal¹⁸ or the Supreme Court.¹⁹ Indeed, any court can raise the question *suo moto*.²⁰ This is because in both public and private law the courts view the standing rule as a rule governing the jurisdiction of the court,²¹ which can be raised at any stage of the proceedings.²² The onus is on the plaintiff to establish his standing.²³ The conclusion that the plaintiff lacks standing automatically results in a lack of jurisdiction.²⁴ If the case is not struck out, the court's subsequent proceedings, including its judgements or its orders, will be a nullity.²⁵

(g) Where the standing rule collides with rules of standing in other contexts (i.e. in private²⁶ and public law²⁷), that as-

16. See *Ipadeola v. Oshowole*, 3 N.W.L.R. 18 (1987).

17. An exception to this rule under the common law was where the plaintiff could show that he had suffered "special damage." See *Fowlers v. Saunders Cro. Jac.* 446 (1617) 76 K.B., E.R. 382. See also J.R. Spencer, *Public Nuisance - A critical examination*, 48 C.L.J. 55 (1989) (for a critical review of the tort of public nuisance).

18. See *Akinbinu v. Oseni*, 1 N.W.L.R. 97, 110 (1992).

19. See *Kilfco Ltd. v. Philipp Holzmann A.G.*, 3 N.W.L.R. 276, 292B (1996).

20. See *Rd. Transp. Employers Ass'n of Nig. v. Nat'l Union of Rd. Transp. Workers*, 2 N.W.L.R. 381 (1992). See also *Akintola v. Balogun*, 1 N.W.L.R. 532, 545G (2000) (holding that *locus standi*, "is a fundamental issue and no court is therefore competent to raise it *suo motu* and decide it without hearing from the parties.").

21. See *Ojukwu v. Kaine*, 9 N.W.L.R. 613, 628C-F (1997).

22. "There is no doubt that the issue, which really goes to jurisdiction, could be raised at any stage, and certainly, there would be nothing wrong with its being raised, even for the first time, here." *Oredoyin v. Arowolo*, 4 N.W.L.R. 172, 187C (1989).

23. See *Attorney-General, Enugu State v. Omaba*, 1 N.W.L.R. 95 (1998).

24. See *Tidex (Nig.) Ltd. v. Nupeng*, 11 N.W.L.R. 263, 279F (1998). See also *Owners M/V Baco Liner 3 v. Adeniji*, 2 N.W.L.R. 195, 202D (1993).

25. See *Labaran v. Okoye*, 4 N.W.L.R. 303 (1995).

26. See, e.g., *Foss v. Harbottle*, 2 Hare 461 (1843) (for the rule in company law).

27. See, e.g., the "sufficient interest" test in the AJR procedure.

pect of Nigerian law is invariably re-written. Whole swathes of Nigerian law are being re-written without any end in view.²⁸

These seven strange results prompt one to wonder whether the courts have simply forgotten what the principle of standing to sue encompasses. Even in the face of results so unreasonable in their defiance of common sense and justice, the standing rule has not become the subject of judicial animadversion. Quite to the contrary, it is hailed as an important discovery.²⁹ Academics have fared no better. The vast majority simply provide descriptive accounts of the law, while a few venture beyond this to attack results of the standing rule without appreciating that it is the rule itself that needs attacking.³⁰

28. See *infra* Part IV.

29. See *Ovie-Whiskey v. Olawoyin*, 6 N.C.L.R. 156, 191 (1985).

30. See the following books on the Nigerian law of standing to sue: G.O. OYUDO, *LOCUS STANDI AND DECLARATORY ACTIONS* (1987); M.A.A. OZEKHOME, *THE NIGERIAN LAW OF LOCUS STANDI* (1988); I.E. SAGAY, *LEGACY FOR POSTERITY – WORK OF THE SUPREME COURT* Ch. 8 (1988); P.A. OLUYEDE, *NIGERIAN ADMINISTRATIVE LAW* 504-511 (1988); A.G. Karibi-Whyte, *Consideration of Preliminary Objections: Locus Standi*, in *JUDICIAL LECTURES: CONTINUING EDUCATION FOR THE JUDICIARY* Ch. 8 (1991); O.A. Bowen, *Locus Standi in the Enforcement of Public Rights in Nigeria*, in *ISSUES IN NIGERIAN LAW* 30 (J.A. Omotola ed., 1991)[hereinafter O.A. Bowen]; C. OKPALUBA, *JUDICIAL APPROACH TO CONSTITUTIONAL INTERPRETATION IN NIGERIA* Ch. 7 (1992); N. TOBI, *THE NIGERIAN JUDGE* Ch. 5 (1992); M.I. Jegede, *Problem of Locus Standi (Standing to Sue) in The Administration of Justice*, in *NIGERIAN ESSAYS IN JURISPRUDENCE* Ch. 10 (T.O. Elias and M.I. Jegede eds., 1993); Y. Akinseye-George, *Towards a Wider Concept of Locus Standi in the (sic) Nigerian Constitutional Adjudication*, in *JUSTICE KAYODE ESO & THE CHALLENGE OF SUBSTANTIAL JUSTICE IN NIGERIA* 25 (1993); W. Owaboye, *Denial of Justice and Concept of Locus Standi in Nigeria*, in *FUNDAMENTAL LEGAL ISSUES IN NIGERIA: ESSAYS IN HONOUR OF JUSTICE OBASEKI* Ch. 8 (W. Owaboye ed., 1995); T. FAGBOHUNGBE, *THE JUDICIAL UNIVERSE OF JUSTICE KAYODE ESO* Ch. 5 (1995).

See G. Fawehinmi, *Constitutional Law Comment No. 1*, 2 N.C.L.R. v-viii (1981); J.O. Akande, *The Problem of Locus Standi in Judicial Review*, 3 NIG. CURRENT L. REV. 42 (1982); B.A. Susu, *Locus Standi, The Constitution (1979) and Confusion in the Courts*, 19 NIG. BAR J. (No. 2) 81 (1983); E.K. Quansah, *Locus Standi and the Interpretation of the Nigerian Constitution*, 1 CALABAR L. J. 17 (1986); O.A. Bowen, *Locus Standi in Public Law: Its Bases and Rationale*, 11 NIG. CURRENT L. REV. 109 (1987); O.I. Igboanugo, *The Doctrine of Locus Standi: An Appraisal*, 2 U.I.L.S.J. 29 (1989); Y. Akinseye-George, *Locus Standi in Nigerian Constitutional Adjudication: Which Way Forward*, 1 JUST. (No. 7) 39 (1990); L.A. Atsegbua, *Locus Standi: Beyond Section 6(6)(b) of the '79 Constitution*, 2 R.A.D.I.C. 314 (1990)[hereinafter Atsegbua]; I.N.E. Worugji, *Individual Enforcement of Public Law and the Problem of Locus Standi in Nigeria*, 3 CALABAR L.J. 142 (1990); A.A. Jimoh, *Locus Standi: What Quantum of Interest Does The Court Require?*, 20 THE LAW 20 (1990); K.M. Mowoe, *The Concept of Locus Standi Under the Constitution of Federal Republic of Nigeria, 1979*, in *ESSAYS ON NIGERIAN LAW* 103 (J.A.

So the courts receiving no assistance from the academy have been left to wallow in a quagmire of their own devising. That they sometimes strive, through dubious means,³¹ to avoid the egregious consequences flowing from an analytical application of the rule is irrelevant. Apart from indicating that the judges may not fully understand their own rule - and this is worrying considering that some Supreme Court justices can be charged with this failing - a failure to apply the standing rule correctly only adds the vice of uncertainty to the existing problem. This is another reason why the *locus standi* rule in Nigeria has caused great confusion.³² Hence, what should be relevant to those interested in genuine reform is that a rule exists for which the correct application (a) produces grave injustice; (b) subverts a key rationale behind the standing principle; and (c) re-writes (to no useful purpose) many areas of Nigerian law.

Considerable judicial and academic ink has been spilled on the subject, yet the source of the problem has eluded courts and commentators. However, in 1995 this author identified the root of the problem in a published article³³ and in 1998 the

Omotola, ed. 1990); M.A. Owoade, *Locus Standi, Criminal Law and the Rights of the Private Prosecutor in Nigeria: Fawehinmi v. Akilu and Togun Revisited*, 1 JUST. (No. 7) 103 (1990) (reprinted in 4 NIG. JUD. REV. 109 (1989-90)); G.O. Oyudo, *The Locus Standi Syndrome in Nigerian Public Law*, 2 JUST. (No.1) 15 (1991); J.N. Aduba, *Judicial Interpretation of the Principle of Locus Standi in Matters Relating to Local Government in Nigeria*, 4 JUST. (No.3) 36 (1993); and A. Okoh Alubo, *Justice Denied? The Concept of Locus Standi in Nigeria*, 42 U. JOS L.J. 143 (1991-94).

It is surprising that, apart from a few exceptions, this voluminous literature involves little or no discourse between the various writers. This has to do partly with how articles are published in Nigeria. As law journals have suffered a demise, law schools tend to publish collections of articles (ranging from Islamic law to Corporate law in one volume) under unhelpful broad titles. So it is very difficult to ascertain from the title whether or not an article on a particular area has been published. Furthermore, because Nigerian law libraries are under-funded it is difficult for law researchers to do any meaningful research. The effect of all this is that academics now write articles without knowing what others have written. See U. Lamikanra, *Legal Research and the Legal Profession*, in NIG. CURRENT LEGAL PROBS. 114 (I.A. Ayua ed., 1998).

31. See Attorney-General, Kaduna State v. Hassan, 2 N.W.L.R. 483 (1985).

32. Oputa J.S.C. confessed that, "[i]t is on the issue of locus standi that I cannot pretend that I have not had some serious headache." *Id.* at 521G. Oputa J.S.C. has said, "prudence will dictate that the issue of locus standi be shelved for a more direct and a more opportune occasion . . . Discretion, they say, is the better part of valour." Oredoyin v. Arowolo, 4 N.W.L.R. 172, 211C (1989). See also Fawehinmi v. Akilu, 4 N.W.L.R. 797, 846C (1987) (citing the need for the courts to tread "carefully on the soil of locus standi").

33. T.I. Ogowewo, *The Problem With Standing To Sue in Nigeria*, 39 J. AFR.

Lagos Division of the Court of Appeal in *N.N.P.C v. Fawehinmi*³⁴ provided firm judicial support for the thesis of the article. Yet, such is the nature of the problem that the significance of these developments have gone unnoticed. Five years hence the application of the standing rule has continued inexorably and more damage has been done to Nigerian law. One suspects that the reason for this is that most judges and practitioners do not apprehend that there is even a problem to be solved. Operating within the framework of the standing rule, they fail to perceive its defects. The aim of this article is to provide a solution to this intractable problem. It is only through the demolition of the structure of the existing standing rule that the solution to the problem can be realized. Accordingly, it supplies the forensic arguments for this demolition exercise. On the ruins of the demolished structure, the article re-discovers the correct *rules* of standing in private and public law.

II. THE CAUSE OF THE PROBLEM

The problem with standing to sue in Nigeria arises from the construction placed by the courts on section 6(6)(b) of the Nigerian Constitution. Although neither the text of section 6(6)(b) nor its pre-enacting history would suggest to our notional observer that it deals with standing to sue, a standing rule has been discovered in this "innocuous provision."³⁵ Section 6(6)(b) provides as follows:

The judicial powers vested in accordance with the foregoing

L. 1 (1995) [hereinafter Ogowewo].

34. 7 N.W.L.R. 598 (1998).

35. It is for this reason that commentators on the Constitution – before the *Adesanya* case – never made the link between standing and § 6(6)(b). See, e.g., H. CHAND, *NIGERIAN CONSTITUTIONAL LAW* (1981); B.O. NWABUEZE, *THE PRESIDENTIAL CONSTITUTION OF NIGERIA* (1982); J. AKANDE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1979 – WITH ANNOTATIONS* (1982). See Report of the Constitution Drafting Committee Vol. I, Ch. 8 (1976) [hereinafter Report on the Constitution] (for the Constitution's pre-enacting history). See also Report of the Sub-Committee on the Judicial System, in Report of the Constitution Drafting Committee, Vol. II, 101-25 (1976) (wherein nothing on *locus standi* was mentioned). Even the military government that promulgated the Constitution into law did not have this in mind. See O. OBASANJO, *CONSTITUTION FOR NATIONAL INTEGRATION AND DEVELOPMENT* 101-109 (1989) (discussing judicial power).

provisions of this section shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.³⁶

By some kind of alchemy the courts transmuted a constitutional provision that seemingly has no bearing on the standing principle into one that contains a rule of standing to be applied in all areas of the law. How this strange discovery was made, under the influence of a poor understanding of Article III of the U.S. Constitution, is a matter that we shall address in due course. According to Bello J.S.C.:

[Section 6(6)(b)] expresses the scope and content of the judicial powers vested by the Constitution in the courts within the purview of the subsection. Although the powers appear wide, they are limited in scope and content to only matters, actions, and proceedings '*for the determination of any question as to the civil rights and obligations of that person.*' . . . It is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked.³⁷

From these premises, the courts derived a rule of standing which can be stated thus: it is the law of Nigeria that a litigant will be granted access to the courts only where the litigant can point to the infringement or threatened infringement of his civil right, but will be denied such access if no such right has been infringed or threatened, with the result that the court will be unable to assume jurisdiction to hear the case. Accordingly, "in determining the issue of locus standi, at whatever level in the adjudication process, a court of law must constantly bear in mind that its judicial powers are being invoked and the matters in which the judicial powers can be exercised are as contained in the provisions of section 6(6)(b) of the [1999] Constitution."³⁸ The test for the application of this rule has been formulated by Bello J.S.C. in the following terms:

36. See NIG. CONST. § 6(6)(b).

37. The assumed discoverer of this rule. See Adesanya, 1 All N.L.R. (Part 1) at 39.

38. Dagazau Carpets Ltd. v. Borkir Int'l Ltd., 7 N.W.L.R. 293, 303H (1997).

standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.³⁹

Clearly, the key words in section 6(6)(b) are "civil rights." The legislative history of the provision does not suggest any explicit decision by the Constitution's framers to use those words, as presently understood, in section 6. It was the drafters - who incidentally were not expert draftsmen⁴⁰ - that inserted the term in section 6. The origin of this term can be traced to Nigeria's Independence Constitution of 1960.⁴¹ The penultimate constitutional conference had recommended that a bill of fundamental rights modeled along the lines of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴² should be written into the constitution.⁴³ In providing for the right to a fair hearing in Article 6, the European Convention had used the term "civil rights" to refer to the underlying matter with respect to which there may be a judicial determination and with respect to which a fair hearing should be guaranteed.⁴⁴ This explains how the term

39. 1 All N.L.R. (Part 1) at 39 (1981). *See also* Ogbuehi v. Gov. of Imo State, 9 N.W.L.R. 53, 84 (1995); Unitex Ltd. v. Yakubu, 13 N.W.L.R. 334, 344 (1998); Ogunmokun v. Military Adm'r, Osun State, 3 N.W.L.R. 261, 285 (1999); Okafor v. Asoh, 3 N.W.L.R. 35, 54 (1999).

40. *See* The Report of the Constitution, *supra* note 35, Ch. 4 (stating that, "the Committee agreed that the work of putting the conclusions of the Committee into the form of a Constitutional Instrument should be referred to the lawyer members of the Committee subject to the directive that they should use simple English as far as practicable."). The Constitution Drafting Committee subsequently appointed the Legal Sub-Committee for the purpose of preparing a legal draft based on agreed conclusions. In view of how the Constitution Drafting Committee was composed, it is obvious that those who drafted the 1979 Constitution did not do so because of their expertise in drafting; it was simply because they happened to be lawyers who found themselves on the Constitution Drafting Committee. *See* NWABUEZE, *supra* note 35, at 2.

41. *See* NIG. CONST. § 21.

42. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Human Rights Convention].

43. *See* Report by the Resumed Nigerian Constitutional Conference (1958) Cmnd. 569.

44. Article 6(1) provides, "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly, but the press and pub-

came to be used in Nigeria's first post-independence constitution and how it ultimately found its way into Chapter IV of the 1979 (and 1999) Constitutions. Unfortunately, the drafters of section 6 of the 1979 Constitution inserted the term into section 6(6)(b) without any knowledge of the jurisprudence that had developed around the term. This jurisprudence had wrongly equated "civil rights" with "private legal rights." (This incognizance of existing case law continued when section 6(6)(b) of the 1999 Constitution was drafted, since it completely reproduced section 6(6)(b) of the 1979 Constitution.) This is the first in a series of errors that led to the present standing rule. That the Constitution Drafting Committee was particularly error prone is not a matter that admits any doubt. For instance, their report states, "the actual drafting of this draft Constitution had to be accomplished under a severe pressure on our time . . . [and therefore] . . . the draft which follows hereafter had to be prepared within an exceedingly short time. . . . [A]ll these mean that there must, invariably, be mistakes in the draft which, had we had more time, it may have been possible for us to put right."⁴⁵

The term "civil rights" has been construed to mean "private legal rights."⁴⁶ According to the Supreme Court in

lic may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Human Rights Convention, *supra* note 42, at art. 6, para. 1.

