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ACCESS TO JUSTICE AND *LOCUS STANDI* IN NIGERIA: ASSESSING THE IMPACT OF THE COMMON LAW APPROACH TO *LOCUS STANDI* ON SEXUAL MINORITIES' HUMAN RIGHTS.

BY

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Declaration

Research dissertation/ research paper presented for the approval of the Senate in fulfilment of part of the requirements for the *qualification for which the student is registered* in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of *qualification for which the student is registered* dissertations' research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

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Nkopane Thandolwethu

Access to Justice and *Locus Standi* in Nigeria:

Assessing the impact of the common law approach to *locus standi* on the human rights of sexual minorities

Abstract

Access to justice is a legal right guaranteed in all international and regional instruments and domestic constitutions. The full enjoyment, protection, and respect of all fundamental human rights rests on the ability of states to establish effective judicial remedies. The ability of all persons within a state to access these judicial remedies through courts is however limited by procedural rules that do not reflect the modern interpretation of the law. Although access to courts is provided for in several instruments including treaties and state practice, Nigeria has failed to ensure that sexual minorities enjoy their right to access courts. This paper intends to assess the effective implementation of the right of access to courts, particularly for sexual minorities in Nigeria considering the Nigerian courts' restrictive approach to *locus standi*. The research argues that the restrictive interpretation of procedural rules does not facilitate access to justice but violates international human rights. The research draws a clear link between the state obligations under international law to respect, protect and fulfil the human rights of sexual minorities and liberally interpreting the law using principles of equality, non-discrimination, and effectivity.

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Chapter one

1. INTRODUCTION TO THE RESEARCH

1.1. Background

In an age where there is a broad-based consensus that sexual minorities are equally entitled to human rights',[1] many African states have opposed the concept of homosexuality and have advocated for the eradication of the rights of the LTGBTQIA+ persons.[2] Nigeria, one of the countries in Africa that continue resisting the rights of sexual minorities, took its opposition a step further by signing into law the Same-Sex Marriage Prohibition Act (SSMPA) in 2014.[3] It is important to note that before the SSMPA, laws criminalizing same-sex sexual relationships were already in existence in Nigeria.[4]

Three years succeeding the adoption of the Act, a report by the Initiative for Equal Rights (IER) on 'Human Rights Violations based on Real or Perceived Sexual Orientation and Gender Identity'[5] reported that over 90% of adults in Nigeria were in support of this Act.[6] This is because Nigeria is a profoundly religious state, with its northern region predominantly Islamic and governed by the Sharia laws while the Southern parts are predominantly Christian. It is therefore not shocking why most of the population supports the SSMPA, as both religions endorse hetero-normativity and regard homosexuality as unnatural and immoral. It is based on this view that Bishop Ayo Oritsejafor, Nigeria's former President of the Christian Association of Nigeria[7] held that even if the SSMPA violated human rights and international law, 'there is

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[1] A. Agada *Assessing the human rights implications of the Nigerian Law dealing with sexual orientation* (published doctoral thesis, University of Pretoria, 2018 28) accessed at httpp://repository.up.ac.za/handle/2263/65626.

[2] S Namwase, A Jjuuko Sexual Minorities' Rights in Africa: What does it mean to be human; and who gets to decide? in Protecting the human rights of Sexual minorities in contemporary Africa (2017) 23

[3] Same-Sex Marriage Prohibition Act 2013 (hereinafter referred to as the Act/SSMPA).

[4] The Sharia, Penal and federal Criminal Code Act, refer to the offence of sodomy with differing punishments for each Act.

[5] 2017 Report on Human Rights Violations based on real or Perceived Sexual Orientation and Gender identity: A joint dialogue of the African Commission on Human and People's Rights, Inter-American on Human Rights and United Nations (2016), p10.

[6] The Initiative for Equal Rights (TIERs) is a Nigerian-based registered non-profit organization working to protect and promote the human rights of sexual minorities nationally and regionally. (https://www.africaportal.org/content-partners/initiative-equal-rights-tiers/)

[7] Friday Olokor 'Anti-gay law: CAN hails presidency, National Assembly, berates rights groups' available at *http://www.punchng.com. news/anti-gay. Law-can-hails-presidency-berates-rights-groups* (accessed 2022/09/02)

always a limit to certain rights and that those who go out of their ways to overstep the limits now know the consequences of their actions, same-sex marriage is offensive to us as a people'.[8]

Many Nigerians share Bishop Ayo's sentiments on homosexuality, that their culture, religion, and morality must be respected. In Its report on the state of human rights for LGBTQ persons in Nigeria to the UN Human Rights Committee, the Initiative for Equal Rights and several NGOs held that these 'religious and traditional sentiments coupled with discriminatory laws create a hostile environment and instil fear in sexual minorities, leaving them with a life plagued by limited access to justice'.[9] This research will however show that, even in the existence of laws criminalizing homosexuality, the state cannot abandon the obligations it has under international law to protect and realize the rights of sexual minorities.

Explaining the high rise in reports of homophobic attacks towards members of the LGBTQ community in the federal state, Agada Akwogu building up on the IER report makes an interesting point that up until the signing into law of the SSMPA, people in Nigeria 'did not know much about the sodomy laws that already existed which were seldom invoked'.[10] Upon knowing about the criminalization of homosexuality, culture-, and religion-passionate nationals strongly influenced by state-sponsored homophobia took it upon themselves to 'cleanse' their beloved country of gay people.[11]

This cleansing of Nigeria of 'gay people' actualized in the assault of 14 young men who were allegedly gay,[12] three cases of manslaughter, five unlawful arrests, five cases of rape, and one case of denial of a fair trial only within one year of the adoption of the Act.[13] According to the Equality Triangle Initiative Director, Nigerian LGBTQ organizations recorded more than 800 cases of violations of the rights of sexual minorities in 2018. These numbers are however only a mild representation of the current horrific status of the violation of the rights of sexual minorities in Nigeria as

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[8] Ibid.
[9] Human Rights Situation for Lesbian, Gay, Bisexual and Transgender (LGBTQ) Persons and Sexual Rights in Nigeria Report presented to the UN Human Rights Committee 126th Session July 1 to July 26 of 2019.
[10] A. Agada 'Assessing the human rights implications of the Nigerian Law dealing with sexual orientation' 2018-page 28 (doctoral thesis) University of Pretoria
[11] Obi Jeremiah 'Mob, Police beat up alleged gays in Abuja' Nigerian Pilot 16 February 2014 8.
[12] n 6 above.
[13] n 6 above page 11

there are many unrecorded cases due to a lack of state protection for sexual minorities.[14]

1.2. The Limitation of the Right to Access Justice

The SMMPA and other sodomy laws in Nigeria violate fundamental human rights guaranteed by the Constitution such as the right to life, the right to freedom of association, and privacy and continuously deny sexual minorities access to justice.[15] Their right to access justice after a violation is limited as there are no laws protecting sexual minorities. Out of fear of being ridiculed, sexual minorities are unable to report human rights infringements to police officials. Expanding on this, a report presented to the UN Human Rights Committee by several human rights initiatives in Nigeria stated that members of the LGBTQI+ are afraid to report sexual violations committed against them for fear that the police will perpetuate the abuse and humiliate them.[16] The report went further to state that lesbian women in the northern parts of Nigeria, where, as stated above Sharia laws are adopted, do not only face discrimination because they are women but also because of their sexual orientation, gender identity, and gender expression. Furthermore, 'insufficient budget allocations for legal aid, alleged corruption and stereotyping within the judiciary hinder lesbians' access to justice.[17]

The ability of one to access justice through courts depends on the right to access courts and the right to a fair trial after accessing courts. Although several factors contribute to a victim being able to access courts, this paper only considers the impact *locus standi* has on access to courts. In its strict sense, an interpretation adopted by Nigerian courts, *locus standi* is accorded to 'individuals when they can demonstrate that the law in question infringes their legal rights or at least that it will cause a sufficient degree of harm to their interests'.[18] Several states however have adopted a broader and liberal approach to defining *locus standi* to include, the ability to enable other persons not

[14] Research Directorate 'The Situation of Sexual and gender Minorities in Nigeria' (2014-2018) 2019
[15] n 15 above s 36
[16] Human Rights situation for Lesbian, Gay, Bisexual, and Transgender (LGBT) Persons and Sexual Rights in Nigeria report presented to the UN Human Rights Committee 126th Session July 1 to July 26 of 2019
[17] Ibid page 13
[18] *Senator Adesanya v President of the Federal Republic of Nigeria and others* 1981 (2) NCLR 358

directly affected by the matter to seek remedies on behalf of victims who cannot bring applications or matters before courts for one reason or another.

Sexual minorities in Nigeria are unable to bring actions before courts without disclosing their sexual orientation, an act that puts them at risk of being charged with an offence under the SSMPA. The inability to bring actions before courts without disclosing their sexual orientation was highlighted in the *Mr Teriah Joseph Ebah v the Federal Republic of Nigeria*[19] matter, where the court refused to hear an application challenging the constitutionality of the SSMPA on the basis that the applicant had no legal standing as he had failed to show that he is a homosexual. It is on this inability of sexual minorities to access judicial remedies before courts due to the strict interpretation of *locus standi* that this paper directs its focus.

Even if such a disclosure will not be deemed as an admission to an offence, the mere act of requiring a victim to admit to being a homosexual before granting them standing before the court strips them of their human dignity. Furthermore, considering sexual minorities in the rural areas of Nigeria who have limited access to legal services due to poverty and lack of independent judicial structures in their communities, NGOs should be enabled to bring matters before courts on their behalf. This paper will highlight how the narrow interpretation of *locus standi* in Nigerian courts has denied sexual minorities access to justice by preventing NGOs and Human rights activists from bringing matters before courts as interested parties.

