

INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA



JUDICIAL COLLOQUIUM ON LOCUS STANDI IN ADMINISTRATIVE JUSTICE AND HUMAN RIGHTS ENFORCEMENT

REPORT

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Preface

On the 8th and 9th of October 2001, the Institute for Human Rights and Development in Africa held a Colloquium on the principles of *locus standi* in administrative justice and human rights enforcement. The Colloquium attracted approximately 80 practitioners, including guests speakers from the Courts of Appeal of Nigeria and Ghana, and the Supreme Courts of The Gambia and Cameroon. NGO practitioners from The Gambia, Nigeria, South Africa and the United Kingdom also made presentations. It was attended by the entire Judiciary of The Gambia and Gambia Bar Association (GBA), and interested persons from Kenya, Tanzania, Nigeria, and Sudan.

The Colloquium was the third in a series of events held by the Institute for Human Rights and Development in Africa, in partnership with Gambian legal community, with a view to promoting the domestic application of international human rights law. These events also strengthen the institutional capacity of the Judiciary, GBA and the Department of State for Justice through continuing legal education, so that judges and lawyers can keep abreast of current developments in the human rights law field.

IHRDA's seminars, training sessions and colloquia provide an environment for the exchange of experience and views amongst judges and lawyers. Within the Commonwealth legal community there is an evolving practice of cross-fertilising legal norms from one jurisdiction to another, which can be done with ease due to the commonality of the legal systems originating from English common law. This is particularly helpful in the Africa, where scarce resources and problematic access to justice means that few cases are heard and subsequently reported. By cross-reference to jurisprudence from other jurisdictions, legal practitioners have access to a wealth of authorities and legal discourse.

Human rights and administrative law traditionally stemmed from the common law, finding its origins in the principles of natural law and natural justice. In present times these areas are governed constitutions, but the commonality of application has not been lost. In Africa, these constitutions had a common origin: the 'Whitehall' constitutions when gaining independence from the United Kingdom. This makes human rights and administrative justice an appropriate area to propagate cross-fertilisation of legal norms.

In human rights cases and administrative law, the first legal stumbling block an applicant faces is whether or not they have 'standing' to bring a claim to court. If they are not allowed to bring the claim, it will not be heard. It is therefore an essential element of procedural law that has a profound effect on the substantive development of law. The rules of standing in the Commonwealth are governed both by common law and constitutional law and have seen a great number of changes in recent years. The Colloquium discussed these changes and drew legal practitioners' attention to the importance of this procedural aspect of human rights law.

The Importance of *locus standi*

In any democracy there should be in place a system of separation of powers, allocating the functions of government between the executive, legislature and judiciary. Such a system prevents abuse of power through 'checks and balances' that make each branch of government accountable to the others. One of those most important forms of accountability in the modern state is *legal accountability*, whereby the actions of the legislature and the executive are subject to review by the judiciary, known generally as 'judicial review.'

The link between legitimate government and respect for the rule of law, which leads even the most tyrannical government to try to maintain an apparently independent judiciary, has given birth to a new-style democracy, constitutional democracy, in which the government's powers and limitations are formulated as legal standards and principles, raising the profile of legal accountability and the judiciary, making them the protectorate of the constitution, and the democracy, itself.

Legal Accountability and *locus standi*

An action for judicial review, known in modern democracies a "constitutional complaint" (or a human rights case), can be brought to a competent court by any 'person' who feels that an administrative (executive) or legislative action/decision has breached a constitutional guarantee. *Locus standi* is the generic term covering the rules or principles identifying the person or persons competent to launch such a case.

Generally, these actions protect and enforce the guarantees of the fundamental rights of the individual, which are found in any modern constitution. Just as any other legal action, an action for judicial review is subject to specific rules of procedure. Under this procedure, the person bringing the action must show they have '*locus standi*' to sue.

In The Gambia, *locus standi* is covered in Article 37 of the Constitution, which provides that:

"If any person alleges that any of the provisions of section 18 to 33 or section 36(5) of this Chapter has been, is being or is likely to be contravened in relation to himself or herself by any person he or she may apply to the High Court for redress.
Any application may be made under this section in the case of a person who is detained by some other person acting on the detained person's behalf."

***Locus standi* and Access to Justice**

Problems often arise from restrictive interpretations of *locus standi*. Most Commonwealth systems have adopted the test of '*sufficient interest*.' This simply means that those persons with 'sufficient interest' in the circumstances of the case have 'standing' to bring an action for judicial review.

However, in some jurisdictions, in particular Nigeria, this test has been interpreted to mean that only those who have a 'personal right', that is those whose rights (constitutional or legal) have been directly infringed by the executive or legislative decision, can bring an action for judicial review. This greatly restricts access to justice and, therefore, accountability of government. Giving only those with a 'personal' right standing to sue greatly reduces the number of people eligible to bring action against the government.

The first problem with a restrictive interpretation of standing is that it creates a reliance on the resources, financial and professional, of a few, or even a single, person, to bring an action to court. This is always a burden, even where a system of legal aid is functioning, but especially so

in developing countries where a majority of the population is poor, and legal actions are relatively expensive and inefficient.

A second obstacle is that the person with standing has to actually want to bring the action. This can give rise to intimidation or gifts of financial incentives, encouraging the person not to bring a case to court. Thirdly, an alleged breach has to have taken place, meaning that no actions can be brought *preventing* someone's rights being infringed.

The result is that, under a restrictive *locus standi* regime, fewer cases are brought to court, lessening the incentive for government to adhere to principles of good administration. Apart from the obvious consequences of weakening constitutional protections, restrictive *locus standi* may not be sound policy in the economic sense, since, in the long run, when government is not accountable, the resulting inefficiencies and failures of good administration cost the government and the taxpayers dearly.

Unrestrictive Standing and Access to Justice

In recognition of the problems associated with restricted standing, the major common law systems of the world, namely Australia, Canada, US, Scotland, England and Wales, India and South Africa, closely followed by the independent Commonwealth states, have all in recent years relaxed the test of 'sufficient interest' and introduced numerous 'types' of standing. These types of standing have opened up the action of judicial review to not only those with '*personal standing*', but to the relatives of that person, namely '*surrogate standing*', to an association of which that person is a member or is representing a number of claimants, namely '*associational standing or class action*' and lastly standing based on a public right or interest namely '*public interest standing*' or in its most relaxed form '*actio popularis*' where the public interest is based merely on the fact that the case concerns a constitutional issue.

Further, there has been a greater expansion of the American law tradition of '*amicus curiae*' or '*public interest intervention*,' where, in a judicial review case, any competent person or association can enter a brief or opinion, mapping out any further 'personal' or 'public' interests that they feel should be considered, in addition to those issues already being considered in the immediate facts of the case. This is seen as an economical way of dealing with numerous affects of a decision without bringing multiple cases. It is also an efficient preventive mechanism.

The opening up of standing obviates the need for a single individual with a personal interest to carry the financial, or indeed political, burden of bringing a case. It also means numerous facets of a case can be dealt with concurrently. Finally, it encourages good administrative practices by the executive and legislature; the resulting integration of constitutional considerations into policy-making means, in the long run, fewer cases at the doors of the Judiciary.

Programme

The two day colloquium was split into four seminars. The seminars took the form of a panel presentation facilitated by a moderator. After the panellists had made their presentations, the moderator would the open the floor to questions, views and comments from the participants.