45. Report of the Constitution, *supra* note 35, at Ch. 38.

46. *Adesanya*, 1 All N.L.R. (Part 1) at 39. See *Attorney-General, Kaduna State v. Hassan*, 2 N.W.L.R. 483, 508D, 509A-B (1985); *Thomas v. Olufosoye*, 1 N.W.L.R. 669, 691E-F (1986); *Odeneye v. Efunuga*, 7 N.W.L.R. 618, 639E-F (1990); *Badejo v. Fed'l Minister of Ed., L.R.C. (Const.)* 735 (1990) (where *Babalakin J.C.A.* was of the view that the plaintiff had a personal right to be admitted into a Federal Government College on the basis of her 73.25% examination score and, therefore, she had *locus standi* to challenge a quota system which had the effect of denying her a place). See also *Alofoje v. F.H.A.*, 6 N.W.L.R. 559, 567G (1996); *Adegbite v. Raji*, 4 N.W.L.R. 478, 488A-C (1992); *Amodu v. Obayomi*, 5 N.W.L.R. 503, 512F-513C (1992). In *Ejiwunmi v. Costain (W.A.) Plc.*, *Musdapher J.C.A.* states, "The issue that now has to be decided is whether the statement of claim has disclosed any personal legal right for which the respondent is entitled to any remedy and if at all they have a right which has been violated." 12 N.W.L.R. 149, 164H (1998). *Uwaifo J.C.A.* said, in *Olagbegi v. Ogunoye II*, that for there to be *locus standi*, "the statement of claim must disclose a cause of action vested in the plaintiffs regarding their rights or obligations which have been violated in the subject-mat-

Odeneye v. Efunuga,⁴⁷ such rights can be conferred by the Constitution,⁴⁸ a statute,⁴⁹ the common law,⁵⁰ or customary law.⁵¹ The genesis of the equation of "civil right" with "private legal right" can be traced to the Nigerian Supreme Court's decision in *Merchants Bank Ltd., v. Federal Minister of Finance*,⁵² where the court construed the term "civil rights" as not including privileges. The Supreme Court held that a refusal to grant a license was simply the denial of a privilege, and if that was so, it did not involve a determination of the applicant's civil rights. Writing in the first volume of *The Nigerian Law Journal*, R.B. Seidman presciently observed that, "if the case heralds the law which is to be, it may fairly be said to be a disaster for Nigerian law."⁵³ Seidman's fear was that "[b]y excluding Hoffeldian 'privileges' from the phrase 'civil

ter." 5 N.W.L.R. 332, 352 (1996). See generally *In re Adetona*, 3 N.W.L.R. 481, 488E-F (1994) (where Tobi J.C.A. said, "Locus standi can only arise from a right cognisable and conferred on the plaintiff by law. Where there is no such right, the plaintiff cannot be said to have a standing (sic) to commence or institute the action."); *Attorney-General of Anambra State v. Eboh*, 1 N.W.L.R. 491, 505F-G, 510B (1992); *Busari v. Oseni*, 4 N.W.L.R. 557, 587-589 (1992); *Albion Const. Ltd. v. Rao Invs. Ltd.*, N.W.L.R. 583, 593D-H (1992).

The courts sometimes state this test as a sufficient interest test, but use the term to denote the required quantum of interest – that quantum being a legal right. See, e.g., *Kilfco Ltd. v. Philipp Holzmann A.G.*, 3 N.W.L.R. 276, 296G (1996); *Ogbuehi v. Governor of Imo State*, 9 N.W.L.R. 53, 87B (1995); *Keepler v. Ofosia*, 3 N.W.L.R. 415, 429G (1995); *Adeyemi v. Olakunri*, 2 N.W.L.R. 500, 507H-508B (1994); *Bamidele v. Comm'r for Local Gov't*, 2 N.W.L.R. 568, 583H-584A (1994); *Okafor v. Asoh*, 3 N.W.L.R. 35, 55 (1999) (where the court uses the term "sufficient legal interest").

47. 7 N.W.L.R. at 639.

48. Such as any of the constitutionally guaranteed rights in Ch. IV of the Constitution. They are the right to life, dignity of person, personal liberty, fair hearing, private and family life, freedom of thought, conscience and religion, freedom of expression and the press, peaceful assembly and association, freedom of movement, freedom from discrimination, the right to acquire and own immovable property anywhere in Nigeria and protection from compulsory acquisition of property.

49. See *Egolum v. Obasanjo*, 7 N.W.L.R. 355 (1999); *Adenekan v. Ajayi*, 8 N.W.L.R. 473 (1998); *Fin. Merch. Bank Ltd. v. Nig. Deposit Ins. Corp.*, 6 N.W.L.R. 226 (1995).

50. Such as the right to sue on a contract.

51. *Oyediran v. Bolarinwa*, 12 N.W.L.R. 559, 561 (1998) (any member of a community has standing to sue in a chieftaincy matter under customary law). Cf. *Seidu v. Attorney-General of Lagos State*, 2 N.W.L.R. 165 (1986).

52. 4 All N.L.R. 598 (1961).

53. R.B. Seidman, *Constitutional Standards of Judicial Review of Administrative Action in Nigeria*, 1 NIG. L. J. 232, 243 (1964-65).

rights' the Court all but reads s.22(1) out of the Constitution."⁵⁴ This decision, which implicitly equates "civil rights" with "private legal rights," accounts for why the standing rule shuts out many from the courthouse. Hence, where a public right is infringed upon, such as a constitutional infringement that implicates no private law right, or a public law right (an interest recognised and protected by public law) has been violated, such as a denial of a legitimate expectation, the litigant will be denied standing. Only private legal rights will suffice.⁵⁵ This is regarded as the irreducible constitutional minimum for standing. A "real interest," "special damage," or even "sufficient interest" (that would ordinarily have satisfied the standing test under the AJR procedure) will therefore not satisfy the section 6(6)(b) standing test.⁵⁶

It was certainly not the intention of the Constitution's framers to equate "civil rights" with "private legal rights." What was intended was that the term "civil rights" should refer to all the justiciable matters (civil and criminal) that a court can adjudicate. The idea was to delimit the judicial function of federal and state courts to such matters. The *genus* "civil rights" therefore embraces two categories of such matters: (a) rights guaranteed in Chapter IV of the Constitution (fundamental rights) and (b) all other justiciable matters that can be determined by a court. The judicial power of the courts

54. *Id.*

55. Hence a shareholder who had sold his shares in a bank had no standing to apply to the court to compel the regulator to revoke the license of the bank. *See Gadzama v. Rims Merch. Bank Ltd.*, 4 N.W.L.R. 234 (1997). Such a person, whether or not he owned shares, had no legal right to compel the regulator to revoke a license.

56. A person is said to have a real interest when he is "a person aggrieved" – the standing requirement for certiorari. Hence, traders impugning the grant of a licence to rivals were said to have standing under this test. *See R. v. Groom, ex parte Cobbold*, 2 K.B. 157 (1901). Since a real interest is an interest lower than a private legal right, it will not suffice in Nigeria. Although there are *dicta* in Nigerian cases that "special damage" will confer standing, this is wrong. Clearly, "special damage" is not the same thing as "private legal right." The requirement of "special damage" was the second alternative standing requirement for applications for declarations and injunctions under the common law. *See Boyce v. Paddington Borough Council*, 1 Ch. 109, 114 (1903). The first requirement was that of private legal right. Cane, *supra* note 1, at 313 (writing that, "if [the requirement of special damage] is to have any area of operation different from that of the legal right test it cannot refer to damage such as would entitle the plaintiff to sue for damages at common law for if he could he would have a private legal right.").

was to extend only to a determination of matters in the two categories. This logical view is further supported by the wording of section 36(1) of the Constitution of 1999 (i.e. section 33(1) of the Constitution of 1979),⁵⁷ which is meant to guarantee a fair hearing, not only in relation to an adjudication involving constitutionally guaranteed rights, but also to all other justiciable matters in respect of which a court can adjudicate.⁵⁸ Accordingly, it should be obvious that the term "civil rights" was intended to refer to a very wide category of matters.⁵⁹

It is Bello J.S.C.'s interpretation of section 6(6)(b) and the existing jurisprudence on "civil rights" that account for the seven strange results previously identified. Consider the first scenario. In the *Merchants Bank* case, it was held that a wrongful refusal to grant a license did not infringe the civil rights of the applicant, as a license is juridically a privilege and not a right.⁶⁰ As the standing rule derived from section

57. NIG. CONST. § 36(1):

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

58. Clearly the term "civil rights" in § 36(1) does not refer only to a determination of constitutionally guaranteed rights (such as the right to private and family life), for if that were the case, no person will have a right to a fair hearing in regard to an adjudication for a breach of contract, for instance. Instead, § 36(1) gives a right to a fair hearing in respect of all justiciable matters that can come before a court. This right to a fair hearing is a civil right, and so is the underlying justiciable matter that the litigant wishes the court to determine.

59. It is often erroneously thought that the term "civil rights" has two different meanings, to wit, constitutionally guaranteed rights (Ch. IV rights) and private legal rights. Hence, we see *Okechukwu v. Etukokuwu* stating that, "[a] civil right within the meaning of section [36(1)] of the Constitution is distinct from a private or domestic right." 8 N.W.L.R. 513, 526D (1998). The correct position is that the term has one meaning, although it embraces two categories. The first category covers all the Ch. IV rights and the second category covers all other justiciable matters that can be determined by a court. Accordingly, a determination of a justiciable matter in tort, contract or crime, for example, is one affecting the civil rights of the person involved. Likewise is a determination of a fundamental right, such as the right to private and family life. In respect of proceedings under these two categories, the judicial powers of the courts are invoked because the person's civil rights are to be determined.

60. See *Nakkuda Ali v. Jayaratne*, A.C. 66 (1951); *Okakpu v. Resident*, Pla-

6(6)(b) fastens on civil rights, the plaintiff had no standing.⁶¹ Even though Nigerian public law recognizes that a legitimate expectation is an interest worthy of protection⁶² and, therefore, the applicant for the banking license has an interest that public law claims to protect, the standing rule prevents the applicant from suing to protect this interest (referred to as a *public law right*). This is the "court-closing" effect of the rule. It immunizes from judicial review a substantial aspect of the exercise of governmental power.

This is also the case where a constitutional or statutory provision is breached without an infringement of the plaintiff's legal rights.⁶³ Here, only a *public right* has been affected. In *Douglas v. Shell Petroleum Dev. Co. Ltd.*,⁶⁴ the Federal High Court held that the plaintiff had no *locus standi*, as he showed no *prima facie* evidence that his "personal right" was affected by the failure of the defendant company to comply with the Environmental Impact Assessment Act of 1992. It is true that the Court of Appeals allowed the appeal against this decision and remitted the matter back to the Federal High Court, but this was on the technical ground that it was erroneous to conclude that the appellant had no standing without looking at

teau Province, N.R.N.L.R. 5 (1958). As Schwartz aptly points out, "The individual who is being given something by government to which that person has no pre-existing 'right' is being given a mere 'privilege'." B. SCHWARTZ, *ADMINISTRATIVE LAW* 247 (3rd ed. 1991).

61. However, if the courts come to recognize some privileges as rights, then the plaintiff will have standing. As Schwartz points out, "[a]nother case where yesterday's privilege has become today's right is the passport case." See SCHWARTZ, *supra* note 59, at 255. This has recently occurred in Nigeria. In *Agbakoba v. The Director, S.S.S.*, in a powerful judgment by Ayoola J.C.A., the Court of Appeal transmuted this privilege into a right. 6 N.W.L.R. 475 (1994). See O.C. Okafor, *The Fundamental Right to a Passport Under Nigerian Law: An Integrated Viewpoint*, 40 J. AFR. L. 53 (1996). The Supreme Court affirmed this decision on appeal. *Director, S.S.S. v. Agbakoba*, 3 N.W.L.R. 314 (1999). It is doubtful, however, that this transformation of privileges into rights can be widespread, since the transformation that occurred in the passport case was attributable to the constitutional right to freedom of movement.

62. See *Stitch v. Attorney-General of the Fed'n*, 5 N.W.L.R. 1007 (1986).

63. Hence, the Supreme Court, in *Nwankwo v. Nwankwo*, held that the provisions of the Code of Conduct set out in the Fifth Schedule to the Constitution does not confer a civil right on any citizen for which he can sue but only the sanction provided in paragraph 12 of the said schedule. 5 N.W.L.R. 153 (1995).

64. The decision of the Federal High Court is unreported. See Suit No. FHC/L/CS/573/96 (Lagos Division). The Court of Appeal decision is reported. 2 N.W.L.R. 466 (1999).

the statement of claim or in the absence of any evidence. Were the Federal High Court to reconsider the matter, the same result will be reached if the plaintiff fails to make a showing that his legal rights have been violated or threatened.⁶⁵ It would, however, appear that in some cases of breach of statute, nothing precludes a court from recognising a private legal right by implying a cause of action and then using this to give the plaintiff standing.⁶⁶ But this highlights the circularity of the standing rule in general: a person will have standing only if his legal right is infringed or threatened. Yet it is the court that would have to determine whether he has a legal right in the first place. The court will be able to make such a determination only when its judicial powers are invoked, but those powers cannot be invoked when no legal rights are in issue! Strangely, the courts seem oblivious to this circular reasoning. To make matters worse, even in private law where standing cannot ordinarily be divorced from the merits, the courts absurdly claim that standing is not dependent on the merits of the case. Yet, the "private legal rights" test is one that goes to the merits.⁶⁷

The third strange result vividly demonstrates the injustice that the standing rule occasions. It was the State's right to commence and stop the prosecution of the murder suspects. If it stopped it unconstitutionally, the deceased father's civil rights are not affected.⁶⁸ While it is true that there is a public right that the criminal prosecution will not be stopped unconstitutionally, but the Nigerian standing rule, *strictu sensu*, does not recognize such a right. Since the father could not

65. It makes no difference that § 7 of the Act makes provision for public involvement in the decision-making function of the environmental agency, since this does not confer a civil right.

66. See T.I. Ogowewo, *Transposition of Securities Legislation to an Emerging Market: The Case of US Federal Securities Law and Nigeria*, 11 J.I.B.L. 239 (1996) (where it is argued that a breach of the anti-fraud provision in the securities laws gives rise to a private cause of action).

67. For instance, standing to sue in contract cannot be determined without ascertaining whether the plaintiff is privy to the contract sued upon. Such a determination goes to the merits. *Ass'n of Data Processing Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (holding that "[t]he 'legal interest' test goes to the merits.").

68. The situation would be different if the father had commenced a private prosecution, which was stopped unconstitutionally. This is because under the Criminal Procedure Law he has a legal right to commence a private prosecution. See *Fawehinmi*, 4 N.W.L.R. at 797; Ogowewo, *supra* note 33, at 17.

point to the infringement of his private legal rights by the unconstitutional entry of the *nolle prosequi*, he will be denied standing. This was how Justices Coker and Karibi-Whyte of the Court of Appeals applied the rule in *Attorney-General, Kaduna State v. Hassan*.⁶⁹ It is true that on appeal their analytical application of the standing rule was brushed aside in favor of a confused application which further complicated this wrong law,⁷⁰ but there can be no doubt that if the standing rule is to be applied logically, there can be no escape from the result reached by those Court of Appeal Justices.

In the fourth scenario, the petitioner in a company law suit is denied standing because the standing test accords *locus standi* only to a plaintiff "who shows that his civil rights . . . have been or are in danger of being violated or adversely affected by the act complained of." In a case of exclusion from management, no private legal rights have been violated or adversely affected. Indeed, if such a right were affected the plaintiff ordinarily will be able to sue under the personal rights exception to *Foss v. Harbottle*.⁷¹ It is for this reason that the company's statute has created a procedure to allow petitioners to vindicate interests that fall short of such rights. But since the standing rule focuses on the underlying legal right that has been infringed, the petitioner will be denied standing. Indeed, the court will be forced to rule that the part of Nigerian company law that allows a court to hear a petitioner even where his legal rights are not in issue is unconstitutional. The legislature cannot confer standing where the Constitution mandates otherwise.⁷² The theory is that the legislature cannot confer standing in a situation that falls below the irreducible constitutional minimum. This should occasion no

69. 5 N.C.L.R. 177 (1985). Karibi-Whyte J.C.A. said, "It is difficult to see how the exercise of the power affects the civil rights and obligations of the respondent-not being a person subject to prosecution or deriving any right from such prosecution . . . The respondent has no special legal right or proprietary interest in the prosecution of those accused of the murder of his son and their discharge from prosecution in my view does not affect his civil rights and obligations." *Id.* at 203. See *id.* at 194 (wherein Justice Coker made pronouncements to the same effect).

70. 2 N.W.L.R. 483 (1999). For a critique, see Ogowewo, *supra* note 33, at 12-13.

71. 2 Hare 461 (1843).