The lack of laws to protect the human rights of sexual minorities and ensure access to effective judicial remedies is a direct breach of Nigeria's human rights obligations under international law.

It is conceded that there is yet not universally recognized ‘sexual right’ within international human rights systems,[20] however, based on state obligations under international law to recognize and protect the human rights of all human beings, this obligation is also owed to sexual minorities. The obligation to protect sexual minorities is found in several International and regional treaties. For example, the International Covenant on Civil and Political Rights, although it does not explicitly

[19] *Mr. Teriah Joseph Ebah v Federal Republic of Nigeria* 2014 (9) CS 197 (FHC).
[20] A. Sogunro ‘Dignity for the Queer African: How the Right to Dignity in International Human Rights Law Imposes Obligations on All States to Protect Sexual Minorities’ Centre for Human Rights, SAPL Journals University of Pretoria 2022 page 3.

refer to LGBTQ persons, its general protection provisions have been interpreted to include sexual minorities. This was affirmed by the UN Human Rights Committee in the matter of *Toonen v Australia* where the committee held that several sections in the Tasmanian Criminal Code which criminalized consenting homosexual conduct between adults violated the ICCPR article 26 right to privacy, article 2 non-discrimination provisions, and article 17 right to equality before the law regardless of sex and 'other status'.[21]

On a regional level, the African Commission realized the need to protect sexual minorities and as a result adopted Resolution 275 in 2014.[22] This resolution placed a duty on state parties to end all forms of violence against sexual minorities.[23] This resolution gives effect to the African Charter on Human and Peoples' Rights (ACHPR[24]) article 2 anti-discriminatory and article 3 equality before the law provisions. Furthermore, the ACHPR has the African Court on Human and Peoples' Rights to enforce its provisions.[25] The African Court has jurisdiction to hear matters from individual complainants, through member states, and African NGOs. It is commendable that the AU recognizes that there are groups of people that may not be able to directly access the court and therefore permit NGOs to bring matters on their behalf. That be as it may, for an NGO and individuals to bring matters directly to the court, a member state must have made a declaration including the jurisdiction of the court to entertain such applications.[26] Nigeria although it is party to the ACHPR and has ratified the Protocol establishing the African Court it has made no such declaration, as a result, not only are LGBTQI+ NGOs in Nigeria not able to approach domestic courts, but they are also unable to approach regional courts on behalf of sexual minorities.

Nigeria is also a state party to several international treaties creating obligations and considering section 19 of the Constitution, Nigeria has a constitutional duty to respect these international law and treaty obligations.

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[21] *Toonen v Australia, Communication* No 488/1992, U.N. Doc CCPR/C/50/D/488/1992 para 6.9.
[22] African Commission Resolution 275 on Protection against Violence and other Human Rights Violations against persons on the basis of the real or imputed Sexual Orientation or Gender Identity was adopted on 28 April 2014
[23] 28-29
[24] African Charter on Human and People's Rights Adopted June 1981
[25] Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights June 1998
[26] Article 34(6) of the Protocol on the African Court.

1.3. Research Problem

Nigeria is a party to several international treaties which protect the human rights of sexual minorities including but not limited to; the African Charter on Human and People's Rights(ACHPR);[27] the International Convent on Civil and Political Rights(ICCPR);[28] the International Covenant on Economic, Social and Cultural Rights[29] (ICESCR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[30] Despite being party to these treaties as briefly discussed above, culture and religion play a dominant role in the homophobia in the country. The problem is therefore attempting to reconcile Nigeria's international human rights obligations with its current homosexuality-prohibiting laws to ensure that all persons in its jurisdiction have access to courts and by extension access to justice.

1.4. Significance of the Research

Acknowledging that there have been many discussions around decriminalizing homosexuality in Nigeria which so far have proved to be futile,[31] this paper takes a different approach. It recognizes that changing the state's view on homosexuality might take a long period, however, as that process takes place measures have to be in place to prevent the further suffering of sexual minorities. The research reiterates the State's obligations under international law to protect vulnerable persons. It provides recommendations of how the right to access effective judicial remedies can be protected and realized while same-sex marriage prohibiting laws exist. The research aims to advocate for a liberal approach to interpreting *locus standi* before courts to enable interested parties to bring actions before courts on behalf of sexual minorities. The research also aims to recommend strategies that can be employed by the state to enable sexual minorities to access justice outside of the traditional paths of courts of law.

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[27] African Union. African Charter on Human and People's Rights, 1981. Signed by Nigeria on 31 August 1982 and ratified on 22 June 1985

[28] United Nations (General Assembly) 1966 ICCPR ratified by Nigeria on 29 July 1993

[29] United Nations (General Assembly) 1966 ICESCR ratified by Nigeria on 29 July 1993

[30] Signed on 28 July 1988, and ratified on 28 June 2001 by the Nigerian government.

[31] Logan Graves 'Decriminalization of Homosexuality in Nigeria's Future?' September 4, 2018 Accessed at https://victoryinstitute.org/decriminalization-of-homosexuality-in-nigerias-future/ on 2023/05/29.

1.5. Research Question

The research seeks to answer the following questions:

1. How does the administration of justice in Nigeria directly deny sexual minorities access to justice through the court's narrow interpretation of *locus standi*?
2. What are Nigeria's obligations in terms of international law to provide access to justice for sexual minorities?

1.6. Literature review

This research contains substantial literature on how courts have interpreted access to justice and *locus standi*, the importance of public interest litigation, sexual minorities in Nigeria and states obligations under international human rights law.

When discussing whether the SSMPA and other same-sex relationship prohibiting laws in Nigeria violate international law and the human rights of sexual minorities, Agada Akogwu provides a good analysis of the sodomy laws in Nigeria and their impact on human rights in Nigeria and international law.[32] Agada argues that the SSMPA and other sodomy laws directly limit the enjoyment of several constitutional rights and directly infringe on the right to equality before courts and non-discrimination. This research as will be noted, leans greatly on Agada's work on sexual minorities rights in Nigeria, however confining it to the boundaries of this research, her work is considered along Magaji Chirom who contends that these laws are valid and not against the Constitution which makes no mention of sexual orientation. Magaji's contention that these laws do not violate international law or domestic law is however proved to be incorrect when considering several academic works including that of Victor Oluwasina who argues that even if Nigeria can invoke public morality in criminalizing homosexuality and therefore limit enjoyment of certain rights, the Siracusa Principles[33] require such limitations to meet specific standards and in this

[32] n 1 above page 127
[33] United Nations, Economic and Social Council, Siracusa Principles of the Limitation, and derogation Provisions of the ICCPR, U.N. Doc. E/CN.4?1985/4, Annex (1985), Principle 10.

instance, Nigeria will not be able to establish a link between limiting the rights of sexual minorities and maintaining Nigeria's fundamental values.[34]

Mittelstaedt points out that several UN international human rights treaties affirm the rights of sexual minorities and for purposes of this research, the right to effective judicial remedies.[35] These instruments include the ICCPR which was considered in *Toonen* to be providing extensive protection to sexual minorities, CEDAW and ACHPR, and ACHR. Mittelstaedt argues that since Nigeria is a party to the ICCPR, CEDAW, and the ACHPR the SSMPA is in direct violation of all these treaties. Although the ACHPR does not make explicit reference to sexual minorities or sexual orientation several authors hold the view that the provisions in the instrument should be read inclusively to include sexual minorities.[36] According to Olivier on the range of state obligations under international human rights, states must not only positively protect human rights and guarantee them but they also have a negative duty to prohibit discrimination and guarantee equal protection against discrimination. She argues that this duty may require states to adopt and implement special measures to ensure that there are no groups marginalized.[37] It is based on this duty to adopt special measures in protecting and realizing human rights that this research argues for a liberal interpretation of *locus standi* in sexual minorities' matters.

The question of *locus standi* and the importance of public interest litigation on behalf of sexual minorities received appreciable attention in this paper. John[38] affirming the spirit of this research argues that a narrow interpretation of *locus standi* is a 'definite barrier to access justice'.[39] Azubike's critical discussion of *Teriah Joseph Ebah v Federal Government of Nigeria*[40] answers the question of *locus standi* in sexual minorities' matters in full clarity. Azubike convincingly argues that Fundamental

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[34] VO Ayeni 'Human rights and the criminalization of same-sex relationships in Nigeria: A Critique of the Same-Sex Marriage (Prohibition) Act' in S Nmwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* 2017. 203-237. Page 229.

[35] E Mittelstaedt 'Safeguarding the right of sexual minorities: The incremental and legal approaches to enforcing international human rights obligations' (2008) 9 *Chicago journal of international law*

[36] A. Rudman in 'The protection against discrimination based on sexual orientation under the African human rights system' 2015 and R Murray & F Viljoen 'Towards non-discrimination based on sexual orientation: The normative basis and the procedural possibilities before the African Commission on Human and people's rights and the Au 2007.

[37] O. De Schutter 'International Human Rights Law' 3rd Edition 670

[38] John E. Bonnie 'Best Practices-Access to Justice Agenda for Public Interest Law Reform'

[39] Ibid.