I. *Locus standi*: Smooth Administration of Justice or Barriers to Access to the Court?

This seminar was presented by Jonathan Cooper, a Barrister-at-law, and Assistant Director of Justice, a renowned NGO active in the promotion of human rights in the United Kingdom and Europe.

Mr Cooper delivered a paper that outlined the main principles of the law of *locus standi* and the changes they have undergone in the United Kingdom through the evolution of administrative justice and the recent adoption of the Human Rights Act 1998. The law of the United Kingdom is a natural starting point for any discussion of Commonwealth legal principles as it largely forms the origins of the common law and constitutional law of most African commonwealth countries and still remains an influential and persuasive precedent.

II. *Locus standi* and Administrative Justice

The panellists were a rich representation from the benches of African courts, namely: Justice Hassan Jallow (Supreme Court of The Gambia), Justice K.E. Amua-Seki (Court of Appeal of Ghana), Justice Niki Tobi (Court of Appeal of Nigeria) and Justice George Gwanmesia (Supreme Court of Cameroon).

They each presented their national rules of standing in relation to Administrative Justice, by which individuals can approach the court to challenge a decision.

III. *Locus standi* and Human Rights Enforcement

Justice Hassan Jallow (Supreme Court of The Gambia), Justice K.E. Amua-Seki (Court of Appeal of Ghana), Justice Niki Tobi (Court of Appeal of Nigeria) and Justice George Gwanmesia (Supreme Court of Cameroon).

The presentations concentrated on the analysis of legal decisions in which the decisions made by a public body were challenged on the grounds of human rights, under common law, criminal law or under the fundamental rights provisions of a Constitution.

IV. *Locus standi* and Recent Developments

This panel was representative of the non-governmental and activist element of the legal community. As the underlying theme of the Colloquium was access to justice, the panellists discussed their use of standing rules to promote access to the courts. The use of third party intervenors, or *amicus curiae* briefs, was also touched upon as well the provision of legal aid in their relative jurisdictions.

Closing Comments: Adoption of Communiqué

The drafting Committee for the Colloquium summed up the programme and conclusions of the Colloquium, which was read out to the plenary session and approved (See page 25).

I. Smooth Administration of Justice or Barriers to Access to the Court?

Jonathan Cooper, Barrister-at-Law, Assistant Director, Justice

In common law jurisdictions, the judicial process is between two legal persons, and protects their legal interests. In administrative actions, however, who can bring a case is less straightforward. Judicial review often involves principles and policy, reviewing the realm of state action which cannot be designated to other parts of the government. This, of course, raises concerns of usurping the roles of legislator and overstepping the role of the courts. The courts are careful to distinguish between those litigants with a genuine interest, and those who could be perceived to be 'mere busybodies'.

It could be argued that 'who has the standing to bring the case' should not be such a central issue, and that the importance of the case should prevail over issues of standing. There is, of course, a line to be drawn, but it should be drawn in the public interest: issues that are of general importance, not only for the individual bringing the action, but of general public interest, should not be barred by rules of standing.

There are three chief arguments for a wide definition of standing:

- Effectiveness of administration: the ability to discuss general points and not be caught up in individual facts (see *Greenpeace* case); this also means that the pressure is not on the individual applicant.
- Enhancing pluralistic, participatory democracy: intangible interests can be heard.
- Wider range of people may appear before the courts: challenges notion of courts as being elite, undemocratic institutions.

Common Law

The test of standing at common law is traditionally the '*sufficient interest test*': "*Sufficient interest is intended to sufficiently embrace all classes of those who might apply and yet permit sufficient flexibility in any particular case to determine whether or not 'sufficient interest' was in fact shown.*" *Inland Revenue Commissioners v. National Federation of Self-employed Small Businesses Ltd* [1982] AC 617 at 658B

The factors relevant to determining whether an applicant for judicial review (administrative justice) has standing are:

- the importance of maintaining the rule of law;
- the importance of the issue raised;
- the likely absence of any other responsible challenger;
- the nature of the breach of duty against which relief is sought; and
- the expertise and experience of applicant body.

Case Note: *R v. Inspectorate of Pollution and another, ex parte Greenpeace Ltd (no 2) (1994)*

This was an application by Greenpeace Ltd, an environmental campaign group, for judicial review of a decision by HM Inspectorate of Pollution and the Minister for Agriculture, Fisheries and Food (MAFF) to grant applications by British Nuclear Fuels plc (BNFL) for variations of authorisations under the Radioactive Substances Act 1960 to discharge radioactive waste from BNFL's premises at Sellafield, Cumbria, in order to test a new thermal processing plant. BNFL contested whether Greenpeace had sufficient interest in the matter to which the application relates and is entitled to the relief sought.

Held: “ *It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court...Consequently, a less well informed challenge might be mounted which would stretch unnecessarily the court’s resources and which would not afford the court the assistance it requires in order to do justice between the parties...This responsible approach undoubtedly had the advantage of sparing scarce court resources, ensuring an expedited substantive hearing and an early result...It follows that I reject the argument that Greenpeace is a ‘mere’ or ‘meddlesome busybody.’ I regard the applicant as eminently respectable and responsible and its genuine interest in the issues raised it sufficient for it to be granted locus standi.*”

Human Rights Act 1998

There is a new test imposed under the UK Human Rights Act 1998 for applications brought under its provisions.

Section 7(7) Human Rights Act 1998: For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that Act.

Art 34 European Convention on Human Rights: “The Court may receive applications from any person, non-government organisation or group of individuals claiming to be the victim of a violation...of the rights set forth in the Convention.”

There was obviously a clear statutory intention to follow the Strasbourg convention. This not surprising considering the British delegation insisted on the strict victim test at the time the Convention was adopted. Thus, in judicial review proceedings under the Human Rights Act, the standing test is considerably more restrictive than the sufficient interest test traditionally applied.

Further examination of the victim test: A ‘victim’ is someone clearly affected in some way by the matter complained of. There will be no challenges in the public interest, namely: no *actio popularis*. Although the test of standing remains more limited than that under the English common law, the term ‘victim’ has been fairly widely construed for ECHR purposes. The Court has held that the Convention is a not only a living instrument in terms of its substantive provisions but also in its procedural provisions. It is clear from case law that a ‘victim; of an alleged breach of Convention rights can be someone who either has already been affected, or who is potentially affected, in the future, by an alleged breach of Convention rights. It does not require that the ‘victim’ has suffered detriment.

Conflicts and Confusion

The consequences of the narrow test of standing in judicial review under section 7 of the Human Rights Act is that some cases may not be brought by way of judicial review under the Human Rights Act but under the ‘common law of human rights.’ As a result, it is possible to identify five different tests for legal standing in UK courts, depending on the case:

1. ordinary common law
2. common law embodying Convention rights
3. European community law
4. European Convention rights alone; and /or
5. any combination of the above

The potential for confusion and conflict should not be underestimated. The effect of section 7 is that public interest groups with a sufficient interest to take Convention (human rights) points or cases on judicial review will be prevented from doing so. Yet, the courts, under administrative

law, have previously accepted that such third parties may bring judicial review cases, on behalf of all those who may be affected, where they can show a legitimate interest (see the Greenpeace case above).

Section 7 prevents public interest groups bringing actions in respect of Convention breaches. This has two practical consequences: First, it has inhibited early challenge on behalf of a class of person covered by a regulation or decision, and where an early resolution of the issue could clarify the law so as to make further challenge unnecessary or unlikely to succeed. Second, it means that where such cases are brought on judicial review by third parties, they are able to raise common law grounds of administrative justice, but not any Convention points, which then have to be litigated later, when a suitable victim has been found.