72. "The Constitution is the fundamental law and it sets the limit of permissible actions. Consequently, a statutory grant of *Locus Standi* can only be valid if it is in accord with section 6(6)(b)." See O.A. Bowen, *supra* note 30, at 48.

surprise. In the U.S. Constitution, Article III also has been the basis of the invalidation of an explicit congressional grant of standing.⁷³

The subversion of a key rationale of the standing principle is also obvious. Instead of preventing a multiplicity of suits and a waste of scarce judicial resources,⁷⁴ the standing rule does precisely the opposite. This aspect of the standing rule is highlighted in the fifth and sixth situations previously mentioned. We see that the standing rule, which has closed the door of the courthouse to so many worthy litigants, nevertheless undermines one of the reasons for having a principle of standing. Thus, a plaintiff whose legal rights are affected as a result of a public nuisance can sue under this rule, and the common law rule whereby the right of action in public nuisance - in the absence of special damage - only can be exercised by, or at the relation of, the Attorney-General will be held to be unconstitutional. This was how the Supreme Court decided *Adediran v. Interland Transport*.⁷⁵ This illustrates the "court opening" effect of the rule. Furthermore, because standing to sue is linked to jurisdiction⁷⁶ - jurisdictional questions

73. The U.S. Supreme Court has ruled unconstitutional a statutory provision permitting, "any person [to] commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 (1992). This provision was ruled unconstitutional because Art. III requires something more than, "a generally available grievance about government." *Id.* Therefore, while it is the case, as was stated by Tobi J.C.A., that a statutory right to sue abrogates a common law principle to the contrary, it is submitted that this is not the case where there is no constitutional authority to sue, but a statute purports to permit such a suit. *Nnamani v. Nnaji*, 7 N.W.L.R. 313, 330 (1999). In such a case, applying the Nigerian law of standing the courts will pronounce the statutory provision as unconstitutional. Therefore, the statement of Tobi J.C.A., in *Busari v. Oseni* that, "where a statute clearly provides for the locus standi or standing of a party to sue, a Court of law, has not option (sic) than to succumb to the provisions of such a statute," should be qualified by adding that, for this to be so, the underlying interest in respect of which the party is given a right of action must itself be a legal right. 4 N.W.L.R. 557, 586A (1992).

74. See *Edwards v. Halliwell*, 2 All E.R. 1064, 1066-67 (1950) (demonstrating that this is a rationale for the principle of standing). See also *Bentley-Stevens v. Jones*, 1 W.L.R. 638 (1974); CROMWELL, *supra* note 1, at 9-10.

75. 9 N.W.L.R. 155 (1991).

76. According to the Court of Appeal, a challenge to a plaintiff's *locus standi* is a challenge to the jurisdiction of the court, because *locus standi*, "is a product of jurisdiction." *Attorney-General, Enugu State v. Avop Plc.*, 6 N.W.L.R. 90, 112H (1995) (opinion of Tobi J.C.A.).

being ones that can be raised at any stage of the proceedings - the standing rule has now become a means of ambushing a plaintiff even at the Supreme Court, although the plea of lack of standing may never have been raised at any of the lower courts. Who suffers? Not only the hapless plaintiff who is denied justice, but also the wider society that had to subsidize the attempted resolution of a dispute at the expense of other disputes.⁷⁷

Finally, its constitutional provenance ensures that it overrides what the courts must now regard as "inferior" rules of standing.⁷⁸ Hence, even in private law, existing standing rules are now being re-written in a manner contrary to the coherence of the substantive law in question. Apart from the inevitable doctrinal inelegance this causes, what only can be described as bad law is being produced and lawyers are now being reared on it.

It is important to keep in view the precise formulation of the standing rule and its test, as the solution to the problem of standing to sue requires this. Unfortunately, the cases and text writers do not always seem to be clear about what the standing test is. There are five reasons for the difficulty in identifying the standing test. First, this is an area where judicial confusion and ignorance are the order of the day; some judges do not appreciate the significance of the view (to which they all subscribe) that section 6(6)(b) is the source of the standing rule. Hence, the courts often apply different tests under the guise of applying the section 6(6)(b) test.⁷⁹ It is an unfortu-

77. In *Pharmatek Indus. Projects Ltd. v. Trade Bank (Nig.) Ltd.*, Mohammed J.C.A. advised that an objection to the standing of the plaintiff should be raised at an early stage of the proceedings so that it can be decided then in order to save legal expenses and time. 7 N.W.L.R. 639, 654 (1997). See also *Cent. Bank of Nig. v. Kotoye*, 3 N.W.L.R. 66, 73 (1994) (opinion of Kalgo J.C.A.). This counsel has generally gone unheeded.

78. It has been applied in numerous legal contexts. See, e.g., *Ojukwu v. Kaine*, 9 N.W.L.R. 613 (1997) (application in a probate case); *Ekpan v. Uyo*, 3 N.W.L.R. 63 (1986) (application in a tort case); *Agbonikhena v. Egba*, 2 N.W.L.R. 688 (1987) (application in a contract case); *CBN v. Kotoye*, 3 N.W.L.R. 66 (1994) (application in a company law case).

79. See, e.g., *Akinnubi v. Akinnubi*, 2 N.W.L.R. 144, 160 (1997) (Onu J.S.C. said, "s.6(6)(b) has been interpreted to mean that before a person could bring a suit in respect of any subject matter, the person must show that he has a legal right or special interest in that subject matter.").

Sometimes the courts combine different tests while purporting to apply the

nate fact that even the Supreme Court does not always seem to understand the precise formulation of the standing test. This led Ademola J.C.A., in *Bolaji v. Bamgbose*,⁸⁰ to remark "[t]he Supreme Court has used the words 'rights being affected' and 'interests being affected' as if the two are inter-changeable words and mean one and the same thing. Surely, 'interest' connotes a different thing from 'rights'." Further, he observes, "[f]rom the review of these cases then, it does appear to me that the courts have not been consistent in the application of one test to the exclusion of the other. Sometimes, the adversity of right is used where no such question has arisen."⁸¹ Clearly, a consequence of adopting section 6(6)(b) as the basis of a universal standing rule is that the applicable test must be tied to the language of that section. The language of the provision uses the term "civil rights" - a term that has been interpreted

§ 6(6)(b) test. Eri J., in *Damisha v. Speaker, Benue State*, after stating the standing rule, "It is only where the civil rights and obligations of a person are affected that the Court can welcome the person" - proceeded in the next paragraph to state, "I wish to point out that there is a distinct difference between locus standi in an application for a declaration and locus standi as applicable to the prerogative orders." 4 N.C.L.R. 625, 631 (1983). See also *Ovie-Whiskey v. Olawoyin*, 6 N.C.L.R. 156, 182 (1985) (wherein Karibi-Whyte J.C.A. combines the §6(6)(b) test with other tests.).

In *Akaniwon v. Nsirim*, Onalaja J.C.A. stated that, "[t]he acid test for determining locus standi was declared by the Supreme Court in *Attorney General for Kaduna State v. Hassan* [citation omitted] as follows, 'There are two tests used in determining the locus standi of a person namely (a) the action must be justiciable and (b) there must be dispute (sic) between the parties.'" Nothing could be more vacuous than this. 9 N.W.L.R. 255, 285 (1997). See also *Guda v. Kitta*, 12 N.W.L.R. 21, 48D-F (1999); *Daramola v. A.G., Ondo State*, 7 N.W.L.R. 440, 476G (2000). For more examples of the prevailing confusion, see the following cases: *Pharmatek*, 7 N.W.L.R. 639, 654 (1994) (wherein Mohammed J.C.A. states that *Adesanya* laid down a "a personal interest" test, but he then proceeds to state that the relevant test is a sufficient interest test); *Asheik v. Governor, Borno State*, 2 N.W.L.R. 344, 351G (1994) (wherein Muhammad J.C.A. said, "A person is said to have locus standi if he has shown sufficient interest in the action and that his interest has been adversely affected by the act of the defendant."). For an exhibition of even more confusion, see the various tests referred to by Muktar J.C.A., in *Morohunfade v. Adeoti*, 6 N.W.L.R. 326, 335 (1997). Uwaifo J.C.A., writing extra-judicially, states, "A party who comes to court must show that he has sufficient interest in the subject-matter or that his allegation of an infraction of the law adversely affects his civil rights and obligation calling for a determination under section 6(6)(b) of the Constitution." Uwaifo J.C.A., *The Court - An Instrument of Justice and Democracy*, in 1995 ALL NIGERIA JUDGES' CONFERENCE PAPERS 164 (1995).

80. 4 N.W.L.R. 632, 652B (1986).

81. *Id.* at 653D.

to mean "private legal rights." This means that once the section 6(6)(b) standing rule is accepted, there can be no room for any test that does not focus on an infringement or threatened infringement of a private legal right.

The second reason for the proliferation of tests is that the speeches in the *Adesanya* case seem to contain a number of standing tests. Judges often apply randomly any of these sundry tests with the consequence that it becomes difficult to predict the outcome of a case.⁸² Hence, appeals based on *locus standi* are routine, since an appellate court may use a different test that works to the advantage of the appellant.

Third, the use of a particular test in a case may be a way to avoid an unjust result that would ensue if the section 6(6)(b) test were to be applied. We saw an example of this in the *Hassan* case.⁸³ The result of this is the addition of yet another test to the pantheon of tests.

Fourth, courts and commentators alike have wrongly viewed *Fawehinmi v. Akilu*⁸⁴ as broadening the law on standing.⁸⁵ Lastly, the courts have a tendency of highlighting either the court-opening or court-closing effect (but never both) of the standing rule, and therefore their description of the rule can be likened to a blindman's description of an elephant. It is for this reason that seemingly contradictory *dicta* can be found in the cases to the effect that "there is no room for the adoption of the modern [liberal] views on locus standi being followed by Eng-

82. Even the speech of Bello J.S.C. is sometimes used as the basis for a "sufficient interest" test. This is, however, wrong since he was merely making a general remark about the position in other common law jurisdictions. See 1 All N.L.R. (Part 1) 1, 35 (lines 5-15).

83. 2 N.W.L.R. at 483.

84. 4 N.W.L.R. at 797.

85. See, e.g., *Ebongo v. Uwemedimo*, 8 N.W.L.R. 22, 45F (1995) (Adamu J.C.A.'s decision); *Nig. Airways Ltd. v. Gbajumo*, 5 N.W.L.R. 735, 746B-E (1992) (Kolawole J.C.A.'s opinion). See also *Atsegbua*, *supra* note 30, at 320. In fact, nothing of this occurred. For a fuller discussion of this case, see *Ogowewo*, *supra* note 33, at 17. However, the following comments will suffice for present purposes. First, it is wrong to say that the § 6(6)(b) test was broadened by the statutory rule that was in issue in the case, since a constitution can never be broadened by a statutory rule. Second, it is wrong to say that the standing test was broadened by the Justices who decided the case, since all that occurred was the court's recognition that a person had a right to bring a private prosecution – and this right clearly fell within § 6(6)(b). This right is, in fact, a common law right (the right of the common informer) and it was given statutory effect in the Criminal Procedure Law of Lagos State. See generally *Fawehinmi v. I.G.P.*, 7 N.W.L.R. 481 (2000).

land and Australia,"⁸⁶ and that Nigerian law "permits [for] a wider and more liberal view of locus standi than the English law"⁸⁷

III. THE DISCOVERY OF A CONSTITUTIONAL RULE ON STANDING TO SUE

Prior to the adoption of the 1979 Constitution, there was no universal standing rule. *Locus standi* depended on the cause of action in private law and the remedy sought in public law.⁸⁸ Consider a few old private law cases. In *Raccah v. Standard Company of Nigeria Ltd.*,⁸⁹ the plaintiffs brought an action for the price of goods sold. The defendants argued that they were not privy to the contract. The important point to bear in mind is that the court focused on the cause of action, not on an external norm. The language of privity was used instead of a constitutional rule of *locus standi*. The position was the same in tort. In *Will v. Will*,⁹⁰ the plaintiff sued for damages for trespass. As the statement of claim disclosed neither a right nor title to possession, and it negated any prior or actual possession by the plaintiff, it was held that the claim disclosed no cause of action. In *Adanji v. Hunvoo*,⁹¹ where the court held that the particular chieftancy dispute raised no legal claim, it was held that a cause of action had not been made out. The point is that "[i]n private law, entitlement to a remedy and the right to apply for that remedy merge."⁹² The issue of standing is simply subsumed within the cause of action.

In public law, the standing test depended on the remedy sought. If the private law remedies of the declaration or in-

86. *Thomas v. Olufosoye*, 1 N.W.L.R. 669, 686D (1986) (opinion of Obaseki J.S.C.).

87. *Ovie-Whiskey v. Olawoyin*, 6 N.C.L.R. 156, 191 (1985) (opinion of Akpata J.C.A.).

88. See B.O. ILUYOMADE AND B.U. EKA, CASES AND MATERIALS ON ADMINISTRATIVE LAW IN NIGERIA 273-284 (1980); P.A.O. OLUYEDE, CONSTITUTIONAL LAW IN NIGERIA 369-375 (1992); S.I.O. AGUOLU, THE PREROGATIVE WRITS AND ORDERS UNDER NIGERIAN LAW AND CONSTITUTION (1981) [hereinafter AGUOLU].

89. 4 N.L.R. 46 (1922-1923).

90. 5 N.L.R. 74 (1923-1924).

91. 1 N.L.R. 75 (1881-1911).

92. Cane, *supra* note 1, at 303.

junction were sought in a public law matter, as was the case in *Olawoyin v. Attorney-General, Northern Region*,⁹³ and *Gamioba v. Ezezi II*,⁹⁴ the standing test was that applicable to those remedies.⁹⁵ The same was the case if the remedy applied for was one of the prerogative remedies.⁹⁶ Again, these cases serve to show that before the courts allowed their wrong interpretation of section 6(6)(b) to infect public law, they decided *locus standi* questions not by referring to an external norm, but instead by focusing on the remedy sought.

The position on standing in public and private law previously adumbrated was changed with the adoption in 1979 of a Constitution, partly modeled along the lines of the U.S. Constitution.⁹⁷

A. *The Influence of Article III of the U.S. Constitution*

The governmental powers of the Nigerian federation are derived from specific provisions of the Constitution. The source of judicial power is section 6. Section 6 is functionally similar

93. 1 All N.L.R. 269 (1961).

94. 1 All N.L.R. 584 (1961).

95. The standing tests are (a) an infringement of a legal right or (b) special damage. See E. Kyrou, *Locus Standi of Private Individuals Seeking Declaration or Injunction at Common Law*, 13 MELB. U. L. REV. 453 (1982). Although the courts generally required an infringement of a legal right before a declaration or injunction could be granted, in the pre-*Adesanya* case of *Olawoyin v. Attorney-General, N. Nig.*, the Federal Supreme Court applied a lesser test that focused on "interests" and not "rights." 1 N.L.R. 269, 273-274 (1961). However, in *Gamioba v. Ezezi II*, the same court changed the standard from "interests" to "rights." 1 N.L.R. 584, 588 (1961).

96. The *locus standi* test for certiorari was quite liberal. A real interest, as opposed to an infringement of a legal right, sufficed. Hence, in *Queen v. The Administrator, Western Nigeria*, it was held that an aggrieved person had *locus standi* to apply for an order of certiorari *ex debito justitiae*. 3 W.N.L.R. 344 (1962). The same was the case with prohibition, although there are cases to be found where it has been held that a stranger will have *locus standi*. A stringent test was required for an order of mandamus. A person had to have a legal right to insist upon the performance of the duty in question, although modern decisions now place emphasis on "interests." See AGUOLU, *supra* note 87, at 38-56; G.L. Peiris, *The Doctrine of Locus Standi in Commonwealth Administrative Law*, P.L. 52 (1983).

97. See B.O. NWABUEZE, *THE PRESIDENTIAL CONSTITUTION OF NIGERIA* Ch. 5 (1982); B.N. Butler, *The 1979 Constitution of the Federal Republic of Nigeria and the Constitution of the United States of America: A Historical and Philosophical Comparison*, 30 HOW. L.J. 1025 (1987).

to Article III of the Constitution of the United States, from which the judicial powers of the federal courts emanate, with one major difference. While Article III, section 2, is the source of the judicial power of the federal courts (which have a limited jurisdiction), section 6(6)(b) is the source of the judicial power of both federal and state courts in Nigeria (which combined have an unlimited jurisdiction). Article III, section 2, reads in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.⁹⁸

It is clear from a reading of Article III that it “contains no explicit constitutional requirement of ‘standing’.”⁹⁹ All it does is extend federal “Judicial Power” to certain specified “Cases” and “Controversies.” The federal courts do not decide academic questions of law, but only such questions as arise in a “case or controversy.”¹⁰⁰ According to Chief Justice Warren in *Flast v. Cohen*:

Embodied in the words ‘cases’ and ‘controversies’ are two complimentary but somewhat different limitations. In part those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that

98. U.S. CONST. art. III, § 2.

99. C.R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 168 (1992).

100. C.A. WRIGHT, LAW OF FEDERAL COURTS 60 (5th ed. 1994).

the federal courts will not intrude into areas committed to the other branches of government.¹⁰¹

The U.S. Supreme Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services Inc.*,¹⁰² has pronounced that "[t]he Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both our standing and our mootness jurisprudence." In *Baker v. Carr*,¹⁰³ the Court had stated that the gist of the issue of standing is whether the plaintiffs have alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,¹⁰⁴ the Court pointed out that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." The test for the application of this rule of standing, as laid down by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*,¹⁰⁵ is that the plaintiff must make a showing that (i) it has suffered "an injury in fact" that is (a) concrete and particularised and (b) actual or imminent, not conjectural or hypothetical; (ii) the injury is fairly traceable to the assailed action of the defendant; and (iii) it is likely that the injury will be redressed by a favourable decision. It should be noted that even where the Article III requirements are satisfied, "a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."¹⁰⁶

The link between standing and Article III is a fairly recent one. The link is not evident in the text of the Constitution or record of deliberations of its framers.¹⁰⁷ Indeed, it has been

101. 392 U.S. 83, 94-95 (1968).

102. 120 S.Ct. 32 (1999).

103. 369 U.S. 186, 204 (1962).

104. 454 U.S. 464, 475-476 (1982). See also *Dep't of Commerce v. U.S. House of Representatives*, 119 S.Ct. 765, 772 (1999); *Fed. Election Comm'n. v. Akins*, 118 S.Ct. 1777, 1784-87 (1998); *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1008 (1998); *Bennett v. Spear*, 520 U.S. 154, 160-162 (1997).