[40] Azubike Chinwuba Onuora-Oguno 'Protecting Same-Sex Rights in Nigeria: case Note on Teriah Joseph Ebah v Federal Government of Nigeria' in S Nwamase & A Jjuuko(eds) *Protecting the human rights of sexual minorities in contemporary Africa* 2017. 203-237. Page 238

Rights (Enforcement Procedure) Rules 2009[41] prohibits Nigerian courts to refuse to hear matters involving human rights for lack of *locus standi*, furthermore, the court's dismissal of the *Ebah* matter on the basis that the applicant must first disclose his sexual orientation is unreasonable and oblivious to the consequences of him exposing himself or other sexual minorities' orientation. Azubike's argument is supported by Oluwu that the narrow interpretation of *locus standi* in Nigeria remains a 'formidable impediment to the effective protection of human rights'.[42] Nijar findings on the importance of public interest litigation correctly point out that public interest litigation protects the fundamental rights of the poor, and socially/economically disadvantaged people in society.[43] Similar to John's view above, the Institute for Human Rights and Development stated that the narrow interpretation of *locus standi* in Nigeria 'greatly restricts access to justice and, therefore, accountability of government'.[44]

The authors referred to above greatly contributed to this research. However, none of the authors have critically analysed (1) how sodomy laws restrict sexual minorities' ability to access justice with a specific focus on the strict interpretation of *locus standi* in exclusion of NGOs and (2) how with this narrow interpretation Nigeria continues to violate international law. It is the aim of this research, therefore, to provide a comprehensive study on the above issues not covered in previous literature.

1.7. Definition of terms

1.7.1. Sexual orientation

Not to be confused with sexual preference, this term refers to the emotional, sexual, and romantic attraction to another person. This may be same-sex orientation (homosexuality), opposite-sex orientation (heterosexuality), or bisexual orientation. This research focuses on same-sex orientation under Nigerian law.

1.7.2. Sexual Minorities

Minorities are described as a group of people residing in a state 'displaying distinct ethnic, cultural, religious or linguistic characteristics, are smaller in number than the

[41] Fundamental Rights (Enforcement Procedure) Rules 2009, (FREP Rules) preamble, para 3€
[42] D Olowu 'an integrative right-based approach to human development in Africa' (2009) *Pretoria University Law Press*, 175
[43] GS Nijwar 'Public interest litigation: A matter of Justice of an Asian perspective' Kuala Lumpur: University of Malaya
[44] Institute for human rights and development in Africa 'judicial colloquium on *locus standi* in administrative justice and human rights enforcement report' presented on 8-9 October 2001 in Gambia.

rest of the population of the State'.[45] With this understanding of minorities, sexual minorities are defined as groups of persons whose sexual orientation or identity differs from the majority or society. Jack Donnelly describes this group of people as those who are 'despised and targeted by the mainstream society' because they are non-conformists.[46] The distinct sexuality of this group of persons makes them prone to discrimination, thus introducing the element of vulnerability to violation of human rights and a requirement for special protection to ensure the realization of their human rights. In the context of this research, this term is used to refer to a group of people who are discriminated against because of their sexual orientation.

1.7.3. Vulnerable Groups/Persons

Vulnerable groups are considered as a group of people who are prone to human rights violations as compared to other groups.[47] A distinction is however made between inherent vulnerability, referring to sources of vulnerability intrinsic to the human condition, and situational vulnerability which refers to vulnerability arising from a societal context.[48] In the context of Nigeria, sexual minorities in rural areas would be classified as experiencing increased vulnerability due to the combined vulnerabilities. This research, therefore, focuses mostly on sexual minorities in rural areas who are not only vulnerable because of their status but also because of limited education, poverty, and inherent traditional practices.[49]

1.7.4. LGBTQIA+ persons[50]

The abbreviation refers to lesbian, gay, bisexual, transgender, queer, intersex, and asexual or ally bodies. The term lesbian refers to a woman who is only sexually attracted to other women. In contrast to lesbians, gay persons are men who are only sexually attracted to other men. Bisexual persons are sexually and romantically

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[45] O. De Schutter 'International Human Rights Law. Cases, materials, Commentary' third edition page 6

[46] J Donnely 'Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights regime' in P Hayden (ed) *The Philosophy of human rights* 2001 554

[47] The African Commission Principle and Guidelines par 1(e) uses the concept of vulnerability to refer to 'people who continue to face significant impediments to their enjoyment of…rights'.

[48] Mackenzie, Rogers & Dodds 'Introduction: What is vulnerability, and why does it matter for moral theory?' in Mackenzie. Page 7

[49] Luke A. Boso 'Urban Bias, Rural sexual minorities, and the courts' 60 UCLA L. Rev 565 (2013)

[50] LGBTQIA Sexuality and Gender Identity accessed at https://www.up.ac.za/ebit-curriculum-transformation-committee-ebit-ctc/article/2843204/lgbtqia-sexuality-and-gender-identity#:~:text=LGBTQIA%2B%20stands%20for%20Lesbian%2C%20gay,on%20a%20range%20of%20platforms.

attracted to both sexes. Transgender is used to describe any person who has a gender identity that is different from the gender that they were assigned at birth. Queer is a term used to refer to persons who are neither straight nor cisgender and who may not want to want to use the above-described labels. Intersex is a term used to refer to people who naturally manifest both female and male characteristics such as hormonal levels or genitalia. Intersex is not directly linked to sexual orientation as intersex persons can have different sexual orientations. Asexual persons can fall under any of the sexual orientations but have a low-level experience of sexual desire. In the context of this paper, the focus is on LGBTQ persons and Intersex bodies who fall under the non-cisgender categories.

1.8. Research Methodology

This research employs an analytical research methodology in determining primary sources such as international law instruments and the Constitution of the Federal Republic of Nigeria which guarantee the right to access to justice. Reliance will also be on academic articles and books that contribute to the discussion of sexual minorities in Nigeria and the administration of justice. Employing the comparative approach, this paper will consider how the wide interpretation of *locus standi* in different countries has contributed to the effective administration of justice for sexual minorities. Adopting both approaches will also assist the discussion on the influence of religion and culture on the inability of sexual minorities to access justice.

1.9. Chapter Analysis

Chapter 1 Introduction to the Research

This Chapter provides a breakdown of the research background, research problem, and questions raised by the research and research methodologies employed in the paper. The background provides a brief overview of the status of sexual minorities in Nigeria, explaining the necessity of this research. The chapter also deliberates on homosexuality-prohibiting laws in Nigeria namely, the Criminal Code Act, The Penal Code and Sharia Laws, and the Same-Sex Marriage Prohibiting Act. The questions raised in this chapter give rise to subsequent chapters in the paper and issues researched in the subsequent chapters. This chapter emphasizes the significance of the study in ensuring that international laws protecting vulnerable groups' human rights are effectively implemented in practice.

Chapter 2 Access to justice in terms of international law

This chapter focuses on the right to access justice for sexual minorities under international law. It provides the status of international law in Nigeria. The chapter argues that under international law states are mandated to provide special protection to minority groups and that to enable such special protection the right to access to justice should be interpreted in line with substantive rights. This chapter will also provide a comparative study of states that have interpreted *locus standi* liberally to ensure that sexual minorities have access to courts when their rights are violated or may be violated by any law. The Chapter will consider state responsibility for failure to give effect to the right to access to justice against the obligation as contained in several international law instruments such as the Draft Articles on Responsibility of States for Internationally wrongful acts.[51]

Chapter 3 Access to justice in Nigeria: *locus standi* and the Right to a fair trial

This chapter's focus is on domestic laws in Nigeria providing for the right to access justice. The chief document providing for this right is the Constitution of the Federal Republic particularly section 36. This chapter will argue that the narrow interpretation of *locus standi* as contained in section 6(6) (b) and its application in case law by the supreme courts for example in the matter between *Mr. Teriah Joseph Ebah v the Federal Republic of Nigeria*[52] limits access to justice as NGOs and other interested parties cannot approach courts on behalf of sexual minorities. This refusal of interested parties to bring matters before courts in support of or on behalf of sexual minorities is considered against The Fundamental Rights (Enforcement Procedure) Rules 2009 which requires courts to welcome public interest litigations. This conclusion chapter will prove that the current practice in Nigeria limits access to courts for sexual minorities and limits their ability to access a fair trial and breaches international human rights discussed in chapter 2.

Chapter 4 The Silent Violation of the Rights of Sexual Minorities.

This Chapter focuses on the legislative framework restricting the right to access courts of sexual minorities. The chapter begins with a brief reflection on anti-homosexuality

[51] Adopted by the ILC in 2001
[52] Suit No. FHC/ABJ/CS/197/2014

laws to demonstrate how these laws cannot coexist with the narrow interpretation of procedural rules.

Chapter 5 Realizing the right to access justice.

This chapter recommends strategies that can be employed by Nigeria to give effect to the right to justice amid its same-sex marriage prohibiting laws. These may include the establishment of independent tribunals to hear sexual minorities in private from the public. In conclusion, this chapter will provide a summary of the previous chapters, highlighting the final arguments made by each chapter.

Chapter 2

2. Access to Justice in terms of international law

2.1. Introduction

Several international law human rights treaties referred to in chapter one and the general framework of international human rights law guarantee several human rights. However, recognising that the effectiveness of these rights is contingent on the implementation thereof, these treaties refer to measures that state parties 'may' adopt and measures that state parties are 'obligated' to adopt to ensure that they do not violate international human rights treaties.[53] These obligations include requiring state parties to establish measures to enable individuals to seek a remedy before a court of law when their rights are violated. This is in line with the Latin phrase: *ubu jus, ibi remedium,* as used by the Committee on Economic, Social and Cultural Rights, that there 'can be no right without a remedy'.[54] This obligation to provide mechanisms of remedy is referred to as the obligation to provide effective judicial remedies.