However, the narrow test of standing in judicial review under the Human Rights Act should not be seen as precluding public interest litigation. Although organisations will be prevented from bringing representative actions, frequently they will be able to assist applications by individuals who can claim to be victims under the Convention test. Public interest groups may support individuals who can claim to be victims, whether by representing them or submitting information in support of their applications.

Furthermore, the English courts may follow cases such as *Open Door and Dublin Well Woman v Ireland*, and construe 'victim' liberally. Section 7(3) gives some encouragement to such a construction because it gives standing not just to victims but also to those who 'would be' victims.

II. Locus standi and Administrative Justice

The Gambian Experience

Justice Hassan Jallow (Supreme Court Justice of The Gambia)

The courts in The Gambia have the jurisdiction to hear constitutional complaints. There are two sources of this power, namely: Common Law and the Constitution itself.

Common Law

The general test for standing in The Gambia, as in the United Kingdom, stems from the Common Law. It can found clearly stated in the case of *UDP & 2 Ors vs. the Attorney-General SCCS No. 3/2000*:-

"At common law a plaintiff or application for a judicial remedy must normally satisfy the court that he has a right or interest in the matter, his personal interest has been or will be immediately adversely effected, or put in either way that he has sustained or is in danger of sustaining an injury to himself or to some other person or authority which he can legitimately represent."

Therefore the definition of the 'victim' in Gambian law is 'one who is aggrieved'. The rule requiring *locus standi* is applicable in The Gambia by virtue of section 2 of the Law of England (Application) Act (Caps Laws of The Gambia) which makes the common law operative in The Gambia.

The Constitution of The Gambia

Under the Gambian Constitution, everyone has the right to challenge the constitutionality of legislation and administrative actions.

Section 5(1) of the Constitution provides as follows:

"A person who alleges that:

- (a) any Act of the National Assembly or anything done under the authority of an Act of the National Assembly; or
(b) any act or omission of any person or authority,
is in consistent with or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect.

Case Note: UDP & 2 Ors vs. The Attorney General SCCS No. 3/2000

The plaintiffs had instituted proceedings in the Supreme Court of The Gambia under its original jurisdiction seeking declaration *inter alia* that the removal of the Chairman and a member of the Independent Electoral Commission (I.E.C.) was in contravention of the Constitution and therefore null and void and of no effect. The plaintiffs being registered political parties did not claim nor did they show that by reason of this alleged unconstitutional removal they had suffered injury, loss or damage or were likely to do so.

At the preliminary stage of the proceedings the defendant Attorney-General filed a preliminary objection to the competence of the plaintiffs to institute the action on the grounds that they lacked the requisite *locus standi*. The parties who were personally affected, i.e. the Chairman and the member, were not party the proceedings. After examining Section 5 and 6 of the Constitution, the latter provides that “all citizens have the right and the duty at all times to defend the Constitution”, the Court in an interlocutory ruling held:

“...to conclude from the nature as well as this ‘ownership’ of the Constitution by the people of The Gambia that, individually and collectively, they have a right and a duty to monitor and ensure that it is being complied with, that it is not contravened and that all public acts are consistent with its provisions. Access to a court of competent jurisdiction, free from the restrictive technicalities associated with the rule of *locus standi*, is *sine qua non* for the exercise of such a right and the discharge of such a duty. The law cannot regard the ordinary citizen, who wishes to assert his right to challenge in a court of law what he perceives to be a contravention of the Constitution, as an interloper, a stranger to the case, a busybody who is meddling with what does not concern him. It does indeed legitimately concern him...”

There is an extension of the normal ‘private interest’ test of private actions and this has been reinforced by the Supreme Court itself. Every citizen has the right to come before the Supreme Court without showing personal interest to challenge the constitutionality of legislation and administrative action.

Locus standi in Ghana

Justice K.E. Amua-Seki (Court of Appeal of Ghana, (ret’d) Supreme Court of The Gambia)

There are similarities between *locus standi* in administrative and human rights cases, the latter being complicated. The administrative justice practice is simultaneously conservative and revolutionary: conservative because it generally follows traditional principles, but when there is a question of constitutionality a more relaxed approach is adopted.

1992 Constitution, Ghana

Article 1(2): states that the Constitution shall be the supreme law of Ghana and that any enactment or part therefore found to be inconsistent with any provision of the Constitution shall be void.

Article 4: confers on every citizen the right, and places on him the duty, of defending the Constitution. One way of doing so is to bring an action in the courts:

Article 2(1): A person who alleges that:

- (a) an enactment or anything contained in or done under the authority of that or any other enactment; or
 - (b) any act or omission of any person
- is inconsistent with, or is in contravention of a provision of the Constitution, may bring an action in the Supreme Court for a declaration to that effect.

The Constitution clearly confers a right on every citizen of Ghana to discharge his civic duty by going court to prevent a breach of the Constitution:

Case Note: *Tuffour v. Attorney-General (1980) GLR 637 CA*

Where an identical provision in the Constitution of Ghana, 1979 was considered. Held: since section 32 of the Interpretation Act, 1960 states that “‘person’ includes a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of person as well as an individual”, not only individuals, but corporate bodies and registered political parties too, may go to court to enforce provisions of the Constitution.

Locus standi in Nigerian Law and Practice

Justice Niki Tobi (Presiding Justice, Court of Appeal, Nigeria)

Nigeria is a federation made up of 36 states, with a federal capital and federal constitution, presently the 1999 Constitution. There have been a large number of cases on *locus standi*.

By section 6(6) of the Nigerian Constitution provides as follows:

- The judicial powers vested in accordance with the foregoing provisions of this section
- (a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;
 - (b) 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.”

The subsection could be generally referred to as a constitutional provision on the issue of *locus standi*. It is only where the civil rights and obligations of a person are affected that he can have the *locus standi* to effectively invoke the right of access to the courts.

Case Note: *Senator Adesanya v. President, Federal Republic of Nigeria and Anor [1981] 2 NCLR*

The appellant challenged the constitutionality of the appointment of Justice Ovie-Whiskey as Chairman of the Federal Electoral Commission. The Supreme Court held that Senator Adesanya had no *locus standi* in the matter because he participated in the deliberation of the Senate in connection with subject over which his views in the House were not accepted by majority of co-senators.

Per Justice Bello: “*It may be observed that this subsection [6(6)(b)] expresses the scope and content of the judicial powers vested by the Constitution in the Courts within the purview of the sub-section. Although the powers appear to be 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 seems to me that upon the construction of the subsection, it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of. The appellant has not*

alleged that the appointment of the 2nd respondent has in any way affected or is likely to affect his civil rights and obligations.”

This test reflects Justice Bello’s view that this section of the Constitution lays down a standing requirement. Although the test was introduced in the context of constitutional issues, it has further been applied in tort, contract and administrative law cases. This is largely due to the later interpretations of ‘civil right’ to mean private legal rights. The case has attracted a lot of commentary including the Supreme Court itself. It is hoped that an interpretation of it will be made by the Supreme Court, but for the moment *Adesanya* remains the law in civil matters.

Cameroon Practice on *Locus standi* in Administrative Justice *Justice George Gwanmesia (Supreme Court of Cameroon)*

Administrative Justice in Cameroon is given a very important place and is thus rooted in the fundamental law of the state: the Constitution.

The Cameroonian Constitution, 1996

Article 38(1): The Supreme Court shall be the highest court of the State in legal and administrative matters as well as in the appraisal of accounts.