105. 504 U.S. 555 (1992).

106. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979).

107. Sunstein, *supra* note 98, at 173.

observed that "[t]he first reference to 'standing' as an Article III limitation can be found in *Stark v. Wickard*, decided in 1944 . . . [and] [t]he explosion of judicial interest in standing as a distinct body of constitutional law is an extraordinarily recent phenomenon."¹⁰⁸

From the discussion so far, three things should be evident. First, because Article III applies only to federal courts (which have a limited jurisdiction), a constitutional requirement of standing derived from Article III is not as pervasive as the standing requirement derived from section 6(6)(b), which applies to all causes in both state and federal courts. Second, because Article III uses the term "Cases" and "Controversies," the test for satisfying Article III is widely formulated. The consequence of this is that Article III is not difficult to satisfy. This is unlike section 6(6)(b), which uses the term "civil rights," which necessarily mandates a test tied to those words. Hence, while the section 6(6)(b) test requires a showing of actual or threatened violation of the plaintiff's legal rights, the Article III test requires a showing of "injury in fact," which is far easier to satisfy. Indeed, U.S. federal courts limit the size of their docket mainly through their prudential rules, rather than through Article III. Lastly, since the reading of a standing requirement into Article III was a fairly recent event, this suggests that if it had not occurred no catastrophe would have ensued in the U.S. federal courts. Unfortunately, none of these points were recognised when *Bello J.S.C.* sought to make section 6(6)(b) do what Article III does in the United States.

Two further issues that are not so evident should be mentioned. First, *Bello J.S.C.* was led astray by the old jurisprudence on Article III. These cases demanded the infringement of a legal right. This requirement was later to be swept away by the U.S. Supreme Court in *Association of Data Processing Organizations v. Camp*,¹⁰⁹ a decision to which *Bello J.S.C.* did not refer. Second, *Bello J.S.C.* was completely oblivious of the existence of the Federal Administrative Procedure Act which gave standing to a person that is adversely affected by agency action.¹¹⁰ This statute mitigated the harshness of the rule

108. *Id.* at 169.

109. 397 U.S. 150, 153 (1970).

110. See 5 U.S.C. §§ 702–703 (1994).

that had tied standing to the requirement that the plaintiff must have suffered a legal wrong.

B. The Adesanya Case

When the argument that section 6(6)(b) laid down a rule of standing was initially raised, it was rejected by one state High Court in *Isagba v. Alegbe*¹¹¹ and by the Court of Appeal in *Bendel State v. Obayuwana*.¹¹² But the argument was later to resurface in the Court of Appeal in the *Adesanya* case. It would be a work of supererogation to discuss the numerous defects that characterise the speeches in the Supreme Court, since this has been done elsewhere.¹¹³ It will suffice for present purposes to review the facts and explore the reasonings behind the decision with a view to determining whether or not the Supreme Court indeed decided that section 6(6)(b) contained a rule of standing to sue.

Like most famous cases that are often cited but rarely read, the *Adesanya* case has not been very well analysed. This shall now be remedied. The facts of the case lie in a small compass. Senator Adesanya instituted proceedings in the High Court against the President of Nigeria and his appointee to the office of the Chairman of the Federal Electoral Commission. He sought a declaration that the appointment was unconstitutional, and an injunction preventing it from taking effect. The plaintiff had opposed the appointment during the confirmation proceedings in the Senate, maintaining that it was contrary to certain provisions of the Constitution, and was, therefore, invalid. The majority in the Senate, however, proceeded to confirm the appointment. The trial judge granted the declaration sought by the plaintiff and set aside the said appointment. In the course of his judgement, the judge remarked that the plaintiff was raising a constitutional issue that did not affect him personally. When the defendant appealed to the Court of Appeal, it was this observation that prompted the Court of to raise the *locus standi* point *suo motu*.¹¹⁴ The Court called up-

111. 2 N.C.L.R. 424, 433 (1981).

112. 3 N.C.L.R. 206, 210 (1982).

113. See Ogowewo, *supra* note 33.

114. *Adesanya*, 2 All N.L.R. (Part 1) 1, 8 (1981).

on counsel to address it on the relevance of section 6(6)(b) to the issue of standing. After making his submissions, counsel for the plaintiff invoked the provisions of section 259(3) of the Constitution, under which the matter could be referred to the Supreme Court for interpretation. Although the reference was made, the Court of Appeal nevertheless went ahead to determine the meaning of section 6(6)(b) and ruled that the plaintiff lacked standing.¹¹⁵

The Supreme Court pointed out that the approach of the Court of Appeal in regard to the reference was wrong. According to the Chief Justice of Nigeria, Fatayi-Williams C.J.N., "A decision already made by the Federal Court of Appeal cannot be referred to the Supreme Court for another decision under that section."¹¹⁶ Because of this irregularity, the reference was deemed to be an appeal by the plaintiff against the ruling of the Court of Appeal. The Supreme Court dismissed the appeal and unanimously held that the plaintiff lacked standing. Since the Supreme Court affirmed the decision of the Court of Appeal, it is important to refer to that decision when examining the speeches in the Supreme Court. This is what the Court of Appeal said about section 6(6)(b):

Section 6(6)(b) of the Constitution of 1979 contains the expression of the scope and amplitude of the judicial powers vested in the courts. It indicates the parties and also the subject matter which are justiciable . . . For a person to have a justiciable and enforceable right, there must exist in the person against whom the right is being enforced a legal duty to do something in relation to which the right was being claimed . . . It is not sufficient if the right to enforce any duty is enjoyed along with every other citizen, such as a public right or that there is a moral obligation on the part of the other to do what was being claimed. The right to enforce the civil rights and obligations must belong to the party so claiming to enforce it. In our opinion the expression civil right and obligations pertain to the sphere of private rights and obligations of the citizen such as legal relationship (sic) created by normal social and commercial interaction between citizens, and between citizens and the State such as contracts and torts arising therefrom.¹¹⁷

115. *Id.* at 13-24.

116. Adesanya, 1 All N.L.R. (Part 1) 1, 15.

117. 2 All N.L.R. (Part 1) 1, 18-19 (1981). It was a joint judgement signed by

In unanimously holding that the plaintiff lacked standing, the Supreme Court clearly affirmed the decision of the Court of Appeal. But was the Court of Appeal's construction of section 6(6)(b) also affirmed? This is an important question because the source of the problem of standing to sue is Bello J.S.C.'s affirmation of the Court of Appeal's decision that section 6(6)(b) contains a requirement of standing. It is important to keep this in view always. The tendency has been to focus on the conclusion that the plaintiff lacked standing rather than on the reasoning that made such a ruling possible. Once it is recalled that all the problems identified at the beginning of this article stem from the assumed constitutional requirement of standing, then analysis should be focused on aspects of the *Adesanya* case that dealt with section 6(6)(b).¹¹⁸ Accordingly, the relevant question is whether the view of Bello J.S.C. that section 6(6)(b) contained a requirement of standing was accepted by a majority of the Supreme Court Justices in *Adesanya*. In answering this question, we must always keep in mind exactly what each Justice of the Supreme Court said - directly or inferentially - on the effect of section 6(6)(b) on the principle of standing. Putting it at its highest, there are four possible views on the effect of section 6(6)(b), to wit: (a) it has no effect whatsoever on standing;¹¹⁹ (b) it contains a requirement of standing in constitutional matters only;¹²⁰ (c) it contains a general requirement of standing;¹²¹ and (d) it creates an *actio popularis* (i.e. it removes the need to show standing) in constitutional matters (outside Chapter IV of the Constitution which guarantees fundamental rights).¹²² Since proposition (c) is the

Nasir, Kazeem, Ete, Nnaemeka-Agu, and Karibi-Whyte J.J.C.A.

118. What has prevented proper analysis of this case is the tendency of writers and judges to focus on irrelevant issues. See, e.g., G. Fawehinmi, *supra* note 30, at vi (wherein he purports to identify "the radicalist view," the "strict constructionist view," and the "liberalist view," in the *Adesanya* case). Subsequent writers have latched on to this categorisation. The correct approach is to focus on whether a majority of the Justices were in favour of the view that § 6(6)(b) laid down a rule of standing. If they were not, then the § 6(6)(b) rule and test fails. And if that is so, the way would have been paved for the courts to apply sensible rules of standing.

119. This is the view of this writer.

120. See *Bolaji v. Bamgbose*, 4 N.W.L.R. 632, 652F (1986) (opinion of Ademola J.C.A.)

121. As stated earlier, this was the view of Bello J.S.C. in the *Adesanya* case.

122. As stated earlier, this was the view of the C.J.N., in the *Adesanya* case.

prevailing view and it is what has been responsible for the problems in the area, we must ask whether that proposition received the support of a majority of the Supreme Court judges in the *Adesanya* case.

Consider the lead judgement of the C.J.N. and that of Bello J.S.C. on the question. The C.J.N. was of the view that there was an *actio popularis* where there was a constitutional transgression outside Chapter IV of the Constitution¹²³ - although his conclusion that the Senator had no standing is at odds with this¹²⁴ - and section 6(6)(b) was what allowed for this *actio popularis*. So we immediately see that his Lordship saw a link between section 6(6)(b) and standing. But what was the nature of the link that he saw? It was that he viewed section 6(6)(b) as playing a negative role - it dispensed with a standing requirement in those constitutional matters. In other words, he did not view section 6(6)(b) as laying down a *locus standi* requirement. On the other hand, Bello J.S.C. construed section 6(6)(b) as playing a positive role - it imposed a requirement of standing in all suits (constitutional and non-constitutional). Thus, while it is true that the C.J.N. and Bello J.S.C. both saw a link between section 6(6)(b) and standing to sue, the link that they each saw was different. One should hasten to point out that it is the view of this writer that section 6(6)(b) plays no role on the question of standing to sue and to the extent that the C.J.N. and Bello J.S.C. respectively attributed a negative and positive role to it, they were both wrong. It shall be demonstrated below that neither view of the Justices received the support of a majority of the court. Perhaps owing to the common conclusion reached in the case, subsequent Supreme Court cases saw *Adesanya* as deciding that section 6(6)(b) imposed a requirement of standing. Since it is the thesis of this article that the problems in this area stem from this singular fact, it is imperative that we examine whether the *Adesanya* case actually laid down the proposition now attributed to it. If by a majority the remaining Justices were in favour of Bello J.S.C.'s view, then it will be correct to say that *Adesanya* decided that section 6(6)(b) laid down a rule of

123. 1 All N.L.R. (Part 1) at 20-21.

124. His conclusion generates a permanent sense of incredulity. For a critique, see Ogowewo, *supra* note 33, at 7-8.

standing.

A close reading of the case will show that only Idigbe J.S.C.¹²⁵ and Nnamani J.S.C.¹²⁶ agreed with Bello J.S.C.'s construction of section 6(6)(b). It has always been wrongly thought that Uwais J.S.C. agreed with the construction placed on section 6(6)(b) by Bello J.S.C.¹²⁷ Uwais J.S.C. said, "I feel that the interpretation to be given to section 6 subsection (6)(b) of the Constitution will depend on the facts or special circumstances of each case. So that no hard and fast rule can really be set-up."¹²⁸ Leaving aside this strange interpretation method,¹²⁹ the important point that results from this is that we cannot in all seriousness treat Uwais J.S.C. as deciding that section 6(6)(b) lays down a rule of standing. It is noteworthy also that Sowemimo J.S.C.¹³⁰ and Obaseki J.S.C.¹³¹ both did not agree with the view of Bello J.S.C. that section 6(6)(b) contained a requirement of standing. Hence, if we ask the question whether the Supreme Court by a majority decided that section 6(6)(b) imposes a standing requirement, only a

125. 1 All N.L.R. (Part 1) at 39.

126. *Id.* at 51.

127. Perhaps because Uwais J.S.C. commenced his judgement thus, "I have had the opportunity of reading in draft the judgement read by my learned brother the Chief Justice of Nigeria. I agree with the reasons and conclusions therein except, I regret, as to the interpretation to be given to § 6(6)(b) of the Constitution of Nigeria, 1979." *Id.* at 56. But this does not suggest that he was agreeing with Bello J.S.C.'s construction. Recall that there are four possible constructions of § 6(6)(b). Bello J.S.C. and the C.J.N. each subscribed to two different interpretations, none of which Uwais J.S.C.'s explicitly agreed.

128. *Id.* at 56-57.

129. The beguiling nature of this approach to statutory construction surprisingly has not been recognized. See Ozekhome, *supra* note 30, at 79 (wherein the author quotes this part of the speech of Uwais J.S.C. and then states, "We respectively share his Lordship's opinion."). It has not been recognized that the logical consequence of Uwais J.S.C.'s interpretation method is that a statutory provision can never have one meaning. Although the point is too plain for argument, this is not a method that is used to interpret a provision. It is perfectly reasonable to say that in exercising a discretion the facts of the case would have to be considered, but this is never done when construing a provision.

130. Sowemimo J.S.C. stated, "On interpretation (sic) placed on section 6(6)(b) I prefer to reserve my comments until a direct issue really arises for a determination." 1 All N.L.R. (Part 1) at 30.

131. Obaseki J.S.C. stated, "This provision by itself, in my opinion and respectful view, does not create the need to disclose the *locus standi* or standing of the plaintiff in any action before the court and imposes no restriction on access to the courts. It is the *cause of action* that one has to examine to ascertain whether there is disclosed a *locus standi* or standing to sue." 1 All N.L.R. (Part 1) at 50.

negative answer can be given, since only three Justices (Bello, Idigbe and Nnamani) out of a total number of seven saw section 6(6)(b) as having this particular effect. Therefore, it is obvious that the Supreme Court in *Adesanya* did not decide that section 6(6)(b) contains a requirement of standing. Unfortunately, this has never been recognised by the courts and commentators. Misreading the case, they treat Bello J.S.C.'s rule as the principle of the case.¹³² The views of those - a group wrongly identified as the minority - who did not agree with this particular construction of section 6(6)(b) are treated as *obiter*.¹³³ The reason for this is obvious. The courts and commentators have focussed on the false choice between the C.J.N.'s *actio popularis* and Bello J.S.C.'s standing rule, as opposed to the relevant issue of whether or not a majority of the *Adesanya* court read section 6(6)(b) as laying down a requirement of standing. If attention had been focussed on the latter, it would have been realised that *on this issue* the *Adesanya* case contains no ratio. This assertion may at first appear baffling. But there are cases where there is a plurality of speeches and no ratio can be discerned. In such cases, the decision is only an authority for what it actually decides. According to Sir Rupert Cross:

[T]he most frequent instances of cases which are only authority for what they actually decide are those in which five speeches are delivered in the House of Lords. There is of course no question of any want or obscurity of reasoning, there is simply nothing which can be described as the ratio decidendi of the House.¹³⁴ . . . Where there is no majority in

132. Uwais J.S.C. said, "[t]he *locus classicus* on *locus standi* is the decision of this Court in *Adesanya v. President of Nigeria* [citation omitted] which was based on the interpretation of section 6 subsection (6)(b) of the Constitution" Briefly, the *Adesanya* case laid down the principle that a plaintiff will have locus standi once he can show that his "civil rights and obligations" have been, are being, or are about to be, violated." *Fawehinmi v. Akilu*, 4 N.W.L.R. 797, 858A-C (1987). In *Odeneye v. Efunuga*, Nnaemeka-Agu J.C.A. said, "[n]ow, the question of *locus standi* to institute an action has fortunately been spelt out and delimited by our written Constitution of 1979 - Section 6(6)(b)." 7 N.W.L.R. at 641H.

133. In *Anago-Amanze v. Onwudiwe*, Araka C.J. so misreads the case that he states as follows, "The majority decision of Sowemimo J.S.C., Bello J.S.C., Idigbe J.S.C., Obaseki J.S.C., Uwais J.S.C., and Nnamani J.S.C., is now binding on this Court and all Courts in Nigeria." 6 N.C.L.R. 620, 632 (1985). See *Ngibo v. Ateze*, 5 N.C.L.R. 464, 468 (1984) (wherein Eri J. described the C.J.N.'s views as *obiter*). See also *Damisha v. Speaker, Benue State*, 4 N.C.L.R. 625 (1983).

134. See *The Ratio Decidendi and a Plurality of Speeches in the House of*

favour of a particular ratio, it is difficult to escape the conclusion that a case is only authority for what it actually decides.¹³⁵ . . . Where there is no ratio decidendi of the House, lower courts are only bound by its decisions in cases in which the circumstance are not reasonably distinguishable from those which gave rise to the decisions.¹³⁶

The assertion that *Adesanya* contains no ratio on the meaning and effect of section 6(6)(b) simply means that the case is not an authority for the proposition that section 6(6)(b) lays down a rule of standing to sue.

IV. THE WRECKING OF NIGERIAN LAW

A wrong rule of standing took firm root after a brief period of uncertainty¹³⁷ and grew inexorably. Beginning as an acorn seed, it soon became an oak tree whose branches were later to extend to every area of Nigerian law. By the time *Inyangukwo v. Akpan*¹³⁸ was decided, Ntia J. could declare that the judicial ink expended on the rule of *locus standi* was such as "to make the issue easily comprehended by any practising lawyers." In *Attorney-General of Kaduna State v. Hassan*,¹³⁹ not only did Bello J.S.C. maintain his construction of section 6(6)(b), his fellow brethren acquiesced in the view that this construction represented the principle of *Adesanya's* case. Although the courts recognized that the crucial aspect of the *Adesanya* decision was the effect of section 6(6)(b),¹⁴⁰ some judges still did not understand the nature and ambit of the standing rule. One only needs to consider the speeches of some of the Justices of the Supreme Court in *Attorney-General of Kaduna State v. Hassan*,¹⁴¹ and the speech of Eso J.S.C. in

Lords, 93 L.Q.R. 378, 379 (1977).