It is with the understanding that human rights cannot exist in isolation from the right to judicial remedies that this chapter discusses what access to justice through courts is in international law. The chapter provides a brief overview of the status of international law in Nigeria. It further analyses how international human rights committees and courts have interpreted state parties' obligation to provide effective judicial remedies to protect minorities and how the principle of effectiveness obligates states to adopt special measures considering the unique vulnerability of specific categories of people. The chapter will further provide a comparative study of how *locus standi* has been interpreted in different countries to protect vulnerable categories of people.

2.2. Status of international law in Nigeria

Although Nigeria is a State party to several international human rights treaties which also protect sexual minorities, ratification of such treaties is only relevant if the state's laws allow for these instruments to be applicable in its legal system, either immediately or upon transformation into domestic legislation.[55] In determining the status of international law under Nigerian domestic law, it is vital to consider two

[53] n 46 above, page 809
[54] Committee on Economic, Social and Cultural Rights, *IDG v Spain,* Communication No. 2/2014, Views on 17 June 2015
[55] F Viljoen *International Human rights law in Africa* (2012) 517.

opposing theories of the relationship of international law to domestic law,[56] which can characterise a country as either a monist or dualist.[57] Monists view international and national law as a single unit requiring no domestication through national legislation.[58] Dualists, on the other hand, distinguish between international and national law and requires international law to be received through domestic legislative measures to apply in a national legal order.[59] The Nigerian legal order is dualist, and this is emphasized by section 12 of the Constitution, which states that;

> No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. [60]

It is according to section 12 that Nigeria has domesticated the African Charter on Human and People's Rights. In *Abacha v Fawehinmi,* the court held that 'no matter how beneficial to the country or citizenry, an international treaty to which Nigeria has become signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly'.[61] The *Fawehnmi* case, as the *locus classicus* on the status of international law in Nigeria, leads to a conclusion that international law treaties that are not domesticated find no respect before national courts. However, a consideration of section 19 of the Constitution[62] and the Fundamental Rights Enforcement Procedure Rules 2009[63] begs a different conclusion that human rights provisions, as contained in international law instruments such as the ICCPR,[64] ICESCR,[65] CEDAW,[66] and CAT,[67] although not strictly binding, ought to be respected by courts. This argument is supported by Professor Niki Tobi, who, in the matter of

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[56] ON Ogbu 'Nigeria courts and domestic application of international human rights instruments in A Ibinabo-obe & TF Yerima (eds) *International law, Human rights, and development* (2004) 98.
[57] F Bangamwambo 'The implementation of international and regional human rights instruments in the Namibian legal framework' in A Bosl & N Horn (eds) *Human rights and the rule of law in Namibia (*2009) 165.
[58] E Oluwatoyin 'The application of International law in Nigeria and the Façade of dualism' NAUJILJ 11(1) 2020 page 15
[59] n 57 above page 167
[60] S 12 (1) of the CRFRN
[61] *Abacha v Fawehinmi* (2000) 6 NWL (pt 660) 356-367
[62] S 19 (d) CRFRN
[63] The Fundamental Rights Enforcement Procedure Rules 2009 Preamble 3b states that 'the court shall respect municipal, regional, and international bills of rights cited to it or brought to its attention of which the Court is aware.
[64] Ratified on 29 July 1993.
[65] Ratified on 29 July 1993.
[66] 23 April 1984.
[67] 28 June 2001.

Mojekwu v Ejikeme[68] argued that Nigerian courts had to provide 'teeth to the provisions of the CEDAW' as applicable. His views were rooted in the objectives of the Constitution to respect international law. Furthermore, the Constitution of Nigeria states that only those laws (including international law) are inconsistent with the Constitution and will be considered null and void and without any effect.[69] Nigeria has no decision where any provision of an international treaty has been declared inconsistent with the Constitution.[70] This chapter, therefore, turns to consider International law treaties that Nigeria is a party to despite lack of domestication to some, with a view that Nigeria's obligations under these international law instruments and regional instruments as far as they are not inconsistent with the Constitution, can help elucidate its obligations to the promotion of access to justice for sexual minorities.

As part of its foreign policy objectives, the Constitution of Nigeria asserts respect for international law and treaty obligations. These objectives attempt to integrate into the Nigerian Constitution rights protected by international conventions to which it is a party.[71] As stated in the previous chapter Nigeria is a State party to the ICCPR[72], the ICESCR, CEDAW[73] and CAT. [74]

In addition to these International Human rights instruments, Nigeria is also a State party to the African Charter on Human and People's Rights,[75] subjecting it to the African Commission on Human and People's Rights.[76] Highlighting the importance of international law on human rights in *Law Office of Ghazi Suleiman v Sudan*[77] the commission held that article 60 of the African Charter's requirement to draw inspiration from international law could also be extended to applying jurisprudence from the European Court on Human Rights and Inter- American Court of Human

[68] *Mojekwu v Ejikeme* (2000) 5NWLR 402.
[69] n 15 above s1(3)
[70] Akogwu A 'Assessing the human rights implication of the Nigerian law dealing with sexual orientation' 2018 page 134.
[71] n 15 above s19(d)
[72] International Covenant on Civil and Political Rights, opened for signature Dec.16, 1966, 999 UNTS (entered into force 23 March 1976)
[73] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249, UNTS 13.
[74] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465, UNTS 85.
[75] n 28 above
[76] Inaugurated on 2 November 1987. Nigeria submitted its first report to the ACHPR in 1990.
[77] *Law Office of Ghazi Suleiman v Sudan* (Communication No. 229/99) (2003) ACHPR; (29 May 2003).

Rights.[78] Therefore Nigeria's obligations to facilitate access to justice through access to courts under some of these instruments are considered below.

2.3. The right to Access Justice in International Law.

2.3.1. State Obligations under International Law

International human rights treaties impel states to, among other obligations, respect, ensure and guarantee human rights without discrimination and effectively. These obligations have a dynamic relationship with all human rights provided for in the treaties and guide the interpretation and understanding of each right and 'the nature of the legal obligations undertaken by state parties.'[79] It is necessary to briefly consider what these obligations entail to inform an understanding of what the right to access to justice is under international law.

There are three types of levels of obligations found in international human rights treaties:

a) Obligation to respect.
b) Obligation to protect.
c) Obligation to fulfil (promote and provide).

a. Obligation to Respect.

The obligation to respect human rights requires State parties to refrain or to avoid taking measures that may result in 'limiting the access to the enjoyment of the Covenant's rights.[80] This obligation includes refraining from 'making laws, policies, regulations, programs, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment'[81] of rights. Abstinence from policies, laws and administrative procedures that limit access to human rights also includes pre-existing domestic laws that are 'manifestly incompatible' with international legal obligations and the requirement to repeal and suspend these to enable the continued enjoyment of human rights.[82]

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[78] *Law Office of Ghazi Suleiman v Sudan* (Communication NO.228/99) [2003] ACHPR 47; (29 May 2003)
[79] General comment No.3 The nature of States parties' obligations (art 2, para 1 of the Covenant)
[80] Sepulveda.M. The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. 2003 page 197.
[81] General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All forms of Discrimination against Women. Para 9.
[82] Sepulveda.M. The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. 2003 page 197

b. Obligation to Protect.

The obligation to protect imposes a positive duty on State parties to take steps to ensure that individuals in their control are protected from violations of human rights by third parties. Attached to this obligation is the duty to ensure equality and non-discrimination in safeguarding access to human rights, specifically to protect minorities/vulnerable and marginalised groups in society.[83] The significance of equality and non-discrimination related to the obligation to protect access to human rights is exhibited in the unique tailoring of this obligation as applicable to various minority groups in international instruments. For example, the Committee on the Elimination of Discrimination against Women held that the duty to protect women's rights as contained in the CEDAW required active steps to 'eliminate customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either sex' and that the protection 'shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies'.[84] Similarly, the Human Rights Committee commenting on the rights of minorities (ethnic, linguistic, and cultural), held that the 'full enjoyment of this right by minorities required positive legal measures of protection and measures to ensure effective participation of members of minority communities'.[85] Therefore, it is clear that to uphold this obligation, state parties must be aware of the differences in various groups of individuals within its society and take active steps to ensure that these groups are afforded equal protection of the law and equal protection of their rights.

c. Obligation to Fulfil.

The obligation to fulfil is vast and requires the State to take various steps to facilitate, provide and promote human rights. When discussing what this obligation means, Supulveda, in *The Nature of Obligations under the ICESCR*, argues that this obligation includes adopting national policies specifically designed to ensure the enjoyment of human rights and to the extent of available resources provide certain rights in the Covenants 'when individuals or groups are unable, for reasons beyond their control, to realise that right themselves by means of disposal'.[86] The requirement to ensure that

[83] General Comment No.14 The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights). 2000 para 51.
[84] General Recommendation No.28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women para 9 and 17.
[85] General Comment NO.23 (50) article 27 of the ICCPR
[86] Sepulveda.M. The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. 2003 page 199

even those that cannot access human rights themselves can, once again, requires State parties to be aware of minorities and vulnerable groups within their jurisdictions. Depending on the right in question, international covenants require certain rights to either be progressively realised or be given effect with immediate effect, and failure to, not being justifiable by 'political, social, cultural or economic consideration of the state'.[87]

The analysis of State Obligations imposed by international human rights law treaties provides a fresh paradigm for examining what human rights as contained in these conventions mean. However, vague terms such as 'necessary steps' and 'active steps' without explicitly clarifying these steps convey that State parties enjoy broad discretion in how they organise their legal systems[88] to be in line with their obligations. This is because international law is based on the fundamental principle of state sovereignty, the idea that states have 'absolute and sole competence of law-making'.[89] Be that as it may, to limit the broad discretion states enjoy concerning their obligation to guarantee human rights and prohibit states from adopting ineffective methods in administering justice[90], the principle of effectiveness that has become a norm in international law, and an interpretation method, is inherent in interpreting these conventions and the human rights they guarantee.