(2) It shall comprise:

- a judicial bench
- an administrative bench
- an audit bench

Article 40: The administrative bench shall examine all the administrative disputes involving the state and other public authorities. It shall:

- examine appeals on regional and council elections disputes;
- give final rulings on appeals and judgments passed by lower courts in cases of administrative disputes.
- examine any other disputes expressly devolving upon it by law.

Access to the administrative bench of the Supreme Court is made simple:

- a) A claim is filed in the registry of the Administrative Bench either by depositing it therein or sending it therein or sending it thereto by post.
- b) The filing fee for any suit stands as low as 15.000frs CFA.
- c) A potential plaintiff who is poor and is unable to afford the 15.000frs.CFA filing fee can apply for, and obtain legal aid which includes the services of a lawyer.
- d) Any Cameroonian aggrieved by any act of the State has a right to seek redress before the administrative court.

To alleviate the hardship of travelling to the Supreme Court in the capital city the Constitution provides for an administrative court to be established in each of the ten provinces of the State to take administrative justice nearer to the people. These provincial administrative courts are progressively being put in place and will handle administrative justice at first instance at the level of their respective provinces.

III. Locus standi in Human Rights Enforcement

Locus standi in Human Rights Cases: Ghanaian Practice

Justice K.E. Amua-Seki

Ghana became independent in 1957 and a constitution, the Ghana (Constitution) Order-in-Council, was imposed by the United Kingdom. This provided for the legislature modelled on that of the United Kingdom with full power to make laws for the 'peace, order and good government' of Ghana. There were few restrictions on the legislator, and no fundamental human rights provisions in the Constitution. Thus, when the legislature passed law for the detention of persons without trial on the ground, among others, that they has been acting in a manner prejudicial to the security of the state, the courts refused to say that such draconian laws were unlawful. Clearly, without a culture of tolerance for divergence of views, the power to make laws for the 'peace, order and good government' of the nation could be abused.

The only recourse for a person detained without trial was under the Habeas Corpus Acts of England 1640, 1679, 1803, 1816, 1862 which were applied as statutes of general application and consolidation in the Habeas Act of 1964.

Section 1:

1. (1) Where an allegation is made by any person that he is being unlawfully detained an application may be made under this section to the High Court or any Judge thereof for an enquiry into the cause of the detention.

2. The application may be made by:

- (a) the person alleging that he is being unlawfully detained;
- (b) any person entitled to the custody of the person detained;
- (c) any other person acting on behalf of the person detained.

The provision is wide enough to cover most of the persons who may wish to bring the wrongful detention of persons before the courts. It should be noted that sub section 2(c) which appeared to take the law further has not been seen as giving a *carte blanche* to all and sundry to interfere in the judicial process. The courts require a person who seeks to bring an application under 2(c) to show that he has the authority of the person alleged to be detained to make the application (authority is implied between family members). A mere stranger or volunteer cannot come to court to ask that a person alleged to be illegally detained is released.

Ghana's experience with repressive rule demonstrated one cannot trust in the good faith of governments. In spite of the worst efforts of military adventurers, whenever Ghanaians have had the opportunity of drawing up constitutions, they have insisted that rights and freedoms be maintained. In the Constitution of 1969, fundamental human rights every citizen ought to have are spelled out in clear terms, and the courts are empowered to override the legislative authority of Parliament.

Article 33 Clause 1 of the Constitution states:

'Where a person alleges that a provision of the Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.'

The right to apply to the High Court for redress is restricted to the person whose fundamental freedoms have been infringed or are threatened with infringement. Any other person would be denied a hearing, except that in cases of wrongful detention relief may be also sought under the Habeas Corpus Act. However, recalling the provisions for enforcement of the Constitution discussed before, namely Article 2(1), enforcement of the Constitution may also involve human rights and therefore may not need to go under Article 33, but can apply instead under Article 2. Political parties and individuals have been able to do this even when they have not been directly affected by the breach.

In *Sam (No.2) v. Attorney-General (2000)*, a private individual suing in his own right as a citizen of Ghana challenged the validity of Section 15 of the Divestiture of State Interests (Implementation) Law, 1993, which barred action against the State, the Implementation Committee or any of its members or officers for any act or omission arising out of the disposal of any interest of the State in various wholly or partly state owned enterprises, thereby obstructing access to the courts. Following *Tuffour v. Attorney-General*, the Supreme Court held that the plaintiff was entitled to bring the action even though no controversy or dispute had arisen concerning an infringement of his rights. It said that the jurisdiction under Article 2(1) was available to all and sundry irrespective of whether they had a personal interest in the subject-matter and declared Section 15 null and void.

It was, however, held in *Edusei v. Attorney-General* in case concerning freedom of movement, that where the plaintiff is seeking to protect or enforce his own rights, he should commence his action in the High Court under Article 33.

Locus standi, or the right of a party to be heard in legal proceedings, is firmly rooted in Ghanaian practice. It is essential that every would-be litigant or applicant, and any other person who wishes to intervene in pending proceedings, should come well-prepared to prove that he has a right to be heard in those proceedings. The Habeas Corpus Act, 1964 conferred *locus standi* on certain classes of persons in cases of wrongful detention. Article 33 of the Constitution conferred the right on all those who complain of a breach of their fundamental rights. Article 2 extended it to all persons in cases of the defence of the Constitution. This is the way to safeguard the Constitution and the rights and freedoms it guarantees.

***Locus standi* in Nigeria Law and Practice**

Justice Niki Tobi, Presiding Justice, Court of Appeal, Nigeria

I should say that the principles of *Locus standi* have been substantially settled under section 6(6)(b) of the Constitution and we cannot go beyond these provisions. Until the Constitution is amended, *locus standi* will depend on the civil rights and obligations of the plaintiffs.

Case Note: Discussion of Adesanya

In 1979 Nigeria had a civilian government after thirteen years of military rule. When they came into power in the civilian regime, it was decided it should be under a Constitution. The new Constitution gave the president powers to appoint chairman and members of the Federal Election Commission, but they be confirmed by the Senate of National Assembly. Senator Adesanya opposed the appointment of the Commission chairman because he has been the Chief Justice of the State and therefore could not hold this position. Adesanya could not succeed in gaining support and was alone in the opposition. The Chairman was appointed. Adesanya went to court to discuss the constitutionality of the appointment. The court of first instance agreed with him and nullified the appointment. On reaching the Court of Appeal, the issue of *locus standi* in a constitutional matter was discussed. Although the Court of Appeal stated that the plaintiff had no

locus standi to bring the action, allowed appeal to the Supreme Court to discuss whether under the Constitution the issue raised as to the validity of the Chairman of the Federal Electoral Commission is dependent on the civil rights and obligations of the plaintiff.

It was held that because the Senator had deliberated in the appointment of the Chairman, he could have no *locus*. He had no right to prosecute outside the Senate any matter in which he had been defeated within.

As stated above, the application of the case has more concentrated on the part of judgment which interpreted section 6(6)(b) of the Constitution as providing for a test of standing for constitutional complaints. This case, although has been followed, the courts have found ways to circumvent it, indeed the Supreme Court itself had considered it dead, but has not been able to pronounce as such as the issue has not been raised in a matter. It is generally considered bad law, the decision was not born out of the arguments presented in the case.

Fundamental Rights

Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999 provides for what we regard as *locus standi* in respect of fundamental rights entrenched in Chapter VI of the Constitution.

“Any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in the State for redress.”

Before a court can invoke any the provisions of Chapter IV (Enforcement of Human Rights) of the Constitution, the party must prove that he is aggrieved.