135. *Id.* at 380.

136. *Id.* at 379.

137. In *Bendel State v. The Fed'n*, 3 N.C.L.R. 1, 92-97 (1982), Eso J.S.C. accepted the C.J.N.'s *actio popularis*. See also *Akinpelu v. Attorney-General, Oyo State*, 5 N.C.L.R. 557, 566 (1984) (opinion of Oloko J.).

138. 6 N.C.L.R. 770, 774 (1985).

139. 2 N.W.L.R. 483, 504-505 (1985).

140. In *Damisha*, Eri J. said, "The constitutional provisions in the said § 6(6)(b) is, in my view, a repetition of the doctrine of *locus standi*." 4 N.C.L.R. 625, 631 (1983).

141. 2 N.W.L.R. 483 (1985). All the speeches of the Justices of the Supreme

Fawehinmi v. Akilu,¹⁴² to observe this. In the latter case, Justice Eso muddled the water by pronouncing that the law on standing had been broadened when no such thing had occurred.¹⁴³

It is very doubtful that Bello J.S.C. intended to formulate a rule of law to be applicable in all areas of Nigerian law, bearing in mind that he was dealing with a narrow constitutional question and that his commentary on the rule of standing which he "discovered" occupied just three-quarters of a page in a judgement that occupied nine pages of the *All Nigerian Law Reports*.¹⁴⁴ This can be contrasted with the fuller statement of the rule by the Court of Appeal. However, it was inevitable that once the rule was accepted as the principle of *Adesanya's* case, it had to be applied in all areas of Nigerian law. There are three reasons for its pervasiveness. First, the provision underpinning it is a constitutional provision and as such it is supreme to all laws; second, the text of the underpinning provision is general, i.e., it does not suggest that it is limited to constitutional law.¹⁴⁵ Thirdly, unlike Article III of the U.S. Constitution, it applies to federal and state courts.

The first case that demonstrated that the standing rule

Court (with the exception of that of Bello J.S.C.) showed clearly that they did not understand the test that they were applying. One clear example is provided by the speech written by Irikefe J.S.C., where he stated that § 213(5) of the 1979 Constitution gave the father standing to sue. *See id.* at 496C. Aniagolu J.S.C. concurred in this opinion. *See id.* at 511. For a critique of this, see Ogowewo, *supra* note 33, at 13. For a decision showing the absurdity of Irikefe J.S.C.'s position, see *Ifebuzor v. Nwabeze*, 8 N.W.L.R. 148, 162C (1998).

142. 4 N.W.L.R. at 847.

143. *Id.*

144. It is seldom recognized that what Bello J.S.C. "discovered" was what the Court of Appeal had already discovered. It is telling that Bello J.S.C. said very little on this provision in the *Adesanya* case. In *Adesanya*, he began his judgement thus, "The main question for determination on the appeal is a narrow one. It is whether or not a Senator as such or in his capacity as a citizen has *locus standi* to challenge the constitutionality of an appointment made by the President and confirmed by the Senate in accordance with the provisions of section 141(1) of the Constitution." 1 All N.L.R. (Part 1) at 31. He then stated that, "the question of standing ought to be decided on the very narrow compass it has been canvassed before us." *Id.* at 32-33.

145. The C.J.N., in *Adesanya*, was of the view that it was limited to constitutional litigation (hence his *actio popularis* was limited to this). But surely there is nothing in the provision that indicates that it has anything to do with standing to sue generally or standing to sue in constitutional matters. *See Ogowewo, supra* note 33, at 7.

was applicable outside constitutional matters was *Thomas v. Olufosoye*.¹⁴⁶ The embarrassing aspect of this case was that it confirmed the suspicion that even the Supreme Court did not fully understand its wrong standing rule. Purporting to apply the section 6(6)(b) test in a private law matter, what the court in fact did, was to apply a test of standing drawn from public law. Recall that in private law cases, courts deal with what is conceptually a *locus standi* issue by simply asking whether there is a cause of action. Hence in a contract dispute the common law teaches that privity rules tell us who has the legal right to sue on a contract.¹⁴⁷ Now, if we distort matters in the way that the Nigerian courts have done by applying the section 6(6)(b) test to this private law issue, the same result will ensue. This is because under this test a plaintiff will be allowed to sue if his civil rights are in issue and "civil rights" have been construed to mean private legal rights. Indeed, the Court of Appeal has pointed out in *Bamidele v. Commissioner for Local Government*,¹⁴⁸ that, "[e]very right founded on contract is a private right." Hence, the constitutional test of standing (by focusing on private legal rights) will not upset what are conceptually standing rules in private law; they will both produce the same results, although there will be the obvious doctrinal inelegance of invoking the constitution in contract law.¹⁴⁹ But if the section 6(6)(b) test is applied wrongly (as

146. 1 N.W.L.R. 669 (1986).

147. Hence, in *Nat'l Union of Hotels and Personal Servs. Union v. Imo Concorde Hotels Ltd.*, Edozie J.C.A., said, "[i]t is an elementary principle of law which requires no citation that, generally, only a party to a contract may sue on it. The appellant's action was not properly constituted as the appellant had no locus standi to maintain it since there was no privity of contract between it and the respondent in respect of contracts of employment between the respondent and its workers whose employment were terminated." 1 N.W.L.R. 306, 327 (1994). The U.K. Parliament has recently passed the Contracts (Right of Third Parties) Act, 1999 to make provision for the enforcement of contractual terms by third parties in certain defined circumstances.

148. 2 N.W.L.R. 568, 583G (1994).

149. A recent example of this doctrinal inelegance in trespass is *Yusuf v. Akindipe*, 8 N.W.L.R. 376, 385H (2000). Apart from this doctrinal inelegance, Nigerian courts have managed to create another problem for themselves. It will be recalled that it was pointed out that in private law, what is conceptually a *locus standi* issue is subsumed within the cause of action. It is, however, common to find Nigerian courts dealing with the issue of *locus standi* and the issue of whether there is a cause of action as if they are separate issues. See *Adesokan v. Adegorolu*, 3 N.W.L.R. 261, 278-299 (1997); *N.N.B. Ltd. v. Odiase*, 8 N.W.L.R. 235, 244 (1993).

was the case in *Thomas v. Olufosoye*¹⁵⁰), it will embarrass private law. Let us now consider the facts of the case.

The plaintiffs were communicants of the Anglican Communion within the Diocese of Lagos. They challenged the appointment of Reverend Adetiloye as the new Bishop of Lagos and asked the court to declare it void because the process of the appointment contravened the rules of the church. Apart from their membership of the church, they adduced no other interest in the matter. The defense argued that the plaintiffs had no *locus standi* because their civil rights were not affected by the wrongful appointment. The Supreme Court accepted this argument. Obaseki J.S.C., who, in *Adesanya* did not see section 6(6)(b) as laying down a rule of standing applicable in all areas of the law,¹⁵¹ did a complete somersault without explaining his reason for such a change. In applying the standing rule derived from section 6(6)(b), Obaseki J.S.C. said, "I have searched in vain to discover any question as to the civil rights and obligations of the plaintiffs raised in the statement of claim," and concluded, "I cannot say that the plaintiffs/appellants have on the pleadings disclosed any 'locus

If we purport to make them separate, we will introduce significant problems. One such problem is this: If the court concludes that there is no cause of action, the appropriate order is to dismiss the case; but if the court says that there is no standing, we find the court saying that the case should be struck out. See *Adesokan v. Adetunji*, 5 N.W.L.R. 540 (1994). At the root of this confusion is the application of one rule of standing in public and private law. The true view is that in public law, standing is a separate jurisdictional issue that does not go to the merits; while in private law standing cannot be divorced from the merits. But once this distinction is swept away by the application of a single standing rule, then the above problem logically follows.

150. 1 N.W.L.R. 669 (1986).

151. Indeed, in agreeing with the judgement of the C.J.N., in the *Adesanya* case, Obaseki J.S.C. said, "it wholly accords with my thinking on this matter." 1 All N.L.R. (Part 1) at 42. Further, he noted that, "I agree totally with the reasons for dismissing the appeal set out in the judgement of my learned brother, Fatayi-Williams, C.J.N." *Id.* at 50. The C.J.N. had said – and we must assume that Obaseki J.S.C. was agreeing with this – "in cases where a plaintiff seeks to establish a 'private right' or 'special damage', either under the common law or administrative law, in non-constitutional litigation, by way of an application for certiorari, prohibition, or mandamus for a declaratory and injunctive relief, the law is now well settled that the plaintiff will have *locus standi* in the matter only if he has a special legal right or alternatively, if he has sufficient or special interest in the performance of the duty sought to be enforced, or where his interest is adversely affected." *Id.* at 26. So we see from this that Obaseki J.S.C. agreed with the C.J.N. that § 6(6)(b) does not contain a standing requirement.

standi'.¹⁵² But did the court apply the section 6(6)(b) test logically? In purporting to apply the section 6(6)(b) test, the court required the plaintiff (in a private law matter) to show some higher interest other than membership of the Anglican Communion.¹⁵³ Put simply, the court sought to apply in a private law context a test that is applicable only where public rights are in issue. This was a misplaced application of a public law test (which the Supreme Court had debarred itself from applying even in public law matters) in a private law setting.¹⁵⁴ The Communion was an unincorporated body that had carefully drawn out rules. Such bodies are generally treated as having a contractual juridical basis.¹⁵⁵ A breach of those rules was an infringement of the contractual rights of its members. A member, therefore, had a legal right to insist on compliance with its rules.¹⁵⁶ Clearly, if the court had applied its section 6(6)(b) test logically, the plaintiff would have had standing.¹⁵⁷

152. *Thomas v. Olufosoye*, 1 N.W.L.R. at 683A, 686C (1986).

153. "The question that naturally comes to my mind is: Is it enough for the plaintiffs/appellants to state that they are all communicants of the Anglican Communion? Have they not got to say that they have an interest in the office of the Bishop?" *Id.* at 686B.

154. *Eso J.S.C.* added to the confusion by delivering a judgement that may have given the impression that he was of the view that the dispute was not justiciable. He said, "[w]hat is very important in the case is the danger of bringing Religion as such to the reasoning of jurisprudence (sic)." *Id.* at 687B. Lapsing into Old English, as if a case on religion calls for this, he says, "[t]he reasoning in religion is one of God or Allah which passeth all jurisprudential understanding." *Id.* But surely, the case raised no religious doctrinal issue. The plaintiffs were simply arguing that the rules of the church had been breached. If *Eso J.S.C.*'s reasoning is to be followed, then the court will not interfere when its bishop has wrongfully dissipated the assets of the church!

155. See T.I. Ogowewo, *Is Contract the Juridical Basis of the Takeover Panel?*, 12 J.I.B.L. 15 (1997). However, it does not always follow that the existence of a constitution necessarily leads to the conclusion that there is a contract. For there to be a contract, the court should be satisfied that there was an intention to create legal relations. Where there is no such intention, the action should be dismissed because the cause of action has not been made out. Many of the so-called church cases that involve matters of doctrine fall under this head.

156. "Every right founded on contract is a private right." *Bamidele v. Comm'n for Local Gov't*, 2 N.W.L.R. 568, 583G (1994).

157. It must be said that *Oputa J.S.C.* did agree that where there is a contract the courts will intervene to protect the contractual rights of the parties. *Thomas*, 1 N.W.L.R. at 688-693. He, however, was of the view that there was no contract, since the terms of the contract were not pleaded. He, therefore, held that since there were no legal rights in issue, the judicial powers of the courts could not be invoked. *Id.* But this is mistaken. The terms of the contract were contained in the constitution of the Diocese – which was pleaded.

The wrecking of contract law continued. In "*K Line Inc. v. K.R. Int. (Nig) Ltd.*,"¹⁵⁸ we see Tobi J.C.A. stating a number of tests, none of which were relevant to the issue at hand, which he considered should guide him in determining whether a consignee could sue on a bill of lading where there was non-delivery of the shipped goods. The issue of who can sue where there has been non-delivery by a carrier should be decided by reference to whether a cause of action has been established in tort (if property has passed to the consignee) or contract (if there is privity to the contract evidenced in the bill of lading).¹⁵⁹ We see the same confusion in another contract case: *N.N.B. Ltd. v. Odiase*.¹⁶⁰ Here, a person sued a bank for breach of contract and the issue was whether there was a cause of action. This turned on whether there was a banker-customer relationship. The court failed to appreciate that the issue of whether there was a cause of action was conceptually the same question as whether the plaintiff had *locus standi*. So the court, having concluded that there was a banker-customer relationship, bizarrely went on to examine the issue of *locus standi*!¹⁶¹ This shows the mess in which the courts have found themselves. The issue of *locus standi* had already been dealt with when the court held that there was a cause of action for breach of the banker-customer relationship.

The rule of standing continued with its destructive streak. In *Taiwo v. Adegboro*,¹⁶² we see it infiltrate property law. Here, the respondent was in occupation of a house that was sold by a bank pursuant to its security; the security having been granted by the owner of the house who was now deceased. The respondent challenged the sale effected by the

158. 5 N.W.L.R. 159 (1993). At 176D, Tobi J.C.A. stated, "The state of the law is that before a person could be said to have locus standi in a matter, he must show that he has sufficient interest which is enforceable in law and not one that he shares with other members of the society." At 176G, his Lordship states, "One test of sufficient interest is whether the plaintiff who instituted the action could have been joined as a party to the suit if some other party commenced the action. Another test is whether the plaintiff seeking the redress or remedy will suffer some injury or hardship arising from the litigation if some other person instituted it. I shall be guided by the above tests in the determination of the standing of K.R. in this matter."

159. See *Broadline Enter. v. Monterey Mar. Corp.*, 9 N.W.L.R. 1 (1995).

160. 8 N.W.L.R. 235, 244 (1993).

161. *Id.*

162. 11 N.W.L.R. 224 (1997).

mortgagee, and the question of her standing was raised. Mohammed J.C.A. promptly invoked section 6(6)(b). In doing so, he inflicted severe damage on that part of property law. This is because, without ascertaining the legal nature of the respondent's interest (if any) in the property, he stated thus:

The mere fact that the 1st respondent was in possession and occupation of the house in dispute at the time it was sold by the 2nd and 3rd respondents to the appellant on 17/6/89, that alone in my view was enough to have given the 1st respondent a standing to institute an action to challenge the validity of the sale.¹⁶³

The standing rule also made an in-road into the law of torts. It has been said that "[a] widespread wrong, as for example a public nuisance, if individually actionable by all affected in some way, could produce a good deal of litigation. Some of the earliest nuisance cases recognized this and it is a reason advanced for the special standing rule that developed in those cases."¹⁶⁴ This rule has now been demolished by the Nigerian standing rule. In *Adediran v. Interland Transport Ltd.*,¹⁶⁵ the plaintiff's action in public nuisance was objected to by the defendants on the ground that in the absence of proof of special damage, the Attorney General should have sued or permitted a relator action to be brought. Karibi-Whyte J.S.C. pronounced:

The Constitution has vested the Courts with the powers for the determination of any question as to the civil rights and obligations between government or authority and any person in Nigeria . . . Accordingly, where the determination of the civil rights and obligations of a person is in issue, any law which imposes conditions, is inconsistent with the free and unrestrained exercise of that right, is void to the extent of such inconsistency. Thus the restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void.¹⁶⁶

"The judicial activism of the Supreme Court judges is laud-

163. *Id.* at 234.

164. CROMWELL, *supra* note 1, at 178.

165. 9 N.W.L.R. 155 (1991).

166. *Id.* at 180.

able.”¹⁶⁷ This was how a Nigerian academic welcomed this decision – without appreciating that the natural consequence of allowing a million plaintiffs to sue individually in respect of a public nuisance, is that the courts would be overwhelmed and inevitably it would be impossible to do justice for them. It should be noted that the court did not impose a requirement that such actions should be brought by means of a class action. It is interesting to note that even in the United States a member of the public who suffers harm as a result of a public nuisance will have a right of action for damages only where he has “suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference.”¹⁶⁸ The seeds for the *Adediran* decision were, in fact, sown in the *Adesanya* case. It will be recalled that the C.J.N. was of the view that section 6(6)(b) was relevant to *locus standi* in constitutional litigation. He saw the provision as removing any standing requirement where there was a constitutional violation outside a breach of Chapter IV. This *actio popularis* view was rejected in later cases, but the seed had already been sown for the idea that section 6(6)(b) could have the effect of opening the courts. What the courts later did was to effect this opening within the context of Bello J.S.C.’s test. Hence, the view became established that once a person’s civil rights were violated or threatened, the person had standing and no statutory or common law rule could prevent this. It was Akpata J.C.A. in *Ovie-Whiskey v. Olawoyin*¹⁶⁹ (six years before the *Adediran*

167. I.P. Enemo, *The Tort of Nuisance and the Nigerian Oil Industry*, NIG. JUD. REV. 195, 202 (1994-97); F.C. Nwoke, *The Changing Face of Public Nuisance in Nigeria*, 4 U. Jos. L. J. 108, 118 (1994) (describing the decision as “a welcome development”). See also J.G. Frynas, *Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria*, 43 J.A.L. 121, 134-136 (1999). The *Adediran* decision has been welcomed mainly because there has been a history of inefficient Attorneys-General neglecting to sue or refusing to permit a relator action to be brought in cases of public nuisance. However, modifying the cause of action to permit universal individual suits is not the solution to this problem, since this would introduce the further problem of overloading the courts. The patch will be worse than the hole. A sensible solution would have been to impose personal liability on the holder of the office of Attorney-General, where there has been a clear case of nonfeasance.