The principle of effectiveness refers to the 'relationship between a particular goal set by the policy maker and the legal remedies available to reach the goal set by the legislator'.[91] Effectiveness is evaluated based on factual circumstances and procedural rules that may hamper the achievement of the objective of the instrument providing access to justice or effective remedies. This is because effectively 'implementing international human rights depends on various factors'.[92] What is effective will, without doubt, differ between states and various groups of people within its territory. Therefore, an effective interpretation of the right to access justice through courts must reflect an awareness of any barriers that may limit access to justice.

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[87] General Comment NO.31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant para 14.
[88] F. Francioni. Access to Justice as a Human Right. 2007 page 3.
[89] Synman, MP. The Evolution of State Sovereignty: A Historical Overview. 2009 page 5.
[90] *DEB Deutsce Energiehandels- und Beratungsegsellschaft mbH v Bundesrepublik Deutschland.* C-279/09 para 29.
[91] Staberock 'Human Rights, Domestic Implementation' 2011 Oxford Public International Law
[92] Staberock 'Human Rights, Domestic Implementation' 2011 Oxford Public International Law

The three obligations stated above, and the principle of effectiveness are essential to understanding what international human rights instruments entail. Therefore, the research applies these three obligations and the principle of effectiveness in the following discussion to determine what the right to access justice through courts means under international law.

2.3.2. The right to Access Justice through courts.

In a quest to determine what access to justice is in international law, it is worth noting that most international human rights instruments do not expressly refer to a right to access justice[93] and that this concept lacks an exact definition. Although there exists no precise definition, because international human rights law is not only based on the 'reciprocity obligations between States' but also 'provides rights to individuals' vis-à-vis States',[94] the right to access to justice has been understood to be made up of individual rights. [95] These individual rights provided for in international human rights treaties consist of primary substantive rights such as the right to life, the right to equality before the law and non-discrimination, and secondary rights, which can only be exercised on the existence of the violation of the primary rights,[96] such as the right to an effective remedy, access to courts, and a fair hearing.

Several international human rights instruments provide access to justice through these individual substantive and procedural rights. At a universal level, UDHR article 8,[97] ICCPR article 2(3),[98] and CERD article 6[99] refer to the right to an 'effective remedy'[100] and article 14 of the ICCPR guarantees the right to equality before the courts. At a regional level, the American Convention uses the term 'judicial protection'[101] and effective recourse, while the African Charter, on the other hand, refers to the right to have a course heard[102], a reference also found in the ICCPR about access to courts.[103]

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[93] F. Francioni. Access to justice as a Human Right. 2007 page 24.
[94] Staberock 'Human Rights, Domestic Implementation' 2011 Oxford Public International Law
[95] Beqiraj J. Access to Justice for Vulnerable Groups 'Strengthening the efficiency and quality of the judicial system in Azerbaijan' 2020 6.
[96] Agbor 'Pursuing the Right to an effective Remedy for Human Rights Violation (s) in Cameroon: The need for legislative Reform. 2017
[97] Universal Declaration of human rights (1948) Article 8.
[98] International Covenant on Civil and Political Rights (1996) Article 2(3) (a).
[99] International Convention on the Elimination of all Forms of Racial Discrimination 1969 Article 6
[100] European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Article 13
[101] Inter-American Convention on Human Rights (1969) article 25.
[102] African Charter on Human and Peoples' Rights (1981) article 7 (1) (a).
[103] *ICCPR* article 9(4), article 14(1).

For this research, the right to access to justice is only considered alongside the right to an effective remedy and access to courts, exclusive of the other procedural rights, such as the right to a fair trial.

The right to access courts is contained in the ICCPR article 14 as follows.

> All persons shall be equal before the courts and tribunals….

The African Charter similarly provides for access to courts in article 7(1) as follows.

> Every individual shall have the right to have his cause heard….

The Human Rights Committee has interpreted Article 14 of the ICCPR to encompass the right of access to courts.[104] The Committee further held that this right should be considered in conjunction with article 2 (3) obligation to provide effective remedies. Effective access to justice through courts ensures that no individual is unable to access courts to claim justice due to procedural rules, race, colour, sex, or another status. This is because the substantive right to an effective remedy through courts is closely related to the right to equality and non-discrimination. The close relation between the right to equality and access to justice enables us to hold as correct the notion that access to justice, in its narrowest sense, represents the ability to access courts (appear in court) and in its broad sense, the 'wider social context of our court system, and the systematic barriers faced by different members of the community'.[105] This means access to justice through courts 'is bound to differ when considered on different parameters' because to satisfy the principle of effectiveness, it has to consider different systematic barriers and factual circumstances related to access to justice.[106]

Access to justice through courts is compromised by several barriers such as 'socio-economic inequalities, inadequate resources for legal aid provision, systematic operational inefficiencies, and lack of knowledge about legal rights, remedies and legal system'.[107] As a result of these factors, vulnerable groups remain invisible in the human rights discourse as they are held back by costs, procedures and lack of effective

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[104] General Comment No.32 Article 14: Right to equality before courts and tribunals and to a fair trial para 9

[105] Chalakkal K. Access to Justice under International Law: Claims against Environmental Crimes of Transnational Corporations. 2019 ELCOP Yearbook of Human Rights 4.

[106] Adenkule C.O. 'Access to Justice in Nigeria: An Extrapolative Appraisal of its Socio Legal barriers' 2015.

[107] L.Greenbaum. Access to justice for all: a reality or unfulfilled expectation? *De Jure Law Journal Vol.53* page2

laws to protect them.[108] When vulnerable groups cannot approach courts effectively, then the courts and State parties cannot fulfil their constitutional obligations and legal obligations contained in international human rights treaties they are party to.

Mathius Nyeti's discussion of what access to justice entails is worthy of attention to remedy this gap before vulnerable groups and access to justice. They argue that access to justice denotes a state organising its legal systems to 'ensure that every person can invoke the legal process for the legal redress irrespective of social or economic capacity and that every person should receive a just and fair treatment within the legal system'.[109] Nyeti's view of access to justice requiring a state to organise its legal system to realise other rights is not without support. The ICSER article 2 compels states to structure their legal system to ensure all persons can access courts and procedures to vindicate their rights.[110] Furthermore, a reflection of state obligations to protect and fulfil human rights above has demonstrated the need for states to ensure equality and non-discrimination by adopting national policies and uniquely tailored measures to ensure the full enjoyment of human rights.

The UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* Article 1(2)(b) contains an obligation to adopt 'appropriate and **effective** legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice'.[111] To ensure effectiveness while considering these systematic barriers, the HRC in the United Nations Human Rights Committee Nature of the General Legal Obligation on the States Parties to the Covenant held that to give effect to Article 2 of the ICCPR, State parties had to take account of the 'special vulnerability of certain categories of persons.' The term 'special vulnerability' recognises that there are groups who, for various reasons, are weak and vulnerable and consequently require special protection for the equal and effective enjoyment of their human rights. These groups that are structurally discriminated against and struggle to defend themselves include disabled

[108] V.Teremetskyi. Access to Justice and Legal Aid for Vulnerable Groups: New Challenges Caused by the Covid-19 Pandemic.
[109] Nyeti, M. 'Access to justice in the South Africa Social Security System: Towards a conceptual approach' 2013 de Jure page 903.
[110] ibid page 903.
[111] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Resolution adopted by the General Assembly on 16 December 2005.

persons, children, refugees, stateless persons, indigenous people, and for this research, lesbian, gay, and transgender people.[112]

Several international human rights instruments contain group-tailored provisions to ensure that vulnerable groups can access justice through courts. For example, the UN Convention on the Rights of Persons with Disabilities Article 13 provides that, in the case of persons with disabilities, effective access to justice requires the State to provide 'procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings'. Similarly, the Council of Europe's Framework Convention for the Protection of National Minorities, providing for effective access to justice specifically for minorities' states in article 10 that State Parties should allow national minorities to participate in legal proceedings in their language and, if necessary, obtain the services of an interpreter.

Special measures such as these must be in place because access to justice and courts is crucial for vulnerable groups to counter the violations and discrimination they face. This is because vulnerable persons are 'frequently denied (effective access to justice) or have limited legal capacity and have difficulty accessing courts'. [113] To date, there are no binding international human rights instruments dealing specifically with sexual orientation or sexual minorities. However, there is no reason why critical human rights principles essential for the effective protection of sexual minorities found in existing international instruments mentioned above cannot be applied to sexual minorities. Hollander touts the ICCPR as holding the most potential in protecting the rights of sexual minorities[114] and this was confirmed by the UN Human Rights Committee in the landmark case of *Toonen v Australia*[115] where although it was determined that the ICCPR does not provide explicit protection to sexual minorities, its general provisions on non-discrimination and equality before the law had to be interpreted to include

[112] Special rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Non-discrimination: groups in vulnerable situations. Accessed at https://www.ohchr.org/en/special-procedures/sr-health/non-discrimination-groups-vulnerable-situations. On 2023/03/29.
[113] Beqiraj J. Access to Justice for Vulnerable Groups 'Strengthening the efficiency and quality of the judicial system in Azerbaijan'. 2020 4.
[114] M Hollander 'Gay Rights in Uganda: Seeking to overturn Uganda's Anti-sodomy law' (2009) 50 *Virginia Journals of International Law* 229.
[115] UN Human Rights Committee Communication No 488/1992/UN Doc CCPR/C/50/D/488/1992/ (1994).

sexual minorities. With this general protection notion, the research now considers what the right to access courts entails for sexual minorities.