Case Note: *Olawoyin v. Attorney-General of the Northern Region [1961] 1 All NR*

The appellant sought for a declaration that the Children and Young Persons Law, 1958 of Northern Region prohibiting political activities by juveniles was unconstitutional in that it contravened the fundamental rights provisions of the 1960 Constitution. The Federal Supreme Court held that only a person who is in imminent danger of coming into conflict with law or whose normal business or other activities have been directly interfered with that can bring such an action. Any Nigerian citizen may, under the Constitution, approach the court for enforcement of fundamental rights in the manner he may deem convenient in any given circumstances, but in order to succeed, he must prove that he has some special interest to protect, which under *Adesanya* would mean something affecting his civil rights and obligations.

Private Prosecution

The Constitution does not provide for private prosecution. A private person however has such a right under statutory provisions. The right to private prosecution does not lie immediately the offence is committed. The issue of private prosecution can only arise when the State refuses to initiate criminal proceedings or does not take reasonable steps to initiate such proceedings. It is only then a private person has the *locus standi* to initiate private prosecution.

Case Note: *Chief Fawehinmi v. Col. Akilu and another: In Re Oduneye [1987] 4 NWLR*

On the 19th October, 1986, Mr Dele Giwa, a journalist and Editor-in-Chief of a Nigerian weekly newsmagazine, NEWSWATCH, was killed in his residence at Ikeja in Lagos by a parcel bomb. On 3rd November, 1986, the appellant submitted to the Director of Public Prosecutions, Lagos State, a 39 page documentation containing all details of the investigation he conducted, together with information accusing two army officers of the murder of Mr Dele Giwa. The respondent stated he could not prosecute the two men for murder until he received a police report of the case.

The appellant filed an application in the High Court of Lagos State seeking leave of the court to apply for an order of mandamus to compel the respondent to decide whether or not to prosecute. The court of first instance dismissed the application at leave stage. The appellant appealed to the Court of Appeal. At the Court of Appeal the question of *locus standi* of the appellant to bring the application was considered. The Court *inter alia* held that the appellant had no *locus standi* to initiate private prosecution.

Reversing the decision of the Court of Appeal, the Supreme Court in a majority decision held as follows:

1. The appellant, as a person, a Nigerian, a friend and legal advisor to the deceased has a personal and private right under the Criminal Procedure law to see that a crime is not committed and if committed, to lay a criminal charge for the offence against one committing the offence in his view or whom he reasonably suspects to have committed the offence.
2. The laws of Nigeria have given every person a right to prevent the commission of a criminal offence and where an offence is committed to lay a criminal charge against any one who sees committing the offence or who reasonably suspects to have committed the offence in order to uproot crime from the Nigerian Society.
3. The Criminal Code and the Criminal Procedure Law do not by their provisions confine complaint in respect of the offence if murder to a particular person or class of persons. Any person who has sufficient information in his possession to establish the crime and identify an accused person is entitled to lay the charge. In the instant case, the appellant is imminently qualified under the law to do so.

It is submitted that the liberal interpretation in Fawehinmi is commendable. It has extended the frontiers of *locus standi*, as far as criminal prosecution is concerned. The point should be made that Fawehinmi is not an extension of the decision in Adesanya as erroneously held in some quarters. Fawehinmi being a criminal matter cannot be an extension of Adesanya, a civil matter.

Locus standi in Human Rights Cases in The Gambia
Justice Mam Yassin Sey, High Court of The Gambia

Whilst Section 5 is valid as a general proposition, there are a number of areas in which the Constitution requires the existence of a specific personal interest in the subject matter for one to be competent to institute legal proceedings.

Section 37:

“If any person alleges that any of the provisions of section 18 to 33 or section 36(5) of this Chapter has been, is being or is likely to be contravened in relation to himself or herself by any person he or she may apply to the High Court for redress.

Any application may be made under this section in the case of a person who is detained by some other person acting on the detained person’s behalf.”

Thus, with respect to in the protection of human rights and freedoms guaranteed by Chapter IV, a literal reading of Section 37(1) appears to restrict competence to a person who claims a contravention of the rights ‘in contravention to himself or herself’ and is thus an ‘aggrieved’ person in the traditional sense.

A stranger does not seem to have any *locus standi* to seek the enforcement of the fundamental rights of another. There is one exception: in the case of an illegal and unconstitutional deprivation of liberty, the Constitution empowers a person to seize the courts on behalf of a detainee to challenge the constitutionality of the deprivation of liberty (section 37(2)). There is no express

requirement for any interest on the part of the third party applicant, nor any requirement for a nexus between applicant and the detainee. However, this is not followed in practice; standing is deemed to reside only in family members.

Case Note: *Janneh v. Director of National Intelligence Agency (1999)*

The applicant in the Originating Motion, Mr Wassa Janneh, applied for an order directing the Respondents to forthwith release the said Momodou Lamin Nyassi, Alias Shyngle Nyassi, from unlawful and illegal detention. In discussion as to the standing of Janneh to bring the application the court commented:

“‘Some other person’ in Section 37(2) of the Constitution, must be one who has locus standi, in relation to the rights of the detained person, and not merely on his behalf only. In other words, though this ‘other person’ does not have to be aggrieved by the action of the respondents in contravening his rights, he has to be a person, such that the right of the detained person which was contravened, affects him in some particular interest...

...Paragraph 1 of the affidavit in support deposes to the fact that the applicant is only a co-nominator of the U.D.P, with the detainee and the application is brought on his behalf. In my respectful view, this is not enough, even under Section 37(2) of the Constitution. Some particular interest ought to be disclosed...I hold that the applicant is too remote, having regard to his disclosed locus in the affidavit, to bring the application on behalf of the detainee. This is not an appropriate issue of being his brother’s keeper. The family is available and it should be the appropriate unit to bring this application.”

Yet, in a situation of poverty, low levels of literacy, lack of legal aid and legal assistance, factors which impair the ability of victims to resort to the machinery of justice for redress, there is a dire need for greater elasticity in the concept of victim, and a more liberal attitude towards the requirement of locus or the nature of the interest.

As much as a person in the jurisdiction has in accordance with sections 5 and 6 of the Constitution a legal interest in the maintenance of the constitutional order sufficient to empower him to seek a remedy in the courts, so it would seem that every person should be considered to have a sufficient legal interest in the observance of and enforcement of the Bill of Rights. After all respect for the fundamental rights and freedom of every individual lies at the core, the heart of the democratic constitutional order.

It is perhaps in this way that the rights of disadvantaged persons and groups such as women, children, the handicapped and all others who are theoretically empowered but are constrained by practical factors from access to justice can benefit from greater protection of their guaranteed rights.

Two cases illustrate possible commendable approaches. Under the African Charter on Human and Peoples’ Rights, the African Commission has held that the conditions of admissibility of a complaint from entities other than States parties set out in Article 56 of the Charter do not include a victim requirement. The complainant therefore does not have to be an ‘aggrieved’ person or one whose personal rights have been or likely to be effected adversely by the decision complained of. Thus, NGOs and strangers have been able to espouse the cases of many victims of human rights violations without any practical difficulties.

Another fine example of judicial flexibility and resourcefulness in the application of the rule of *locus standi*. In the celebrated case of *Open Door and Dublin Well Woman v. Ireland*, women of child bearing age were accepted by the court as potential victims of an injunction barring

abortion information in Ireland and therefore having sufficient interest and *locus standi* in challenging such an injunction.