168. RESTATEMENT (SECOND) OF TORTS § 821C (1979). See also Burns Jackson v. Lindner, 59 N.Y.2d 314, 464 N.Y.S.2d 712, 721, 451 N.E.2d 459, 468 (1983); Bologna v. Kerr-McGee Corp., 95 F. Supp. 2d 197 (S.D.N.Y. 2000).

169. *Ovie-Whiskey v. Olawoyin*, 6 N.C.L.R. 156, 191-192 (1985).

case) who, in fact, sounded the deathknell of the standing rule in public nuisance; the Supreme Court in *Adediran* was merely the rule's hangman.¹⁷⁰

The judicial vandalism continued. This time it was the turn of company law. In 1993 the Supreme Court ruled in *Elufioye v. Halilu*¹⁷¹ that the section 6(6)(b) standing rule would override the rule in *Foss v. Harbottle*.¹⁷² Omo J.S.C. proclaimed:

Once the civil rights and obligations of the plaintiffs as individuals are affected . . . the courts in exercise of their judicial power [under section 6(6)(b)] can look into such rights and obligations, and for that purpose the plaintiffs have a locus standi before them. Such right guaranteed under the Constitution cannot be in any way detrimentally affected by the common law rule in *Foss v. Harbottle*.¹⁷³

Superficially, this statement may not seem to herald a disaster for company law, since it is difficult to envisage how the constitutional test will be broader than the personal rights exception to the rule in *Foss v. Harbottle*.¹⁷⁴ As standing under the constitutional test is defined in terms of a breach of a person's legal right, it follows that there would be no conflict between the personal rights exception to *Foss v. Harbottle* and the constitutional test. Indeed, Karibi-Whyte J.S.C. recognized this much in the case at hand when he said that the rule in *Foss v. Harbottle* is "ad idem with section 6(6)(b) of the Constitution 1979 where there is locus standi if the determination of the civil rights and obligations of the plaintiff is involved."¹⁷⁵

However, quite apart from the obvious awkwardness of conducting the constitution into the contractual relationship of corporators, lurking beneath this veneer of congruence is the

170. It is astonishing that in a subsequent case the Supreme Court restated the traditional view without referring to the *Adediran* case. See *Daodu v. N.N.P.C.*, 2 N.W.L.R. 355 (1998). Is one to take it that the Supreme Court was not even aware of its own previous decision in *Adediran*? See also *Ilori v. Benson*, 9 N.W.L.R. 570, 578E & 579D (2000).

171. 6 N.W.L.R. 570, 595D (1993).

172. 2 Hare 461 (1843).

173. 6 N.W.L.R. 570, 595D (1993).

174. It is a misnomer to refer to the personal rights category as an exception to the rule in *Foss*, since the rule cannot apply to debar a member from suing when the member's personal rights have been infringed.

175. *Elufioye*, 6 N.W.L.R. at 599E.

potential for disaster. This is because where the courts wrongly identify a "right" (perhaps because the plaintiff alleges a right and the substantive law is not clear to them) and this "right" cannot be litigated because of the rule in *Foss v. Harbottle*, it is likely that the courts will hold that this "right" should be redressed by virtue of section 6(6)(b) and that the rule in *Foss v. Harbottle* should give way. Indeed, the Supreme Court has said as much. Omo J.S.C. said:

It is only where the right and obligations of an individual are in issue, and such a case does not fit into the exceptions under the rule in *Foss v. Harbottle*, that there may be a conflict since locus standi is available to the individual in a determination of his rights and obligations.¹⁷⁶

A case where this is possible is one where errant directors loot the corporate treasury, resulting in the diminution of the company's share price. It is conceivable that a shareholder may point to the fall in the value of the shares in his pocket caused by the wrongdoing, and that the court may see this "loss" as giving rise to a personal right to sue. Since the rule in *Foss v. Harbottle* prevents a shareholder from obtaining personal recovery in respect of such "loss,"¹⁷⁷ it is likely that a Nigerian court will grant the shareholder standing because of section 6(6)(b), once it wrongly identifies an infringed "right."¹⁷⁸ At once, by so doing, the courts would have chipped off one of the central features of company law - the principle of separate corporate personality - and introduced the spectre of double recovery. A harbinger of this is the recent Court of Appeal decision in *Central Bank of Nigeria v. Kotoye*.¹⁷⁹ In that case, it was stated emphatically that: "the rule in *Foss v. Harbottle* is a common law rule derived from the decisions of courts. It has no legal force or effect and can be overridden by statute . . .

176. *Id.* at 595E.

177. A shareholder has no personal action for a diminution in the value of his shares caused by directorial wrongdoing. See *Stein v. Blake*, 1 All E.R. 724 (1998). See also T.I. Ogowewo, *Personal Actions for a Diminution in the Value of Shares*, 9 K.C.L.J. 150 (1998-99).

178. It is hoped that if this occurs, the courts will recognize that the wrong has been committed against the company and therefore the company is the proper plaintiff. See *Gombe v. P.W. (Nig.) Ltd.*, 6 N.W.L.R. 402, 420B (1995).

179. 3 N.W.L.R. 66, 73 (1994).

[o]nce the question of the civil rights and obligations of the plaintiff/respondents as an individual is affected or likely to be affected, under section 6(6)(b) of the 1979 Constitution, an individual is entitled to invoke the judicial powers of the Constitution . . . in this case, the rule in *Foss v. Harbottle* will have to give way to such individual rights and obligations which were about to be encroached."¹⁸⁰

This point goes well beyond company law. Whenever the courts stumble upon any rule of law, substantive or procedural, that regulates access to the courts or entitlement to legal relief, there is always a risk that such a rule would be held to be unconstitutional on the ground that it is inconsistent with section 6(6)(b). An example of such a substantive rule is the rule restricting recovery for pure economic loss in negligence. The destructive effect of this standing rule on Nigerian substantive and procedural law cannot be underestimated.¹⁸¹ Instead of the courts re-thinking their rule they have persisted in applying it often with supreme arrogance borne out of profound ignorance. It was Oputa J.S.C. who said in *Oredoyin v.*

180. *Id.* at 77D, 80E-F.

181. Consider a case where a consignee who is not a party to the bill of lading contract attempts to sue the carrier for damage caused to the delivered goods and property had not passed before the damage occurred because the goods were part of a larger bulk and were therefore unascertained. If the consignee sues in contract the action should fail because there is an absence of privity and if he sues in tort the action will fail because he did not have property at the time of the damage. Although, there have always been ways to allow the consignee to sue (e.g. such as implying a *Brandt v. Liverpool contract*, assignment of contractual rights, and the use of the rule in *Dunlop v. Lambert*), it is likely that a Nigerian court would simply invoke § 6(6)(b) to permit the buyer to sue. By so doing, the courts would be re-writing Nigerian shipping law. Two challenges have been made to procedural law on the basis of § 6(6)(b). In *Atolagbe v. Awuni*, a law which made the payment of a deposit a condition precedent to the institution of an action against the government was challenged as being contrary to § 6(6)(b). On this occasion the challenge failed at the Supreme Court. *See* 9 N.W.L.R. 536 (1997). In *N.N.P.C. v. Fawehinmi*, a law which prescribes that a pre-action notice should be issued before an action is brought (§ 12 Nigerian National Petroleum Corporation Act, Cap. 320 Laws of the Federation of Nigeria) was challenged as being inconsistent with § 6(6)(b). The challenge failed at the Court of Appeal, although there was a dissenting judgement. *See* 7 N.W.L.R. 598 (1998). The correct position is that requirements that have the effect of unreasonably limiting access to the courts can be challenged on the ground that they contravene the constitutional provision (§ 36 of the Constitution of 1999) that guarantees a right to a fair hearing. This is how its progenitor (Art. 6 of the ECHR) has been interpreted. *See* *R. v Lord Chancellor, ex parte Lightfoot*, B.C.C. 537 (2000). *See also* *Amadi v. N.N.P.C.*, 10 N.W.L.R. 76, 109G & 110B (2000).

Arowolo,¹⁸² "[s]ince [the *Adesanya* case] was decided, there has been 'quiet murmuring' among members of the profession as to whether or not it was too widely or too narrowly decided. These murmuring are neither here nor there." Onalaja J.C.A. in *Ejiwunmi v. Costain (W.A.) Plc.* has even said, "this rule of law is also a rule of common-sense."¹⁸³ F.R.A. Williams, a leading Nigerian advocate, has even gone as far as stating that, "Nigerian legal history will endorse the view that the reasoning of Mr. Justice Bello on *locus standi* in civil proceedings as contained in his judgment in *Adesanya's* case will turn out to be one of his most useful and lasting contributions to Nigerian jurisprudence."¹⁸⁴

So far, only one judge has been able to see through this dense fog of obfuscation. Ayoola J.C.A. in a dissenting judgment in *F.A.T.B. v. Ezegebu* stated thus:

I do not think section 6(6)(b) of the Constitution is relevant to the question of locus standi. If it is we could as well remove any mention of locus standi from our law books. Section 6(6)(b) deals with judicial powers and not with individual rights. Locus standi deals with the rights of a party to sue. It must be noted that standing to sue is relative to a cause of action.¹⁸⁵

This independent and bold piece of thinking is an oasis of common sense in a desert of sophistry. Its only shortcoming was the absence of supporting argument that a dissenting judgement of this sort needs. The wait for supporting argument did not, however, last long. For in 1998, in a seminal judgement,¹⁸⁶ Ayoola J.C.A. was able to give a construction to

182. 4 N.W.L.R. at 186.

183. 12 N.W.L.R. at 167.

184. F.R.A. Williams, *A Tribute to Justice Mohammed Bello*, in THE AUTHORISED BIOGRAPHY OF CHIEF JUSTICE MOHAMMED BELLO 207, of Appendix 7 (M. Kamil ed. 1995).

185. 9 N.W.L.R. 149, 236B (1994). It is fair to point out that before this judgement, Ademola J.C.A., in *Bolaji v. Bamgbose*, came nearer to the true position when he said, "The test in section 6 subsection 6(b) must in my view be confined to its proper limit and must not be allowed to intrude into other areas." 4 N.W.L.R. at 652F. However, to the extent that he saw the provision as relevant to the issue of standing to sue in constitutional and statutory matters, it is submitted that he was wrong.

186. See *N.N.P.C. v. Fawehinmi*, 7 N.W.L.R. 598 (1998).

section 6(6)(b), which, if adopted by the courts, will reverse the damage that has been done to Nigerian law. It is to this decision that we must now turn.

V. THE PROPER CONSTRUCTION OF SECTION 6(6)(B)

It has been demonstrated that the *Adesanya* court did not by a majority decide that section 6(6)(b) laid down a standing requirement. What we must consider here is whether the prevailing interpretation of section 6(6)(b) is correct. Recall that neither the text of section 6(6)(b) nor its pre-enacting history suggests that it deals with standing to sue. Although the same point can equally be said of Article III of the U.S. Constitution from which a standing rule has nevertheless been derived, the two situations are not alike.

First, there is no compelling reason for Nigerian courts to adopt American jurisprudence, which is quite recent and has been heavily criticized.¹⁸⁷ Recently, the High Court of Australia in *Truth About Motorways Pty. Ltd. v. Macquarie Infrastructure Investment Management Ltd.*,¹⁸⁸ refused to follow this jurisprudence. It was argued that by purporting to confer standing on the applicant, sections 80 and 163A of the Trade Practices Act of 1974 (Cth) were contrary to Ch. III of the Australian Constitution. The essence of this argument was that since Ch. III of the Australian Constitution (i.e. sections 75 - 77 of the Constitution) is similar to Article III of the Constitution of the United States, the *Lujan* reasoning¹⁸⁹ should equally apply in Australia. This argument was robustly rejected by Australia's Highest Court. Gaudron J pronounced:

It is convenient to note, at once, that although Ch. III of the Constitution has significant similarities with Art. III of the

187. O.A. Bowen has referred to the, "error (not uncommon among African scholars and judiciary) of unwholesome importation of foreign judicial decisions, taken out of their social and political context, into the interpretation of Nigerian law which also possesses its own distinctive socio-political character." See Bowen, *supra* note 30, at 31. It is interesting to note that a year after the *Adesanya* case, Bello J.S.C. said, in *Attorney-General of Bendel State v. Attorney-General of the Fed'n*, "I would further reiterate that great care should be exercised in the use of the rules of constitutional law formulated for countries whose constitutions are not in *pari materia* with our Constitution and whose ways of life are not identical with ours." 3 N.C.L.R. at 39.

188. H.C.A. 11 (2000).

189. 504 U.S. 555 (1992)

Constitution of the United States of America, there are, as this Court has often noted, significant differences. In particular, the latter is concerned with "Cases" and "Controversies," whereas Ch. III selects "matters" as the subject-matter of federal jurisdiction. And "matters" is a word of such generality that it necessarily takes its content from the categories of matter which fall within federal jurisdiction and from the concept of "judicial power." There is, thus, no reason why the position in this country should equate precisely with that reached in the United States of America.¹⁹⁰

Second, the text of Article III allows for a fairly workable standing rule, but the same cannot be said of section 6(6)(b) because (a) it applies not only to the federal courts but also to all state courts; and (b) it uses the specific term "civil rights" - a term that unknown to the draftsman had been narrowly equated with "private legal rights" - which necessarily controls the nature of the standing rule and its derivative test. The term "civil rights," as interpreted by the Nigerian courts, is much narrower than the term "Cases" and "Controversies" in Article III of the U.S. Constitution or the term "matters" in Ch. III of the Australian Constitution.

If one puts aside for the moment the encrustations of authority on section 6(6)(b), its meaning appears reasonably clear. The provision was intended to *protect* and *confine* the judicial function. There can be no better place to find a judicial statement on its protective function than in the speech of Ayoola J.C.A. (with which Onalaja J.C.A. concurred) in *N.N.P.C. v. Fawehinmi*.¹⁹¹ Ayoola J.C.A. stated:

In most written constitutions, there is a delimitation of the power of the three independent organs of government, namely: the executive, the legislature and the judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the States in the courts and defines the nature and extent of such judicial powers does not directly deal with the right of access of the individual to the court. The main objective of section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of powers between the judiciary on the one hand and the other organs of government on the other, in order to obviate any claim of

190. H.C.A. 11, at para. 42 (2000).

191. 7 N.W.L.R. 598 (1998).

the other organs of government, or even attempt by them, to share judicial powers with the courts. Section 6(6)(b) . . . is not intended be a catch-all, all-purpose provision to be pressed into service for determination questions (sic) ranging from *locus standi* to the most uncontroversial questions of jurisdiction.¹⁹²

Section 6(6)(b), according to Ayoola J.C.A., was meant to guarantee that "[o]ther than in consonance with the Constitution itself, legislative provisions which preclude the judiciary from exercising its judicial powers violate the separation of powers principles enshrined in section 6 of the Constitution."¹⁹³ His Lordship reasoned that an enactment or rule of law will be held to infringe section 6(6)(b) if the enactment or rule of law (a) provides for the sharing of judicial powers of the State with any other body other than the courts in which it is vested by the Constitution; (b) purports to remove the judicial power vested in a court or redefines it in a manner as to whittle it; or (c) limits the extent of the power vested.¹⁹⁴ Conversely, section 6(6)(b) confines the courts to the adjudication of justiciable matters. Hence, the determination of a political question would be outside the scope of the judicial function. This should not, however, be confused with the separate question of standing. Standing is concerned not with whether a particular issue is fit for a judicial resolution, but, rather with whether the plaintiff is the proper person to seek the intervention of the court.

VI. REDISCOVERING THE CORRECT RULES OF STANDING IN PRIVATE AND PUBLIC LAW

It is obvious that the solution to the problem of *locus standi* in Nigeria is to evict section 6(6)(b) from the principle of standing,¹⁹⁵ but when one considers that many judges still do not realize that there is a problem to be solved, this solution

192. *Id.* at 612A-C.

193. *Id.* at 612E. Therefore, a statute which is a legislative judgement or which contains an ouster clause will infringe § 6(6)(b).

194. On this principle of constitutional law, see *Liyanage v. The Queen*, A.C. 259 (1967); *Lakanmi v. Attorney-General, W. State*, 1 U.I.L.R. 201 (1971).

195. This was the thesis of this author's earlier paper on the subject when it was stated that, "any discussion of standing to sue under section 6(6)(b) is completely misplaced." See *Ogowewo*, *supra* note 33, at 18.

may not be grasped. For instance, even though Onalaja J.C.A. concurred in glowing terms with Ayoola J.C.A. in the *N.N.P.C.* case, yet six months later he restated in *Ejiwunmi v. Costain (W.A) Plc.*¹⁹⁶ the very view that Ayoola J.C.A. had debunked to his agreement! Assuming this obstacle of ignorance is overcome, it can be envisaged that the courts may fear to tread, what they may consider to be, the path of apostasy. First, they may feel bound by the principle of *stare decisis*. However, once it is recognized that Bello J.S.C.'s construction of section 6(6)(b) is not the ratio of the *Adesanya* case,¹⁹⁷ it then follows that those cases, including those decided by the Supreme Court, that treat *Adesanya* as deciding that section 6(6)(b) lays down a rule of standing are wrong. Therefore, any court should be free to depart from this wrong reading of *Adesanya* without offending the principle of binding precedent.¹⁹⁸ This may very well explain the boldness of the speech of Ayoola J.C.A. in the *N.N.P.C.* case. The second reason is that because the subject of *locus standi* has been hallowed through ritual incantations of the Constitution, many may fear that adverse consequences would result from section 6(6)(b)'s eviction. Some may even clamor for a constitutional amendment, even though this is not a pre-requisite for breaking the link between *locus standi* and section 6(6)(b).¹⁹⁹ As for the fear of adverse consequences, it

196. 12 N.W.L.R. at 167.