2.3.2.1. Sexual minorities' right to access courts.

As provided above, the right to access courts does not refer to sexual orientation or gender identity; it is guaranteed for every individual and all persons. The term 'everyone' is also evident in other instruments providing the right to access courts. Pratima Narayan[116] argues convincingly that the use of the word 'everyone' in almost every clause in the UDHR creates an impression that/ these positive rights are conferred on all human beings, including sexual minorities. The UDHR article 2 states that

> Everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, colour, sex, language, or other status.

Articles 2(1) and 26 of the ICCPR contain a similar provision, extending the protection and guarantee of human rights to all persons without distinction of any status. The Human Rights Committee in *Toonen'*s case interpreted 'sex' as used in articles 2 (1) and 26 to include sexual orientation[117]. The UNHRC has also affirmed the right to equality and non-discrimination of sexual minorities on several matters, asserting that although there is no explicit provision protecting sexual minorities in the ICCPR, the provisions of non-discrimination and equality can be interpreted to protect them. Speaking specifically to sexual orientation in *Zimbabwe Human Rights NGO Forum v Zimbabwe,* the commission stated that the provisions of equality and non-discrimination, when affording rights, ensure equality of treatment 'for individuals irrespective of nationality...age or sexual orientation'.*[118]* Articles 2(1) & (26) of the ICCPR and Articles 2 & 3 of the African Charter contain language analogous to the UDHR, reiterating the equality of all persons before the law despite any status. The African Commission in *Purohit and Another v The Gambia* emphasising the importance of articles 2 and 3 of the African Charter, held that these provisions are 'non-derogable and therefore must be respected in all circumstances in order for

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[116] P Narayan 'Somewhere over the rainbow International Human Rights protections for sexual minorities in the new millennium (2006) 24 Boston University International Law Journal 329
[117] n 115 above para 8.7
[118] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication NO.245/2002) [2006] ACHPR 73; (25 May 2006) para 169

anyone to enjoy all other rights.'[119] Based on the non-discrimination and equality provisions above, sexual minorities equally enjoy the right to access courts. However, due to the special vulnerability that sexual minorities experience, to ensure access to courts for sexual minorities, the standard procedure cannot apply as is. The right to access courts must be provided for effectively.

The first obligation contained in Article 2(1) of the ICCPR is to respect the right of access to courts. The discussion above on state obligations indicated that this obligation requires state parties to abstain from laws that may limit access to human rights, in this case, the right to access to courts. The right of access to courts for minorities must therefore be interpreted in the light of various means of deliberate denial of access to courts. One of the legal tools closely related to access to courts used to deny vulnerable groups and sexual minorities' access to courts is *locus standi*.

a. Locus Standi

Locus standi, a Latin word for standing, 'traditionally implies that a person who applies to the court for redress should have sufficient interest to approach the court'[120] meaning the litigant must have suffered harm or was about to. This principle is intertwined with the right to access justice, with its interpretation crucial to realising human rights. This view is supported by Chidua and Makiwane, who believes that 'liberal standing rules enhance an active enforcement of human rights, whilst excessively strict rules stultify the opportunity of review for constitutionality'.[121] As harmless as the principle of *locus standi* may be to human rights protection, when not interpreted liberally, this principle denies third parties who did not directly suffer any harm standing to bring 'an action in the interest of the public, to have a court declare a law unconstitutional or to challenge the actions of the government and its agencies'.[122]

Public interest litigation is crucial, especially in countries that have outlawed homosexuality. That is because, where homosexuality is criminalised, the State and the criminal justice system have the potential to impose stigma on sexual minorities,

[119] *Purohit and Anor v Gambia* (Communication No. 241/2001) [2003] ACHPR 49; (29 May 2003) para 49
[120] A.C. Ekeke. Access to Justice and *locus standi* before Nigerian courts. 2014 page 7.
[121] L.Chidua & PN Makiwane. Strengthening *Locus standi* in Human Rights Litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution. 2016 PER 11 page 1
[122] Luyali. Impact of unrestricted *locus standi* on access to justice. 2011.

making it challenging to approach courts. In addition, over 60 countries have laws that bring sexual minorities into 'direct conflict with the law by expressly discriminating on the grounds of sexual orientation and because the 'crime' related to the individual's perceived or actual sexual orientation, individuals accused, suspected, or proven to have breached these laws'.[123] Sexual minorities lose their ability to safeguard the personal aspects of their lives, including the specific details of their sexual activities. Each encounter with the justice system is a possibility of stigmatisation, intolerance, moral opprobrium, or violence against sexual minorities.[124] Even in countries that have repealed homosexuality-prohibiting laws, sexual minorities are still at risk of public stigma when approaching criminal justice authorities. Due to these factors that limit their trust in the justice system, they cannot approach courts to seek remedies after a violation. They cannot approach courts to challenge policies and laws that discriminate against them or have the potential to. The narrow interpretation of *locus standi* frustrates their ability to exercise their Article 14 right of access to courts even further. When members of the public with 'genuine interest' in matters involving sexual minorities', human rights violations are denied access to courts based on 'lack of sufficient interest', human rights violations go un-remedied, state obligations to protect, respect and fulfil human rights are left unfulfilled and without accountability and courts remain not accessible to the vulnerable.

In *Olo Bahamonde v Equatorial Guinea,* the Human Rights Committee held that 'the notion of equality before courts and tribunals encompasses the very access to courts and that a situation in which an individual's attempts to seize the competent jurisdictions of his or her grievances are systematically frustrated runs counter to the guarantees of article 14'.[125] A narrow interpretation of *locus standi* excluding public interest ligation, therefore, violates Article 14 right of access to courts and further violates the State's obligations to respect, protect and ensure human rights. To avoid a violation of the right to access courts, an approach to *locus standi* must consider the three obligations discussed at the beginning of this chapter. It must also reflect the

[123] E4J University Module Series: Crime Prevention and Criminal Justice. UNODC. Accessed at https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-9/key-issues/references.html. On 2023/03/29.
[124] Ibid 115.
[125] *Olo Bahamonde v Equatorial Guinea*, Communication No. 468/1991, UN. Doc.CCPR/C/49/D1993.

principle of effectiveness. This research argues that a liberal approach that leaves room for public interest litigation is preferable to avoid denial of access to justice.

Public interest litigation is not expressly mentioned in any international law instrument. The right to have effective judicial remedies or access to courts as contained in these instruments leaves the impression that it is only accrued to individuals whose rights were directly violated. However, a consideration of the preambles and objectives of these instruments with the right to an effective remedy before courts lead to a conclusion that, although not expressly mentioned, public interest litigation advances the purposes of these instruments[126] and can be read into the provisions of access to courts.

The objective and intention, as contained in the preambles of several international human rights, are to advance the protection of human rights and serve the interests of all individuals. Akinrinmande argues that public interest litigation serves as a medium for protecting and transforming the welfare of marginalised groups. It raises issues beyond the personal interest of the applicants, affecting a sector of the public or defenceless groups and seeks to explain and challenge vital questions of law.[127] An interpretation of access to courts to include public interest litigation is therefore justified because it advances the objectives contained in these instruments. Furthermore, if the State goes back on its obligation to respect and protect the right to access to courts by ensuring an effective administration of justice, public interest litigation becomes necessary to remedy such wrong.[128]

2.4. Towards a liberal Approach to *Locus standi* under international law.

State practice on interpreting *locus standi* provides strong support for the above proposition. For example, the Courts in the United Kingdom interpreted *locus standi* restrictively to exclude parties not directly affected.[129] In *Ex P. Sidebotham,* the *locus classicus* on the subject of standing, Lord Justice James held that a person 'must' show that they suffered a particular loss and directly affected to be an aggrieved person and

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[126] *Allen v Renfre county* Justice Charles Y held that 'a preamble is a helpful interpretative device…certain judgments have attributed considerable importance to the interpretative assistance rendered by the preamble in Constitutional litigation.'

[127] OG. Akinrinmade. Public Interest Litigation as a catalyst for sustainable development in Nigeria. *OIDA International Journal of Sustainable Development* Vol. 06, No.06 86

[128] OG. Akinrinmade. Public Interest Litigation as a catalyst for sustainable development in Nigeria. *OIDA International Journal of Sustainable Development* Vol. 06, No.06 88.

[129] *Ex P. Sidebotham* (1880) 14 Ch D 458 at 465

thus be granted *locus standi*.[130] The courts in the UK have, however, since 1978, adopted a liberal approach to *locus standi*. In R *v Somerset County Council and ARC Southern Ltd, ex parte Dix*[131] defending the rule of law and the obligation of a state to fulfil its legal duties and stressing the importance of widening the definition of *locus standi* Justice Sedly wrote:

> Public law is not at base about rights, even though abuses of power may and often do invade private rights, it is about wrongs – that is to say, misuses of public power, and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or outcome may, without in any sense being a mere meddler, wish and be well-placed to call the attention of the court to an apparent misuse of public power.