Access to the Courts for persons who, rightly or wrongly, believe they have a genuine grievance is an important component of access to justice. The challenges and constraints to access are diverse; among them are resource constraints for potential litigants, illiteracy, the inefficiency of the machinery of justice, the complexity of the process and the rigid application of rules and concepts such as the requirement of *locus standi*.

The rationale for the rigid rule of locus may no longer be tenable. The fear of a potential deluge of litigation which might overwhelm the machinery of justice may not be borne out [sic].

The liberal provisions of Sections 5 & 6 of the 1997 Constitution, creating enlarged standing for individuals in ensuring respect for the constitutional order, are a very progressive development. There are nonetheless restrictive features in the Constitution, particularly in the enforcement of fundamental rights and freedoms and in challenging elections to the office of President, which may require review to bring them into conformity with the otherwise liberal spirit of the Constitution.

Overall, there is a need for a more liberal, less restrictive judicial approach to questions of standing before the Courts, a more elastic notion of who is a victim and an aggrieved person, and enhanced standing for individuals within the legal process. In an environment where many who are personally aggrieved lack the means to access the courts for a remedy, we should perhaps approach the issue of *locus standi* more with the spirit of being our brother's keeper rather than the spirit of everybody for himself and none for us all.

***Locus standi* in Human Rights Enforcement in Cameroon**

Justice George Gwanmesia

Human rights and fundamental freedoms are incorporated in the preamble of the Cameroon Constitution of 18th January 1996 and are part and parcel of the said constitution. In the preamble, the people of Cameroon affirm their attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, Charter of the United Nations and the African Charter on Human and Peoples' Rights, and all duly ratified instruments thereto.

In Cameroon, laws and regulations govern human rights, ensuring their protection and enforcement through free and independent courts. Government and non-governmental organisations also have a role to play in protecting human rights.

Courts

Even before the democratisation process in the 1990s in Cameroon, human rights cases were brought before several courts. The main substantive laws and regulations currently applicable include, *inter alia*, the Penal Code, the Labour Code, the Civil Code, the Criminal and Civil Procedures Code applicable in the English and French speaking parts of Cameroon. It is important to point out here that English and French are the official languages in Cameroon and its legal system receives inspiration from both the civil and the common law while the harmonisation of the two legal systems is a continuing process.

The Penal Code has undergone several amendments, the most important for the protection of human rights being that of the 10th January 1997, criminalising torture. Torture, harassment and ill treatment of suspects, especially by agents of the security forces, were widespread and systematic.

Illegal arrest and detention

In Cameroon, the High Court has jurisdiction to hear and determine all applications for immediate release made by or on behalf of persons imprisoned or detained, which applications are based in the illegality of or the absence of authority for such deprivation of liberty (*habeas corpus*).

The preamble of the Cameroon Constitution provides that no person may be prosecuted, arrested or detained except in the cases or according to the manner determined by law. Furthermore, and whatever the case may be, the Penal Code lays down sanctions and penalties for illegal deprivation of liberty applicable to individuals and officials. It is chiefly civil servants, judicial police officers, and forces of law and order that are charged with arbitrary arrest and detention.

Case Note: Kollo Edouard v. The People (Habeas Corpus)

Kollo Edouard was sentenced to death on the 26th September 1986 for the illegal possession of a firearm, bullets, attempted aggravated theft and aggravated theft. On appeal, the Court of Appeal in Douala reduced the sentence to a two year term of imprisonment. Remanded in custody on the 25th June 1986, he was to be discharged on the 25th June 1988. But the Legal Department objected and refused to issue a released warrant.

On the 11th July 1988 his lawyer filed a petition for his immediate release on the grounds that his detention was illegal. The Court granted the application and ordered his immediate release on the 7th November 1988.

Constitutional Matters

We do not have any case yet in this domain since the creation of the Constitutional Council by the Constitution of 1996. However the Supreme Court performs the duties of Constitutional Council until the latter is established.

The Constitutional Council gives final rulings on:

- The constitutionality of laws, treaties and international agreements.
- The constitutionality of the standing orders of the National Assembly and the Senate prior to their implementation;
- Conflict of power between State institutions, between the State and Regions, and between the Regions.
- Laws as well as treaties and international agreements may, prior to their enactment, be referred to the Constitutional Council.

Matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators. Presidents of the regional executive may refer matters to the Constitutional Council whenever the interests of their Regions are at stake.

Rulings of the Constitutional Council are not subject to appeal. They will be binding on all public, administrative, military and judicial authorities, as well as on all natural persons and corporate bodies. A provision declared unconstitutional may not be enacted or implemented.

Government and Non-Governmental Organisations

The protection, promotion and enforcement of human rights are some of the actions that marked the beginning of the democratic process in Cameroon. Hence the creation in November 1990 of the National Commission on Human Rights and Freedom (NCHRF). The National Commission in its capacity as the watchdog for the defence, protection, promotion and enforcement of human rights in Cameroon discharges the following duties:

- receives complaints relating to violations of human rights and freedoms;
- conducts enquiries and carries out the necessary investigations on the violations of human rights and freedoms, and reports to the President of the Republic;
- refers cases of violation of human rights and freedoms to the competent authorities;
- inspects all types of penitentiaries, police stations in the presence of the State Counsel with jurisdiction or his representative. Such inspections may lead to the drafting of a report submitted to the competent authorities;
- studies all matters relating to the defence and promotion of human rights and freedoms;
- proposes to public authorities measures to be taken in the area of human rights and freedoms;
- popularises by all possible means instruments relating to human rights and freedoms;
- co-ordinates where necessary the activities of non-governmental organisations wishing to participate in its tasks and whose stated objectives is to work in Cameroon for the defence and promotion of human rights and freedoms;
- maintains relations with the United Nations, international organisations and foreign committees or associations pursuing humanitarian objectives and informs the Ministry of External Relations thereon.

The National Commission is still weak in that it has no jurisdictional powers to intervene in a case before a court or challenge the merits of a court judgment.

Some NGOs maintain working relations with the National Commission. It has been noted with satisfaction that some NGOs regularly collaborate with the National Commission, which also collaborates with administrative and law enforcement officials, since in the discharge of their daily duties they are confronted with human rights violations and are thus in possession of information that can be very useful.

Recent Developments in *Locus standi*

The Gambia

Art 37 (on 'persons aggrieved' under) relates only to fundamental human rights, apart from detention of the person, which is covered by Art 37(2) which allows third parties to intervene, though in *Janneh* it was held that a particular interest in relation to the detained person's rights should be proved. However, in *UDP* it was held that the Constitution, in particular a part that protects human rights, is to be given a general and progressive construction.

It would appear that Article 5 removes the limitation of standing for legislative and executive acts that contravene constitutional provisions, but has not displaced the rule that the person must have some interest in the matter. The broad scope of Article 5/6 would seem to allow the intervention by amicus application.

Nigeria

The practice of *locus standi* has been developed by Nigerian courts in such a way that no one can authoritatively state what their position is. Hurilaws, an NGO in Nigeria engaged in human rights litigation, has challenged the constitutionality of some governmental actions, only to be stopped on the grounds of *locus standi*. The reason is always that it cannot establish that its own civil rights and obligations have been affected. For example, Hurilaws has challenged the constitutionality of the *Shar'ia* law as applied in Zamfara State of Nigeria and the action of the government in setting up an inter-ministerial committee to oversee the licensing of GSM operators. In both cases the court held that it did have *locus standi* to do so.