197. When the plaintiff's counsel in *Thomas v. Olufosoye* pointed out that the *Adesanya* decision was not supposed to, and did not lay down a general rule of law on *locus standi* to be followed in all the cases, Oputa J.S.C. responded, "[i]n *Abraham Adesanya's* case, there was no disagreement on the rationes decidendi of the justices. Each agreed that the appeal be dismissed – the reason being that the Appellant had no *locus standi*. How each of the Justices arrived at his decision – that is, the way he argued it, is not as important as the decision he arrived at based on general principles of law." 1 N.W.L.R. at 689. By focusing on conclusions, and not the reasons that support the conclusions, the learned justice of the Supreme Court seems not to understand what constitutes the *ratio* of a case.

198. Oputa J.S.C., in *Thomas v. Olufosoye*, said of § 6, "This section has been judicially interpreted by the Supreme Court in *Senator Abraham Adesanya's* case. The decision in that case remains our law on *locus standi* until it is reversed by another and contrary decision of a constitutional panel of at least 7 Justices." *Id.* at 693B. It is true that the decision of the Supreme Court in *Adesanya* remains the law until reversed, but the real question is what did the case decide. It certainly did not decide that § 6(6)(b) laid down a standing requirement. Therefore, any court is free to adopt Ayoola J.C.A.'s interpretation of § 6(6)(b).

199. In *Bolaji v. Bamgbose*, Nnemeka-Agu J.C.A. said, "[u]ntil the Constitution is amended, *locus standi* must of necessity, be based on the civil rights and obligations of the plaintiff." 4 N.W.L.R. 632, 658C (1986). E.K. Quansah, also has

is impossible to imagine consequences more adverse than those that exist at present. Indeed, before the principle of standing was made to donne a constitutional attire, there were cases

called for a constitutional amendment. See Quansah, *supra* note 30, at 31. But since § 6(6)(b) has nothing to do with standing, the standing rule can be jettisoned without an amendment of the Constitution. This does not, however, mean that the provision cannot be better worded. A better way of drafting the provision would have been as follows:

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

Three changes have been made. First, by deleting "in Nigeria," it eliminates the possibility of the absurd argument being advanced that the courts have no judicial power to adjudicate between a government and a person outside Nigeria. Since the term "persons" in the first part of the clause does not include government, this is necessary. Second, by adding "or between governments," it eliminates the possibility of the equally absurd argument being advanced that the courts have no judicial power to adjudicate between two governments (such as state/federal or state/local government). As presently drafted, such an argument can be advanced because the term "persons" in the first part of the clause does not include governments and, therefore, that clause will not apply to government/government suits. Neither does the second part of the clause cover this situation, since it contemplates suits between "government or authority *and* any person." Lastly, it deletes the remaining part of the clause, which is surplus. With this deletion, the focal point of the provision changes from "civil rights and obligations" to "matters." The term "matters" in this context means justiciable matters. As stated earlier, the aim of § 6(6)(b) is to delimit the judicial function to justiciable matters. Quite apart from common sense, there is considerable Australian authority for this view of the function of this kind of provision. See *Abebe v. Commonwealth*, 73 A.L.J.R. 584, 596 (1999) (opinion of Gleeson C.J. and McHugh J.), 618 (opinion of Gummow). See also *In re Judiciary and Navigation Acts*, 29 C.L.R. 257, 265 (1921); *Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd.*, 148 C.L.R. 457, 508-509 (1981) (opinion of Mason J., with whom Stephen J. concurs); *Fencott v. Muller*, 152 C.L.R. 570, 606-608 (1983) (opinion of Mason, Murphy, Brennan and Deane J.J.); *Stack v. Coast Sec. (No. 9) Pty. Ltd.*, 154 C.L.R. 261, 278 (1983) (opinion of Gibbs C.J.), 290 (opinion of Mason, Brennan and Deane J.J.); *Mellifont v. Attorney-General (Q)*, 173 C.L.R. 289, 316 (1991) (opinion of Brennan J.). On a separate note, it is appropriate to mention that § 6(6)(b) in its previous incarnation (in the defunct 1989 constitution) was amended by the addition of a clause that sought to abolish the doctrine of state immunity in Nigerian law. That amendment does not appear in the present 1999 Constitution or the repealed 1979 Constitution. It would be outside the province of this work to dwell on that confused and unnecessary amendment. However, for a devastating critique of the amendment and the case law that led to it, see H. Ogunniran, *State Immunity from Tort Liability in Nigeria: A Critique*, in *A BLUEPRINT FOR NIGERIAN LAW* Ch. 15 (A.O. Obilade ed., 1995).

where the courts categorically stated that the Constitution did not lay down a standing requirement.²⁰⁰ No problems resulted then. Why should they now? The only problem that is envisaged is that because the error has been around for so long, when the standing rule is abandoned many lawyers and judges might lose their way, as the correct rules of standing have been lost to those reared on a wrong rule. It is these lost rules of standing in private and public law - to which the courts must return - that we will now consider.

A. Private Law

Standing rules in private law express fundamental notions in substantive law. In contract, for instance, the rule of privity (the standing rule) expresses the concept of consideration. The same can be said of the rule in *Foss v. Harbottle* (a standing rule), in the law of associations which is the procedural manifestation of the principle of separate corporate personality and the principle of majority rule.²⁰¹ In essence, standing rules in private law must stem from the cause of action²⁰² and not from an external source that does not give expression to any notion in the substantive law of the area concerned. Therefore, once we jettison the notion that section 6(6)(b) lays down a standing rule and test to be applied in all areas of the law, then in private law the courts will decide what is conceptually a *locus standi* issue by focusing on the cause of action. The consequence of this will be the immediate reversal of the damage currently being inflicted on Nigerian private law. The risk that the courts may fail to identify the applicable standing rule in areas of private law is real. For example, the decision of the Supreme Court in *Thomas v. Olufosoye* shows that where a member of an unincorporated association brings an action in respect of an infringement of the association's rules, the courts may make the mistake of applying in this contractual setting a

200. *Supra* text accompanying notes 110-11.

201. See C. Hale, *What's Right with the Rule in Foss v. Harbottle?*, 1 C.F.I.L.R. 219, 222 (1997).

202. "In private law there is, in general, no separation of standing from the elements in a cause of action." *Bateman's Bay Local Aboriginal Land Council v. The Aboriginal Community Benefit Fund Pty. Ltd.*, 194 C.L.R. 247, 264 (1998) (opinion of Gaudron, Gummow and Kirby J.J.).

standing test applicable only in public law (such as a sufficient interest test). There is, therefore, a need for the courts to go back to basics so as to master the substantive law in the various areas of private law.

B. Public Law

Actions for a judicial review in Nigeria can be based on either the common law doctrine of *ultra vires*²⁰³ or the Constitution. In the case of the former, the action may be brought (i) under the AJR procedure – the equivalent of Order 53 RSC in England – under the relevant rules of court²⁰⁴ or (ii) for a

203. Judicial review based on the *ultra vires* doctrine is the system through which the High Court exercises supervisory control over all forms of public power. This supervisory jurisdiction helps to ensure that public bodies not only perform their duties, but also do not abuse their power nor act arbitrarily, capriciously, unreasonably or unfairly. See, G. Borrie, *Regulation of Public and Private Power*, P.L. 552 at 561 (1989). The basis of the courts' supervisory jurisdiction has traditionally been the *ultra vires* doctrine of the common law. An exception to this is the jurisdiction of the court to quash a decision because of an error on the face of the record; this jurisdiction which rested on a historical base emerged outside the *ultra vires* doctrine. See *R. v. Northumberland Comp. Appeal Tribunal, ex parte Shaw*, 1 K.B. 338 (1952).

Historically, the prerogative writs of certiorari, prohibition and mandamus were used for this supervisory purpose. Although the basis for this supervisory jurisdiction is the common law, rules of court now lay down the procedure for invoking the jurisdiction. In Lagos State, for example, the procedure is governed by Order 43. This procedure is a specialised procedure by which the courts may grant one of the prerogative remedies of certiorari, prohibition or mandamus and, alternatively, or in addition, a declaration or injunction. Damages may also be awarded in an application for judicial review, if one of those five remedies is granted and the court is satisfied that damages would have been available if claimed in an ordinary action. Where the basis of judicial review is the *ultra vires* doctrine, then the three grounds categorized by Lord Diplock, which have been accepted by the Supreme Court of Nigeria in *Stitch*, will apply. See *Council of Civil Serv. Unions v. Minister for the Civil Serv.*, A.C. 374 (1985); *Stitch v. Attorney-General of the Fed'n*, 5 N.W.L.R. 1007 (1986). Nigerian courts will therefore review administrative action if it is illegal, irrational or flawed by procedural impropriety.

204. See, e.g., Order 43 of the Lagos State High Court Civil Procedure Rules. Order 43 replaced the old Order 53. Under the old Order 53 only the prerogative remedies could be obtained. There were various problems with the old Order 53 procedure, the principal of which was that of "procedural incompatibility." It was impossible to seek declarations, injunctions or damages (i.e. private law remedies) in the same proceedings as those for the prerogative remedies. These private law remedies were obtainable only in actions begun by writ or originating summons. The prerogative remedies also had other shortcomings. Primarily, they were hedged about with all sorts of technical limitations. They also had considerable

declaration and injunction under the common law.²⁰⁵ As there is currently no procedural exclusivity rule in Nigeria,²⁰⁶ actions for declaratory or injunctive relief are permissible in public law litigation, even though under the AJR procedure such relief is now obtainable. In the case of the latter (i.e. where the judicial review action is founded on the Constitution), it normally will be (i) to protect or enforce a fundamental right guaranteed in Chapter IV of the Constitution or (ii) to prevent an infraction of the Constitution, or to pronounce as unconstitutional an infraction of the Constitution or to invalidate a law on the ground that it is constitutionally invalid. In the case of (i) the avenue for the enforcement of fundamental rights is provided in section 46 of the Constitution. In the case of (ii) no special procedure is required – such actions are usually for declarations and injunctions.

Since virtually all the State High Court Rules contain the AJR procedure, the relevant standing test under that procedure is that of “sufficient interest.”²⁰⁷ If this test is applied, the position on standing to sue in judicial review applications under the AJR procedure would be akin to the position in public law in England and the United States where liberal standing rules apply. This will usher in a liberal standing regime in the AJR cases. Presently, the Nigerian courts regard the “sufficient interest” test in the rules of court on the AJR procedure as simply stating that standing should be shown -

procedural disadvantages – an absence of an automatic right to discovery, cross-examination and general interlocutory relief. Furthermore, there were problems related to standing as different standing rules applied to the different remedies.

205. The problems associated with the old Order 53 actions led the courts to adapt private law remedies of the injunction and declaration in the service of public law. In *Iwuji v. Fed'l Comm'r for Establishment, Attorney-General of the Fed'n*, Eso J.S.C. said, “The two reliefs sought are declaratory . . . and I think a declaratory action is more advantageous, in this regard, to the applicant than seeking a judicial review by Prerogative Action.” 1 N.W.L.R. 497, 507 (1985). His Lordship was simply repeating in his own words, the words of Lord Denning, in *O'Reilly v. Mackman (C.A.)*, that, “[w]hilst the darkness still prevailed, we let in some light by means of a declaration.” 2 A.C. 237, 253 (1983). The House of Lords has now put an end to this. There is now a procedural dichotomy between public and private law in the sense that as a general rule it would be contrary to public policy and be an abuse of court process for a plaintiff in a public law matter to seek redress by ordinary action. This is known as the procedural exclusivity rule.

206. See discussion, *supra* note 204.

207. See Federal High Court (Civil Procedure) Rules Act 1999, *supra* note 11, Order 43, r. 3(5).

which they already regard as a constitutional imperative - and they then apply the section 6(6)(b) test to determine standing. But once that test ceases to apply, the courts will have to apply the liberal "sufficient interest" test contained in the rules. In England, the following have been granted standing pursuant to this test: a journalist who sought a declaration that the policy adopted by the chair of the justices of not revealing the names of sitting magistrates in certain circumstances for security reasons was unlawful;²⁰⁸ an NGO with an interest in environmental matters that challenged certain authorisations given to British Nuclear Fuels Ltd by the Pollution Inspectorate and the Agriculture Minister for the discharge of nuclear waste;²⁰⁹ a pressure group that challenged the decision of the Secretary of State for Foreign and Commonwealth Affairs to grant overseas aid for the purpose of constructing a hydro-electric power station in Malaysia;²¹⁰ and a citizen who - "because of his sincere concern for constitutional issues" - challenged the ratification of a treaty.²¹¹ It is, therefore, obvious that a "sufficient interest" test under the AJR procedure allows not only standing to be accorded to those with a personal interest (even where their legal rights are not in issue), but also to those who represent the "public interest."

However, considering that there are other kinds of judicial review proceedings in Nigeria outside the AJR procedure and each kind has its own standing test, it is necessary for us to identify the traditional standing tests in the other different types of judicial review proceedings. Where judicial review is by action for a declaration and or injunction - the preferred form of action in Nigeria in administrative and constitutional matters²¹² - the traditional common law standing test was

208. See *R. v. Felixstowe J.J.*, *ex parte* Leigh, Q.B. 582 (1987).

209. See *R. v. Inspectorate of Pollution*, *ex parte* Greenpeace Ltd. (No. 2), 4 All E.R. 329 (1994).

210. See *R. v. Foreign Sec'y*, *ex parte* World Movement Ltd., 1 W.L.R. 386 (1995).

211. See *R. v. Sec'y of State for Foreign and Commonwealth Affairs*, *ex parte* Rees-Mogg, Q.B. 552 (1994).

212. In *Attorney-General of Anambra State v. Okafor*, the Supreme Court pointed out that anyone whose rights are infringed by the exercise of statutory power by an authority vested with such power can challenge its exercise by seeking a declaratory order. 2 N.W.L.R. 396 (1992). It must be said that with the presence of the new Order 43 there is much to be said for the application of a procedural exclusivity rule.

quite strict. It was as strict as the test derived from section 6(6)(b). For instance, it has been said of the declaration that, it is "by its very nature . . . of no avail to a plaintiff not invested with legal rights which are capable of being declared."²¹³ When the section 6(6)(b) rule is abandoned, the question will arise as to whether or not to apply the traditional strict tests in such judicial review actions. It is my view that the courts should apply a liberal test in this context. Take the case of unconstitutional behavior. The application of a test that focuses on private legal rights (i.e. the traditional test in respect of declaratory relief) will have the effect of insulating unconstitutional behaviour from attack, considering that the Attorney-General is not likely to sue his own government. Liberality does not, however, mean that an *actio popularis* should be recognised.²¹⁴ It is, therefore, suggested that the courts should apply a "sufficient interest" test in this context, notwithstanding the absence of explicit authority in the rules of court.²¹⁵ Under such a test, the courts can give standing to a plaintiff who clearly demonstrates an interest higher than that of the ordinary member of society, even though this interest does not amount to a legal right. The benefit of this test is that it will reverse the present situation whereby the judiciary unwittingly allows legislative and executive constitutional violations to go unchecked. In the case of unlawful administrative action that is challenged by action for declaratory or injunctive relief, a sufficient interest test should equally be applied. Such a test would have the benefit of ensuring that a uniform test applies to all cases of unlawful administrative action, regard-

213. G.L. Peiris, *The Doctrine of Locus Standi in Commonwealth Administrative Law*, P.L. 52, 70 (1983).

214. There are three reasons why the floodgate argument has force in this context. First, since the challenges will not be under the AJR procedure, there would be no filtering mechanism to weed out frivolous litigants. Secondly, the award of costs in Nigeria is so derisory that it has never been regarded as a discouragement to litigation. Lastly, because lawsuits are greatly subsidised from the public purse, litigants in Nigeria have an incentive to sue in a manner that involves a huge social cost.