In *R v Inland Revenue Commissioners,* the court held that the strict interpretation of *locus standi* must be updated. It stated as follows,

> It would be a grave lacuna in the legal system of public law if a pressure group or even a single public-spirited taxpayer were prevented by outdated technical rules of standing from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[132]

In Kenya, Odiambo argues that the restrictive approach to *locus standi* and lack of express provision on public interest litigation in the 1963 Constitution of Kenya, was used to 'defeat several initiatives aimed at securing the public interest'.[133] The inauguration of a new Constitution[134] in 2010 established a new order in interpreting *locus standi*. Article 22 of the Kenyan Constitution provides that anyone has standing to institute an action on an individual's behalf and in the public's interest. [135] Kenyan courts, like the courts in the UK, consider the merits of the matter brought before the court and the impact the matter may have on the understanding and transformation of the law to the benefit of the public when deciding issues of standing. As a result, in

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[130] Ibid.
[131] *R v Somerset County Council and ARC Southern Ltd, ex parte Dix* (1997) Env LR 111
[132] *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617
[133] MO Ohiambo. Legal and institutional constraints to public interest litigation as a mechanism for enforcing environmental rights and duties in Kenya. *Fifth international conference in environmental compliance and enforcement.* Cited by AC Ekeke in Access to justice and *locus standi* before Nigerian Courts.
[134] The Constitution of Kenya, 2010.
[135] The Constitution of Kenya Art 22

several significant decisions, the Kenyan courts have granted the right to access courts to challenge the constitutionality of certain laws to persons who, before the 2010 Constitution, would not have legal standing before the court. For example, in *Dennis Mogambi Mg'are v Attorney General& 3 others*, without challenging the standing of the petitioner (who had no sufficient interest) in the matter, the court held that challenging the constitutionality of legislation and the determination of whether any law is inconsistent with the Constitution fell within the jurisdiction of the court.[136]

The Indian courts made provisions for the liberalisation of *locus standi* to facilitate access to justice for people experiencing poverty. Justice Bhagwati's profound view on the liberal view of *locus standi* in Indian courts is that,

> The judges in India have asked themselves the question: can judges escape addressing themselves to substantial questions of social justice? Can they simply follow the legal text when they are aware that their actions will perpetuate inequality and injustice? Can they restrict their inquiry into law and life within the narrow confines of a narrowly defined rule of law? [137]

He further stated in the matter of *Gupta v President of India:*[138]

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

Article 32 of the Constitution of India empowers courts to enforce fundamental human rights without any procedural technicalities standing in the way. For example, in *Bandhua Mukti Morcha v Union of India*, the Supreme Court held that a different approach had to be adopted when dealing with the marginalised, as blindly following the norm would result in an inability to enforce fundamental rights. As a result, the

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[136] *Dennis Mogambi Mg'are v Attorney General& 3 others.* High Court of Kenya at Nairobi petition No. 146 of 2011.
[137] SK Agrawala. The legal philosophy PN Bhagwati. 1987 cited in T Ngcukaitobi. The evolution of standing rules in South Africa and their significance in promoting social justice. *South African on Human Rights* vol.18 no4 2002 601.
[138] Gupta v President of India AIR 1982 SCC.

court concluded that adopting 'new tools, new methods and new strategies to make fundamental rights meaningful for large masses of people' is necessary.[139]

The South African Constitution has also adopted a liberal approach to *locus standi* through section 38. Section 38 of the Constitution makes provision for applicants acting on behalf of other persons who cannot act in their name, acting in the public interest or representing a group or class of persons. In *Lawyers for Human Rights v Ministers of Home Affairs*[140] the court held that it was crucial to consider the 'degree of vulnerability of the people affected, the nature of the right said to be infringed and the consequences of infringement of the right' when deciding the legal standing of persons not directly affected by the case. The court's approach or criteria used to determine *locus standi* and section of the Constitution have made courts accessible to ordinary citizens through public interest groups. Consequently, several public interest groups such as The Women's Legal Centre, the AIDS Law Project, and the Community Law Centre have, over the years, successfully litigated to protect vulnerable groups.

The liberal approach to rules of *locus standi* in the states mentioned above has facilitated access to courts for several minority groups. Public interest litigation has proved to be essential for human rights protection, social change, and access to justice for vulnerable persons in society. Although not expressly mentioned in international human rights treaties, the right to non-discrimination and equality requires states to take active steps towards realising their obligation to provide access to courts. For sexual minorities, the obligations entail state parties repealing any procedural laws and technicalities, such as *locus standi*, to enable sexual minorities to access justice.

2.5. Conclusion

The general framework of international human rights law provides for the right to an effective judicial remedy to all persons. international law obligates states to ensure that this right is provided for effectively. This chapter has argued that what is effective in providing for human rights is likely to differ from one group of persons to another, therefore an awareness of factors that may limit access to effective judicial remedies is required. This chapter has argued that the state's obligation to protect, fulfil and respect human rights should be the guiding principle in giving effect to human rights.

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[139] *Bandhua Mukti Morcha v Union of India & others* (1997) 10 SCC 549.
[140] 2004 4 SA 125 (CC).

The state's obligation to respect human rights ensures that they refrain from policies and laws that limit human rights. This chapter highlighted *locus standi* as one of the rules limiting sexual minorities' access to effective judicial remedies. The chapter has argued that the restrictive interpretation of locus standi denies third parties who may not be directly impacted from bringing an action on behalf of the public or the marginalised. The chapter stressed the importance of public interest litigation in the protection of human rights. It argued that public interest litigation advances the protection and transformation of the welfare of marginalised groups. To support this argument the chapter considered international state practice on the interpretation of locus standi.

The chapter argued that due to respect for the obligation to fulfil and promote human rights, some States have liberally interpreted *locus standi* rules to the benefit of the marginalised. This is a clear example of adopting specific measures that ensure that the right to an effective remedy is provided for without discrimination. A good example is that of Kenyan courts' which give more weight to the merits of the case and the impact the matter may have on the public not procedural rules of standing. This ensures that laws that may be unconstitutional are challenged even by people who would normally not have standing. Courts in India have also placed more emphasis on addressing questions of social justice rather than focusing on the narrow rules of law. The liberal approach to rules of *locus standi* in the states mentioned above has facilitated access to courts for several minority groups. Public interest litigation has proved to be essential for human rights protection, social change, and access to justice for vulnerable persons in society.

Chapter 3

3. The Right of Access to Courts for Sexual Minorities in Nigeria.

3.1. Introduction

Since the adoption and signing of the International human rights treaties referred to in Chapter 2, there has been a consistent global acceptance of the need to ensure the protection of human rights. The right to access to courts, as the vehicle to facilitate human rights violations provided for in international human rights instruments, has equally been reflected in several national Constitutions. The 1996 Nigerian Constitution, for instance, provides for the fundamental right to access courts through sections 6[141] and 46 (1)[142] of the Constitution. These sections vest in the courts, the power to enforce and protect the fundamental human rights contained in the Constitution and provide that any person who alleges contravention of human rights guaranteed in the Constitution shall have the right to approach a court for redress.[143]

Despite the Constitution reflecting the 'quest for the promotion and protection of human rights', Okogbule in Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects argues convincingly that there is still a 'sustained struggle for the protection of the human rights of individuals, groups, and communities in Nigeria'.[144] This is because there still exists several substantive and procedural obstacles that not only inhibit the general masses from accessing courts[145] but specifically make it impossible for sexual minorities to access justice through courts. Okgbule and Adewale identify the concept of *locus standi* as one of the constraints limiting access to courts in Nigeria.[146]

This chapter examines the scope of section 46(1) of the 1999 Nigerian Constitution as applicable to sexual minorities in Nigeria. Unlike States discussed in Chapter 2 which

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[141] S 6(6) of the 1999 Nigerian Constitution.
[142] S 46 (1) of the 1999 Nigerian Constitution.
[143] Elijah Adewale Taiwo. Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision. *African Human Rights Law Journal* page 547
[144] N Lerum S. Okogbule. Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects. In SUR International Journal on Human Rights. 2005 no 3 page 95.
[145] Ibid.
[146] See n 142 & n 143 above.

have adopted a liberal approach to determining standing, section 46 limits the categories of persons that can approach courts. This chapter will argue that the restrictive interpretation *locus standi* as found in section 46 (1) frustrates the enforcement of sexual minorities' fundamental human rights while the liberal approach can encourage public interest litigation to protect sexual minorities.

3.2. **Access to Justice through Courts in Nigeria.**

Access to justice as discussed in chapter two can be looked at from a narrow and/or a wider sense. Although the narrow sense refers only to access to courts of law and the wider sense refers to the 'wider social context of our court system and the systematic barriers faced by different members of the community', it is important to note that these perspectives are not disconnected. This is because the ability to access justice through courts is largely influenced by principles such as equality and fairness. Thus, while the discussion to follow will emphasize access to justice from the narrow sense of access to courts, the wider sense of access to justice is incorporated into the analysis.

It is only when individuals can access courts that they can remedy and protect their fundamental human rights. The Nigerian Constitution guarantees this access to courts to protect human rights by vesting judicial powers in the courts of law. Section 6(6)(b) of the Constitution states that these judicial powers extend 'to all matters between, or between government or authority and to any persons in Nigeria, and all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person'.[147] To give effect to these judicial powers section 46 (1) reads:

> 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 that State for redress.[148]

Sections 6 and 46 of the Constitution when read together provide for the right to access courts to challenge a violation or imminent violation of rights to all persons. However, a closer look at Section 46 (1) presents a procedural rule that limits a person's right access to courts. This section incorporates the concept of *locus standi* into Nigerian

[147] S 6(6)(b) of the 1999 Nigerian Constitution.
[148] S 46 (1) of the 1999 Nigerian Constitution.

constitutional jurisprudence and requires the court to deal with it *in limine.*[149] In *Attorney General of Akwa Ibom v I.G. Essien*, the court emphasised the necessity of considering *locus standi* before consideration of the merits stating that 'for a person to have *locus standi* in an action he must be able to show that his civil rights and obligations have been or are in danger of being infringed. Thus, the fact that a person may not succeed in action does not have anything to do with whether he has standing to bring the action'.[150] The requirement to establish *locus standi in limine* as in the common law approach to *locus standi,* means, the identity of the parties is critical to alimenting an action brought before the court. As a result, if the party bringing the action fails to establish *locus standi*, that is the identity of the parties concerning the claim, the applicant or plaintiff's claim will be dismissed without consideration of the merits.[151] Although *locus standi* is designed to discourage interlopers from meddling in matters before the court that may not involve them, how Nigerian courts have dealt with *locus standi* has posed serious problems for litigants in Nigerian courts.