A close reading of Adesanya's case will reveal that the court was not, in fact, in agreement that Article 6(6)(b) of the Constitution of Nigeria fixed the test of *locus standi* in Nigeria. Subsequent decisions of the courts, including those of the Supreme Court itself, which treat Adesanya's case as deciding that section 6(6)(b) as setting a requirement for *locus standi* thus exhibit a misunderstanding of that decision.

Case Note: NNPC v. Fawehinmi (1998) 7 NWLR

Per Ayoola JCA:

"In most written constitutions, there is a delimitation of the power of the three independent organs of governments namely: the executive, the legislature and the judiciary. Section 6 of the Constitution which vests judicial powers of the Federation and the States with courts and defines the nature and extent of such judicial powers does directly deal with the right of access of the individual to the court. The main objective of section 6 is to have 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 other organs of government, or even attempt by them to share judicial powers with the court. Section 6(6)(b)...is not intended to be a catch-all, all-purpose provision to be pressed into the service for determination of questions ranging from locus standi to the most uncontroversial questions of jurisdiction."

This passage states the province and effect of section 6(6)(b) of the Nigerian Constitution: it is not intended to be the yardstick for measuring *locus standi*. The Nigerian Supreme Court in the recent case of *Owodunmi v. Registered Trustees of Celestial Church & Ors* accepted this position of Ayoola JCA. Once this point has been well noted, the way will be clear for courts to approach *locus standi* as other jurisdictions do, applying the cause of action test for private law actions and a liberal interpretation of the 'sufficient interest' test in public law actions.

There is no specific provision dealing with *amicus curiae* in Nigeria; however, the case of *Green v. Green (1961)* set a test. The court invites distinguished lawyers to assist the court when there is an issue of grave importance. However, in a case with many issues, an *amicus curiae* brief may add to delay. It may also be perceived as a form of lobbying which affects the independence of the courts.

South Africa

Recent developments on standing in South Africa have been positive. Prior to reform, the court applied the strict interpretation of the English common law test, with an exception for *habeas corpus* which was narrowly constrained and was only when the person was physically incapable of representing themselves.

The new democratic constitution radically changed this:

Article 38:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons may approach the court are:

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, on in the interest of, a group or class or persons;
- d) an association acting in the interests of its members.

There are four categories of persons listed. The Constitutional Court has interpreted this to mean that anyone can bring a serious matter, which is neither moot nor academic, to the Court,

regardless of their personal interest, or whether an infringement has taken place. An important thing to note is that in the first category, it does not have to affect the person's fundamental rights.

Case Note: Ngxuza v. Department of State for Welfare Eastern Cape Provincial Government (2001)

There exists a state welfare scheme which guarantees to those who cannot look after themselves, within four categories, a monthly welfare grant. The system inherited from the apartheid regime was corrupt and the government undertook a major reform. However, this resulted in tens of thousands of welfare orders being cancelled without notice or justification. A class action was brought against the Department after numerous individual actions had failed to solve the problem, though each individual applicant received compensation. As well as looking for individual relief, the class action provides details about the entire programme. The Department attacked the application on standing, arguing in that the class could not be defined.

Held: *"...it would appear that our common law was the poorer for not allowing the development of representative or class actions. The Constitution seeks to rectify that deficiency in section 38 of the Constitution and there is no reason to interpret that provision in a narrow and restricted manner. A flexible approach is required. Making it easier for disadvantaged and poor people to approach the courts on public issues to ensure that the public administration adheres to fundamental constitutional principle of legality in the exercise of public power serves our new democracy well...*

...There are practical problems associated with representative and class actions which must, until uniform practices are laid down by legislation or in court rules or practice directions, be addressed in the kind of orders to be issued in this kind of litigation. The novelty of these proceedings should, however, not be a bar to courts finding ways to regulate these proceedings in a practical manner in order to ensure that they are expeditiously finalised."

For *amicus curiae*, the courts traditionally asked counsel to address the court on difficult theories of law. This continues under the new constitution, which establishes a number of independent bodies to promote aspects of human rights. These bodies have *locus standi* by virtue of the constitutional provisions and been allowed by the court to make submissions. The court will also listen to parties such as social workers and civil servants.

Case Note: Mohammed v. President of the Republic of South Africa (2001)

The thrust of the consequential relief the applicants unsuccessfully sought in the High Court and pursued in this Court was a declaration to the effect that the arrest, detention, interrogation and handing over of Mohammed to FBI agents were unlawful and unconstitutional; and that the respondents breached Mohammed's constitutional rights by handing him over to the custody of the United States without obtaining an assurance from the United States government that it would not impose or carry out the death penalty on him if convicted. An *amicus curiae* was submitted by the Society for the Abolition of the Death Penalty in South Africa, and the Human Rights Committee.

A new legal aid system has been set up, now known as 'Judi-care'. It will be run with in-house state employees, but thus far these are limited, existing in very few courts and centres. Much of South Africa thus does not have access to legal representation. The state is only obliged to provide legal representation where 'substantial injustice' is likely to occur, such as criminal matters in the High Court, but not the Magistrate's Court. It has been argued that any period of imprisonment given to an undefended defendant constitutes a 'substantial injustice' but the legal point remains undecided.

Therefore, despite the ease of standing, finding lawyers to make this reality is more difficult. The Department [of Justice] seems to accept there will never be enough lawyers, and therefore is granting rights of appearance to people who are not formally qualified.

United Kingdom

NGOs play an extremely important role in advocacy through law. These NGOs need standing, since it is often more efficient for an NGO to bring an application than to find individual applicants or 'victims'.

The use of test case litigation, subject to the standing test, and the use of *amicus curiae* is effective auditing of legislation for compliance with the Human Rights Act. Test case litigation is costly, and costs are awarded against the losing party. However, the effects can be dramatic: an order may be struck down or legislation be deemed incompatible with the European Convention. Litigation is important even where it fails; even the threat of litigation can result in a change in law. The weakness lies with the 'victim', who may be subjected to adverse publicity, or may not provide the best facts on which to pursue the case. Thus, pursuing a third party intervention may be more attractive.

A third-party intervention may be the more effective role for NGOs to play in litigation. Intervenors are able to interpret comparative law, such as Commonwealth or international jurisprudence. They can also introduce statistical analysis and the social and economic implications of the decision. Third-party interventions can influence decisions, they draw publicity to the cases and costs are not generally awarded against third-party intervenors. Such interventions are not limited to the facts of a particular case and can address other issues. On the other hand, a source of frustration may be that there is no control over the case, submissions can be ignored despite the amount of time and energy involved and it is possible, if unlikely, that costs can be awarded.

Concluding Observations

Administrative Justice

The laws of standing in administrative justice have dual origins: common law and constitutional law. Under the common law, the test of 'sufficient interest' has been adopted from English common law. In the United Kingdom, this test has been progressively applied allowing for associational standing and seemingly public interest standing, though this was upon the condition that the applicant had expertise in the field (*Greenpeace*).

This development can also be found in the application of the general provisions on standing under the Constitutions of Ghana, The Gambia and Cameroon. The courts have construed these provisions as 'ownership' clauses under which citizens not only have a right, but a duty to protect the provisions of the Constitution. Standing has been given to interested parties, political parties and in The Gambia, the President himself.

Human Rights Enforcement

Under the Fundamental Rights Chapters of the Ghanaian, Gambian and Nigerian Constitutions and the Human Rights Act of the United Kingdom, the provisions of standing are restrictively formulated, allowing only a 'victim' or 'person aggrieved' to challenge an administrative decision on the grounds of human rights contravention. Access to justice is thus restricted in relation to the most essential and influential area of law in relation to governance, namely human rights.