215. A similar departure from the strict rule applicable to the declaration was made in Canada in, *Thorson v. Attorney General of Canada* (No. 2), 43 D.L.R. (3d) 1 (Canada) (1974). It will also be recalled that Lord Denning had done likewise in *Attorney-General ex rel. McWhirter v. Indep. Broadcasting Auth.*, Q.B. 629, 649 (1973), before *Gouriet v. Union of Post Office Workers*, AC 435 (1978), was decided. See also *Olawoyin v. Attorney-General*, N. Nig., 1 All N.L.R. 269 (1961).

less of how the action is brought. In short, it is this writer's view that once the section 6(6)(b) standing rule is jettisoned, then in the entire domain of Nigerian public law a sufficient interest test should apply. This sensible approach has commended itself to rational systems of law, and Nigeria will do itself no credit if it continues to apply a standing test that focuses on the infringement of a legal right. The underlying philosophical bases of such a liberal standing test in public law are "communitarian" and "expository" principles of constitutional law adjudication.²¹⁶ The former supports a liberal standing test by recognizing that the public, rather than only the victim of a constitutional rights violation, has a legitimate interest in the observance by the State of constitutional guarantees.²¹⁷ According to Joanna Miles, this model prevents the "privatization" of human rights violations²¹⁸ - a hallmark of a standing rule that focuses on the infringement or threatened infringement of a person's legal rights. The model allows persons with a genuine desire and capacity to vigorously pursue a suit to bring such cases to the courthouse, even where the victim of the rights violation refuses to sue. The expository principle, by viewing the judicial function as being primarily the exposition of legal principles, rather than simply the resolvers of disputes, supports a broad standing rule that does not focus on the characteristics of the plaintiff.²¹⁹ This is because judicial pronouncements in this sphere affect a multitude of persons not before the court (unlike the position in private law) and clarify the proper interpretation of constitutional provisions not just for the case at hand, but to all future interactions between governments (federal, state, local) and citizens and governments.²²⁰

This transcendental construct can be concretized by considering an aspect of the recent controversy generated by the introduction of the *Sharia* in some of the States in Nigeria.²²¹

216. See J. Miles, *Standing Under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication*, 59 C.L.J. 133 (2000).

217. See *id.* at 136.

218. See *id.* at 148.

219. See *id.* at 136.

220. See *id.* at 153.

221. The BBC reported that in February and May 2000 more than 1,300 people died in riots over the *Sharia* issue in the northern city of Kaduna in Nigeria. See

Pursuant to sections 144 and 145 of the Zamfara State Sharia Penal Code Law No. 10 of 2000, Zamfara State recently amputated a convicted cow thief.²²² Even though the *Sharia* is widely (but not always accurately) believed to be unconstitutional,²²³ neither the convict who was amputated nor the Federal Government has sought to challenge the constitutionality of this law. Hence, the question arises, whether any NGO concerned with civil liberties in Nigeria will have standing to sue, even where the victim has not challenged the constitutionality of the law? A communitarian and expository model of constitutional adjudication, by supporting a broad sufficient interest test, should accord an NGO standing in such circumstances.²²⁴ While it is certain that the NGO is not the immediate

BBC Report (June 29, 2000), available at <http://news6.thdo.bbc.co.uk/hi/english/world/africa/newsid%5F811000/811548.htm>.

222. See *Zamfara Amputates Cow Thief*, in POST EXPRESS, at <http://www.postexpresswired.com> (last visited March 25, 2000).

223. At a general level, there is nothing unconstitutional about the introduction of the *Sharia* in any State of Nigeria. There is no reason why Delta or Zamfara State should not be able to introduce Sharia Law of Tort or Contract, for example, since these areas fall within the legislative competence of the States. Unconstitutionality arises only if (a) the law in question prescribes a state religion or (b) contravenes any of the fundamental rights in Chapter IV of the Constitution or (c) conflicts with any other aspect of the Constitution. Applying this test, the aspect of Zamfara's State penal code that prescribes amputation as punishment for theft is unconstitutional. This is because it violates the constitutional provision in Ch. IV that provides that "Every individual is entitled to respect for the dignity of his person, and accordingly - (a) no person shall be subject to torture or to inhuman or degrading treatment." Even under the present standing rule, a diligent Federal Attorney General should be able to invoke the courts to test the constitutionality of such a Sharia law, since he has a duty to do so pursuant to the combined effect of § 5(1)(b) and § 150(1) of the 1999 Constitution (if this is regarded as Nigeria's constitution) or the combined effect of § 5(1)(b) and § 138(1) of the 1979 Constitution (if this is regarded as Nigeria's constitution, as this writer has argued).

224. If the Federal Attorney-General refuses to go to court, as presently seems to be the case, it would follow that under the present rule of standing, it would be impossible for a litigant to question the constitutionality of such a Sharia law if the litigant is unable to make a showing that the impugned law infringes or threatens his or her legal rights. However, once the § 6(6)(b) rule is swept aside, as this article argues, there should be no reason why a person who has a sufficient interest should not be able to go to court. Such a person will be a relevant NGO, although it need not be confined to such persons. Lord Diplock explained, "It would, in my view, be a grave *lacuna* in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped." *R. v. IRC, ex parte Nat'l Fed'n of Self-Employed*, A.C. 617, 644

victim of the rights violation, *Klass v. FRG*²²⁵ (a decision of the European Commission of Human Rights interpreting the Convention for the Protection of Human Rights and Fundamental Freedoms - the provenance of Chapter IV of the Nigerian Constitution) shows that legislation can be challenged by a person without it being necessary for him to show that specific measures under the legislation have been taken against him.

Finally, in cases where there has been an infringement or threatened infringement of a person's fundamental rights contained in Chapter IV of the Constitution, the standing requirement would seem at first glance to be indicated in section 46(1), which provides, "any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." However, it is arguable that this provision only makes it abundantly clear that the person whose rights have been infringed or threatened should be able to sue; and that it does not go as far as taking away a right to sue that is vested in a third party by the common law. An example of such is the writ of *habeas corpus*, which is obtainable in respect of a Chapter IV right. It has been said by Madden C.J. in the Australian case of *R. v. Waters*²²⁶ that, "[a]nybody in the community who knows that a person is wrongfully imprisoned has a right to have the writ to discharge that person out of the imprisonment." Furthermore, as stated above, the European Commission of Human Rights in *Klass v. FRG* has demonstrated that the concept of "victim" can be broadly interpreted. In fact, the matter can be tested by considering the following situation: a person is wrongly deprived of his life in violation of Chapter IV of the Constitution. Yet, the wording of the constitutional guarantee of the right to life and section 46, if literally construed, would suggest that no suit would be permissible by any person other than the person whose life is wrongly terminated. This would, in effect, mean that close relatives of the deceased will be unable to bring an action in their own right based on the violation of the constitutional guarantee. This would be a paradoxical result. Clearly,

(1982).

225. 2 E.H.R.R. 214 (1978).

226. V.L.R. 372, 375 (1912).

what this demonstrates is that there is a need to interpret section 46 broadly. This is how the functionally equivalent provision of the European Convention on Human Rights has been construed.²²⁷

VII. CONCLUSION

If by logical reasoning from premises, conclusions arrived at are contrary to common sense and justice, then we ought to go back and examine the premises to see if they are sound. This is what this article has done. It has been demonstrated that the so-called Nigerian law of standing, whose assumed constitutional basis has been shown to be manifestly false and whose illogicality is incandescent, is the result of a catalogue of errors. Chronologically, and in an ascending order of gravity, the first error lies in the drafting of section 6(6)(b) by - on their own admission - an over-worked body of amateur draftsmen operating under a severe time-constraint. Since the term "civil rights" had already been judicially defined very narrowly, it would have been better not to use the term in section 6(6)(b). Its presence in the provision is not, however, a significant cause of the *locus standi* problem. It is merely a part of a matrix of more critical errors. The second error was the misplaced application of U.S. jurisprudence on Article III to section 6(6)(b) by Justice Bello in the *Adesanya* case. Although this was critical, it was merely the error of one judge out of seven. The third error was the misreading of the *Adesanya* case by the Supreme Court. This was the most grievous error of all. It led to the adoption of Justice Bello's rule as the principle of the *Adesanya* case. It was this misreading of *Adesanya* that led to the discovery of a fallacious rule of standing based on section 6(6)(b). The universal nature of the rule meant that it had to apply across the gamut of Nigerian law. Thus, by conducting section 6(6)(b) into territory where it can only be described as a trespasser, the supreme tribunal has done incalculable damage to the edifice of Nigerian law.

227. See art. 34 (previously art. 25, prior to the ratification of Protocol 11). It has been held that close relatives of a person killed in alleged violation of art. 2 of the Convention are indirectly affected and, accordingly, entitled to bring an action in their own right based on that violation. See also *Mrs. W. v. U.K.*, 32 D.R. 190 (1983).

Only the poor forensic skills of the courts can explain the longevity of this rule, which has infected all regions of Nigerian jurisprudence. The jurists that ought to have dispelled the darkness with illuminative analyses failed to discredit the rule; at the highest, their discourses have been limited to condemning unjust results, without appreciating that it is the structure of the law that has produced such results. If they had for once adverted their attention to whether the *locus standi* test was functional, perhaps its sheer crudity would have forced them to investigate whether the Supreme Court in *Adesanya* did, in fact, decide that section 6(6)(b) laid down a requirement of standing. Apart from vandalising Nigerian law in the various doctrinal categories in private and public law, the Supreme Court, through the standing rule, also has undermined the rule of law. Gani Fawehinmi, a leading Nigerian constitutional lawyer, observed after the *Adesanya* case that the danger posed by *locus standi* "is potent and must be nipped in the bud in Nigeria, as it is capable of leading to terrible injustice. It can be used by the other arms of Government - Legislative and Executive - to cover unconstitutional iniquities."²²⁸ It hardly needs pointing out that the consequence of a persistent enfeeblement of the rule of law is that Nigeria will move closer to a civilian dictatorship; and a military dictatorship becomes likely when there is a civilian dictatorship.

VIII. POSTSCRIPT

The latest word on standing to sue in Nigeria is the decision of the Supreme Court in *Owodunni v. Registered Trustees of Celestial Church and Bada and Ors.*²²⁹ At first glance, it appears that the Supreme Court has at last accepted this writer's thesis - first advanced in 1995²³⁰ and given firm judicial support by the Court of Appeal in *N.N.P.C v. Fawehinmi*²³¹ - that the *Adesanya* court did not by a majority decide that section 6(6)(b) of the Constitution laid down a requirement of standing. Reviewing the *Adesanya* case,

228. See Fawehinmi, *supra* note 30, at vii.

229. 6 S.C. (Part III) 60 (2000).

230. Ogowewo, *supra* note 33.

231. 7 N.W.L.R. 598 (1998).

Ogundare J.S.C. pronounced "From the extracts of their Lordships' judgements I have quoted above one can clearly see that there was not majority (sic) of the court in favor of Bello J.S.C's interpretation of section 6 subsection (6)(b) of the Constitution."²³² Further down his Lordship stated "In my respectful view, I think Ayoola J.C.A. (as he then was) correctly set out the scope of section 6 subsection (6)(b) of the Constitution . . . in *N.N.P.C v. Fawehinmi & Ors.*"²³³ These pronouncements, which were not *obiter dicta*, received the unanimous agreement of the remaining Justices. It, therefore, appears that the foundation of the Nigerian standing doctrine has been demolished by this decision. It cannot even be argued that as the case was not decided by a full (seven member) Panel of the Supreme Court, the five member Panel is not competent to overrule the full Panel that decided *Adesanya*. This is because the *Owodunni* court did not purport to depart from *Adesanya* – all it did was show that *Adesanya* had been wrongly interpreted in subsequent cases.

It is, however, too early to hold a requiem on the standing doctrine for three reasons. First, it is rather strange that such a legal revolution - for that is what it is - could occur without the other members of the Panel (apart from simply concurring) having anything to say about the change. Their silence on this point is deafening. It leaves one with the impression that they may not have appreciated the significance of this aspect of the case. Secondly, it appears that even Justice Ogundare did not appreciate the full implication of his pronouncements. This is because after stating that section 6(6)(b) was not relevant to *locus standi*, a few paragraphs later - obviously led into error by a view put forward by Ademola J.C.A. in *Bolaji v. Bamgbose*²³⁴ - he proceeded to state that section 6(6)(b) was relevant to *locus standi* in constitutional litigation!²³⁵ Lastly,

232. *Owodunni*, 6 S.C. (Part III) at 82.

233. *Id.* at 83.

234. *See Bolaji v. Bamgbose*, 4 N.W.L.R. 632, 652F (1986) (opinion of Ademola J.C.A.). *See supra* note 185.

235. *See Owodunni*, 6 S.C. at 83-84. Ogundare J.S.C. states, "I think there is some wisdom in the views expressed by his Lordship Ademola J.C.A. The judgements delivered in the *Adesanya* case seem to support him. The term 'civil rights and obligations' applies more in the sphere of public law." *Id.* This is clearly wrong. *See supra* at § II. It is either that § 6(6)(b) contains a rule of standing or it does not. There is nothing to suggest that it does or that it does only in

there are sixteen Justices on the Supreme Court, five of whom sat on this particular Panel. It is very likely that a different Panel of the court may go back to section 6(6)(b) in discussions on standing.²³⁶ For these reasons, one must resist the temptation at this point to sing a dirge for the standing doctrine. Where does this leave the law? In the *Owodunni* case, Justice Ogundare began his judgement by observing that:

This appeal raises once again the vexed question of locus standi which, in spite of a plethora of decided cases on it, still remains a Gordian Knot. A number of judicial pronouncements have been made and academic papers written. Rather than the problem being solved, it has become more intractable as the case now on hand demonstrates.²³⁷

constitutional matters.

236. Quite apart from the above weaknesses, a different Panel of the Supreme Court could rightfully point to the fact that Ogundare J.S.C. was wrong when he stated that Bello J.S.C.'s construction of § 6(6)(b) was the minority position in the *Adesanya* case. To reach this conclusion, Ogundare J.S.C. opined that Idigbe J.S.C. did not subscribe to Bello J.S.C.'s construction. But this is wrong. Idigbe J.S.C. said that, "[f]or the reasons given by my learned brother, Bello J.S.C. I agree that the plaintiff . . . has no locus standi to prosecute the claims in these proceedings." 1 All N.L.R. (Part 1) 1, 80 (1981). Further down, he expresses his agreement with the point in issue in even more direct language. *Id.* at 42. When Idigbe J.S.C.'s speech is carefully analyzed, it will be seen that he saw § 6(6)(b) as dealing with separation of powers and as laying down a standing requirement. By viewing § 6(6)(b) as laying down a requirement of standing, Idigbe J.S.C. was clearly agreeing with Bello J.S.C. The correct position, as has been demonstrated, *supra* at § III(B), is that the *Adesanya* court was divided equally on this issue.

237. See *Owodunni v. Registered Trustees of Celestial Church and Bada and Ors*, 6 S.C. (Part III) at 62. The case did not involve any difficulty. Shorn of all adornments, the case involved a claim by a member of a voluntary association to enforce one of the terms of the contract – the right to insist on constitutional behaviour by the association. In this context, as stated earlier (see text accompanying nn. 147-149) the false § 6(6)(b) rule causes no difficulty.

The plaintiff in this case challenged the appointment of Bada to the office of Pastor of the Celestial Church of Christ, as being in violation of Article 111 of the church's constitution, the purport of which was that the appointment of the Pastor by the church was a matter of divine choice to be revealed to, "the erstwhile incumbent." As can be expected in matters of religion, the church's doctrine (as indicated by its constitution) accepted the co-existence of the physical and spiritual spheres with no clear separation.

The constitution of the church in many of its Articles clearly showed that the church believed in saints and in the transmission of messages from the spiritual world to those in the physical world. Crucially, Article 111 did not go on to stipulate the mode by which this divine revelation to the erstwhile incumbent was to be expressed to the church before the person is named and proclaimed the successor by the church. After the Pastor died without formally appointing a successor, Bada was named and proclaimed "Pastor" by the church. The defendants

Even though the citadel of the standing doctrine has been severely assaulted, a pessimist may opine that perhaps not much has changed.

maintained that Bada was the divine choice and that the revelation of this to the erstwhile Pastor (at a time when he was dead but regarded as having a spiritual existence as a saint) was expressed to the church metaphysically in the form of "spiritual messages" through "visionaries," and that this was in accordance with Article 111. Having broken the link between *locus standi* and § 6(6)(b), the court accepted the principle that in matters of private law, the issue of standing is subsumed within the cause of action. Since the cause of action in the case was breach of contract, the plaintiff (the rule of privity having been satisfied) had a right to sue on the contract. (It is noteworthy that even this elementary point confused the Court of Appeal and to some extent the Supreme Court, as they kept referring to the standing test not in terms of privity but as a "sufficient interest" test; a test applicable only in public law.)

There were, however, two limitations that should have debarred the plaintiff from suing in this case, but the court was oblivious of both. First, a member may be debarred from suing by the rule in *Foss v. Harbottle*. This is a rule (which applies to corporate and unincorporated associations) that precludes suits by minorities in respect of matters within the control of the majority of members. (In *Mozley v. Alston*, 1 Ph 790 (1847), it was held that a minority of members of a railway company who challenged the usurpation of the defendants to the office of director could not sue because this was a matter for the majority to decide.) This rule helps to prevent futile suits. It prevents a situation where the court reaches a decision only for the majority of members to overrule the decision – a fact that eventually occurred in this saga. Second, a member will be debarred from suing in respect of a matter where there is no intention to create legal relations. Even though the manner of appointment of the Pastor in this case was clearly a matter of spiritual doctrine (unlike the case of the Anglican Church in *Thomas v. Olufosoye*) and, therefore, not justiciable, the Supreme Court wrongly ventured into spiritual territory and ruled that Bada's appointment was void.

The appropriate answer to the question posed to the court was that there was no intention to create legal relations in respect of this matter and, therefore, there was no cause of action for breach of contract. Put simply, the contract of the members of Celestial Church of Christ did not extend to the appointment of the Pastor, since this appointment was to be by divine choice, as revealed to the erstwhile Pastor and expressed by him to the church in an unspecified manner that embraced even the metaphysical. The Supreme Court assumed that just because the Pastor died without making an appointment, Article 111 had not been complied with, even though the church's doctrine contemplated that the communication of the divine choice through the Pastor could be made to the church when he assumed the role of a saint. By this decision, the court, in effect, reached the bizarre conclusion that matters of spiritual ecclesiastic doctrine are justiciable.