The strict construction of the provisions has led the judiciary and legal community to find alternative ways to protect human rights. Traditionally, in the United Kingdom, this was done through applying the rights inherent in the common law. The most famous of these rights, codified in the Magna Carta 1215, is that of *habeas corpus*. This remedy is still in use in African jurisdictions, and in The Gambia it is enshrined in the Constitution. *Habeas corpus* extends to representative standing, in which an application is made on someone's behalf. Other routings

have been through private prosecution, where a violation of human rights has taken place and an investigation has failed to take place, there is provision for those with sufficient evidence, who does not have to be the victim, to apply for the investigation to take place.

Perhaps most significant is the courts' relaxing the general provisions for standing, in relation to applications of human rights violations. This is the most promising route to a broader interpretation of standing under human rights provisions. In South Africa, relaxed rules of standing are encouraged not only by the text of the Constitution, but by the prevailing legal culture which emphasises the central role of the courts in overcoming the legacy of the apartheid regime. In The Gambia, the position has been a general and progressive construction in certain constitutional cases.

Nigeria and Cameroon have more restrictive standing than The Gambia and Ghana. Despite the strength of public interest litigation, the evolution of standing in Nigeria has been hampered by years of military rule and misinterpretation of the *Adesanya* case. There are strong indications that the case will come under review by the Supreme Court and a clearer rule of standing will be adopted. In Cameroon, there is a need for a more formal court protection of human rights. The provisions on administrative law are progressive, reflecting an understanding of the difficulties facing applicants. It may be hoped that provisions for human rights protection will reflect the same sensitivity.

Recent Developments

Public interest litigation is an essential element in administrative justice and human rights enforcement. However, rules of standing have placed restraints upon the use of public interest litigation, and there has been therefore extensive use of third party intervenors or *amicus curiae* briefs throughout the jurisdictions surveyed.

In plenary discussions during the Colloquium, there was broader recognition of the fact that even if the rules of standing are made less restrictive, the lack of legal and financial resources, especially of women and children application, may bar access to court. There was, therefore, discussion of both legal aid schemes for the courts, and the use of traditional dispute resolution systems and remedies that may serve the cause of human rights. It was recognised that the theoretical discussion of the rules of standing must be placed in the context of undeveloped countries with traditional law backgrounds.

Communiqué of the Judicial Colloquium on *locus standi* in Administrative Justice and Human Rights Enforcement

8-9 October 2001

Kairaba Beach Hotel, The Gambia

1. The Institute for Human Rights and Development in Africa organised a Judicial Colloquium on *Locus standi* in Administrative Justice and Human Rights Enforcement at the Karaiba Beach Hotel, Banjul, The Gambia, on the 8th and 9th October 2001.
2. The participants of the Colloquium, which was very well-attended, included H.E. the British High Commissioner to The Gambia, H.E. the Representative of the European Commission, the Vice-Chair of the African Commission on Human and Peoples' Rights, the Chief Justice of The Gambia, the President of The Gambia Court of Appeal, the entire membership of The Gambia Judiciary, officials of the Department of State for Justice, senior judges from Commonwealth countries, the President and members of The Gambia Bar Association, scholars and jurists from Africa and the United Kingdom, the Ombudsman, NGO representatives and the Institute's Executive Director.
3. Papers were presented by eminent jurists and judges on the following topics and discussed in plenary session:
 - i Overview of Standing: access/governance issues and different practices.
 - ii *Locus standi* in Administrative Justice: a comparative perspective on constitutional provisions for judicial review.
 - iii *Locus standi* in Human Rights Cases
 - iv Recent Developments in Standing: *amicus curiae*, third party interventions, public interest litigation and legal aid.
4. Countries specifically considered were The Gambia, Ghana, Nigeria, South Africa, Cameroon and the United Kingdom.
5. During the two days of presentations and ensuing searching discussion and debate on the issues raised, the Colloquium arrived at the following conclusions and resolutions:
 - i Bearing in mind the high rate of illiteracy, poverty, and unawareness of the general citizenry, courts should give liberal interpretation as to who should have standing and be guided by the 'interest' test, i.e. public interest, where the individual has no individual interest. Comparative practice shows that generally, individuals do not approach the courts unless they have an interest to protect.
 - ii Judicial review is an essential ingredient of the democratic process and a restrictive definition of standing thwarts judicial review by placing certain actions beyond legal challenge.
 - iii Access to justice is an indispensable element in the maintenance of the rule of law.

- iv. Section 37 of the Constitution of the Republic of The Gambia 1997, should be afforded a liberal interpretation.
- v. Judges should be accorded the necessary security of tenure of office and independence.
- vi. Bearing in mind that a high percentage of the population in Africa lives under the jurisdiction of customary laws and practices:
 - (a) in promoting access to the courts, regard should be had to traditional practices of dispute resolutions i.e. making reference to elders, family members and traditional councillors.
 - (b) In dispensing criminal justice, regard should be had to alternative modes of punishment enshrined in customary law and practices e.g. community service, which in certain instances may have a greater deterrent effect than the imposition of fines and imprisonment.

The current inadequacy of legal aid being one of the greatest impediments of access to justice, the state should make provision for legal aid.

- i. Legal practitioners should endeavour to bring forward constitutional cases for adjudication before the courts.
- ii. Bearing in mind the recent constitutional developments in the countries discussed legal practitioners should make use of the opportunities of third party interventions.

List of Participants

1. Justice Lartey
Chief Justice of The Gambia
2. Justice Wallace G. Grante
Justice, Court of Appeal of The Gambia
3. Justice K. E. Amua Sekyi
Justice, Supreme Court of Ghana
4. Justice Niki Tobi
Justice, Court of Appeal of Nigeria
5. Justice George Gwanmesia
Justice, Supreme Court of Cameroon
6. Justice Hassan B. Jallow
Justice, Supreme Court of The Gambia
7. Justice Mam Yassin Sey
Justice, High Court of The Gambia
8. Justice G. C. Ihekire
Justice, Court of Appeal of The Gambia
9. Justice Gelega-King
President, Court of Appeal of The Gambia
10. Justice Timothy A. Kabalata
Justice, High Court of The Gambia
11. Justice Joseph Bawah Akamba
Justice, Court of Appeal of The Gambia
12. Justice A. D. Yahaya
Justice, Court of Appeal of The Gambia
13. Justice Abubacar S. Tahir
Justice, High Court of The Gambia
14. Justice Ahmad O. Belgore
Justice, High Court of The Gambia
15. Ousman A.S. Jammeh
Master, Supreme Court of The Gambia
15. Mark Euijen
Legal Resource Centre
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16. Jonathan Cooper
JUSTICE
UK
17. Okeychukuwu Ilofulunwa
Hurilaws
Nigeria
18. Jennifer Miano
Kenya Human Rights Commission
Kenya
19. John Wallace
Legal and Human Rights Centre
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20. Abdelbagi Jibril
Human Rights Consultant
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21. Sonny C. Onyegbula
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Central Bank of The Gambia
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24. Amie Bensouda
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25. Emmanuel Joof
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26. Fatou Bomm Bensouda
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27. Michael F. Lana
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28. Ida M.E. Jallow
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30. Omar M. M. Njie
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36. Omar Jawara
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Human Rights Studies
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53. Badou Conteh
Legal & Compliance Officer/Credit Service
Manager/Barrister-at-Law
54. Kofi Akainyan
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56. Ibrahim Lowe
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