3.2.1. *Locus standi* in Nigerian courts**.**

When ascertaining whether the plaintiff before the court has legal standing, the courts laid out two tests namely, 'the action must be justifiable, and there must be a dispute between the parties'.[152] The requirement that there must be a dispute between parties is understood to refer to the requirement that the plaintiff must prove 'sufficient interest' in the matter failure to will result in the plaintiff being treated as a stranger in the matter, resulting in them being denied access to courts. The determination of what constitutes 'sufficient interest' was clear in the matter between *Olawoyin v Attorney General of the Northern region of Nigeria*[153] and several other matters have operated against access to courts in Nigeria. It is however pertinent to mention here that although apex courts have preferred the narrow common law understanding of *locus standi,* the decisions in the lower courts correctly maintain that the plaintiff does not have to establish personal interest before the court can entertain the matter.[154] Although the lower courts support this liberal interpretation, which is correct according to our

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[149] n 142 above. In *A-G Anambra v A-G Federation* [2007] 12 NWL the court held that *locus standi* must be considered at earliest as it is linked to the issue of jurisdiction of the court to entertain the matter. 'It is *sine qua non* to the exercise of jurisdiction because judicial powers are limited to cases in which the parties have *locus standi'.*

[150] *Attorney General of Akwa Ibom v I.G. Essien* (2004) 7 NWLR pt 872 p 288.

[151] Adewale at n 142 above. 552.

[152] *Attorney General Federation V Attorney General of the 36 States of Nigeria* (2001) 9 SCM 45 59.

[153] *Olawoyin v Attorney General of Northern region of Nigeria* 1961 AIINLR 269.

[154] Adewale n 142 above, 552.

view, the decisions in these lower courts are not binding precedents as compared to decisions made by the Supreme Court.

The *Olawoyin* matter is one of the first cases in Nigeria that dealt extensively with *locus standi*, entrenching into the judicial jurisprudence the common law approach. In this matter, the applicant sought a declaration of unconstitutionality of Part VIII of the Northern Region Law No. 28 of 1958, which prohibited 'political activities by juveniles and prescribed penalties on juveniles and others who are parties to certain specified offences'.[155] The applicant in this matter, Mr Olawoyin, argued that the provisions contained in the 1958 law prevented him as a father from educating his children on political issues and had the potential of violating constitutionally entrenched rights such as the right to private and family life, freedom of conscience and freedom of expression.[156] Both the High Court and the Supreme Court dismissed the matter on the grounds that 'since no rights of the applicant were alleged to have been infringed, a declaration could not be made *in vacuo'* and that only the directly or immediately threatened persons could challenge the constitutionality of the provisions.[157] A similar approach was adopted in *Gamioba v Ezezi*[158] where the court referred to the *Olawoyin* matter in its decision to dismiss this matter. The plaintiffs' alleged that a certain trust instrument was inconsistent with the Constitution and sought a declaration of invalidity from the court. The court refers to the *Olawoyin* matter, correctly acknowledging that a question of 'validity of a law is a matter of concern to the public at large'[159] but in contradiction to that held that the plaintiff who challenged the validity of a law 'must be able to show not only that the statute is invalid, but the court should be satisfied that the plaintiff's legal rights have been, or are in imminent danger of being, invaded in consequence of the law'.[160]

The court further made clear its views on the restrictive interpretation of *locus standi* in the case that has been described as 'an obstacle in the enforcement of rights and a negation of a purposive interpretation of the Constitution',[161] the matter of *Senator*

[155] n 152 above.
[156] n 152 above.
[157] n 145 above.
[158] *Otugor Gamioba and others v Esezi II, The Onodjie of Okpe, and Other* 1961 AII NLR 608.
[159] Ibid 152 above.
[160] Ibid 152 above
[161] A. Ademola. 'Human Rights and national development' in MA Ajomo & B Owasanoye 'Individual right under the 1989 Constitution (1993) 12 28.

Adesanya v President of the Federal Republic of Nigeria and Others[162]. The court's remarks on the plaintiff's standing to challenge the violation of provisions of the Constitution are worth noting. The court correctly held that to deny a Nigerian citizen,

> who is aware or believes, or is led to believe that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our legislative Houses, whether Federal or Statute, is unconstitutional, access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised disenchantment with the judicial process.[163]

Be that as it may, the Supreme Court held that the Plaintiff still had to prove 'justifiable interest which may be affected by the action or that they will suffer injury or damage'. It is commendable that the courts are aware of the diversity of Nigeria, however as in *Ezezi,* despite the diversity noted, Nigerian courts still maintain that a direct link between the plaintiff and the action must be established.

The court's approach to *locus standi* in these matters and several others that followed[164] is crucial to the argument made by this paper in two ways. Firstly, the court's disregard for State's international law obligations to ensure, protect and respect human rights specifically for the vulnerable groups discussed in chapter two is distinctly discerned from its interpretation of *locus standi* in these cases. Secondly, these matters set into motion the silent infringement of several human rights of vulnerable minority groups.

A. Disregard of state obligations under international law

The matters referred to above differ in facts and circumstances. However, the similarities between the matters are crucial to the understanding of the first argument above. The cases discussed above, and other *locus standi*-related cases referenced all seem to challenge the validity or constitutionality of a particular legislation, policy, or

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[162] *Senator Adesanya v President of the Federal Republic of Nigeria and others* (1981) 2 NCLR 358.
[163] Ibid
[164] Also see *Attorney General of Bendel State v Attorney General of the Federation and 22 others* (1982) 3 NCLR 1 where the court held that 'A party invoking the powers of the court with respect to an unconstitutional statute, must show, not only that the statute is invalid but that he has sustained or is immediately in danger of sustained some direct injury from its enforcement and not merely that he suffers in some indefinite way in common with the public generally' and, *A-G Adamawa v A-G Federation (*2005)18 NWLR page 581 608, where the court held that 'it is not enough for a plaintiff to merely state that an Act is illegal or unconstitutional. He must show how his civil rights and obligations are breached or threatened'.

decision by the state. As a result, the decisions in each matter would have a direct impact on the public. For instance, in the case of Mr Olawoyin, the decision made by the court on the merits of the case, would determine the ability of Nigerian parents to exercise their right to private family life, freedom of conscience, and freedom of expression concerning educating their children on political issues. The decision by the court would not only be limited to Mr Olawoyin and his children but would also have a direct impact on millions of children's constitutionally entrenched right to freedom of expression. In the case of *Ezezi* the trust challenged by the plaintiff had a direct impact on communal land rights and the decision made by the court on the constitutionality of the powers of the Minister to appoint trustees in respect of communal rights would directly have an impact on several communities with communal land tenure systems. The court's dismissal of the above matters without considering the merits therefore meant, until a directly affected party approached the court, those unconstitutional and invalid laws and policies remained in place.

A counterargument may be made at this instance that since the laws challenged in these matters had a direct impact on the public, finding a directly aggrieved or impacted person should not be a challenge. The problem with this argument is that it fails to consider the socio-economic structure of the country which is another similarity between several *locus standi* matters. Okogbule correctly argues that the cost of litigation in Nigeria is so high that 'ordinary Nigerians can hardly' afford to commence actions or even sustain them as some cases could last up to four or five years. He refers to the costs of litigating in the Federal High Court, where the costs of filing are related to the monetary claim sought and as a result 'vulnerable Nigerians who are usually victims of oil spillages, pollution and other environmental hazards, find it extremely difficult to exercise their legal rights when these petroleum-related activities adversely affect their normal activities'.[165] Nigeria is also a country with high levels of illiteracy due to a lack of access to education. Education can liberate individuals from ignorance, and poverty, lack of access to education, therefore, breeds poverty and 'forced connivance with agents of oppression and marginalization'.[166] The

[165] J.F. Fekumo, 'The Problem of Jurisdiction in Compensation for Environmental Pollution and Degradation in Nigeria: A fundamental Rights Enforcement Alternative' being a paper presented at the Nigerian Bar Association Annual Conference held in Abuja, 22-27 August 2004, 0 26.

[166] T. Akinola Aguda, 'Human Rights and the Right to Development in Africa' (Lagos: Nigerian Institute of International Affairs, 1989) p. 26.

result is that a 'large majority of Nigerians do not have access to social justice and are alienated from the political and economic structures of society'.[167]

The socio-economic factors such as poverty and illiteracy preventing directly aggrieved parties from approaching courts also require awareness of the vulnerability of the parties involved. In the few cases mentioned above the question of the constitutionality of each law would have a direct impact on, children, women and girls and indigenous people. The vulnerability of these groups of people should have guided the courts in interpreting *locus standi*, to ensure that their human rights are still protected. The research refers to the discussion of state obligations in Chapter 2, to argue that the state obligation to protect human rights requires that any law or policy be interpreted in a manner that advances equality and non-discrimination. The research further reflects on Article 2 of the ICCPR requiring state parties to consider the 'special vulnerability' of certain categories of persons whose vulnerability requires unique tailoring of the legal system to ensure their access to justice. An awareness and respect of Article 2 of the ICCPR mean that before a decision to dismiss a matter based on technical rules should reflect an awareness of who will be impacted by the decision and whether the decision to dismiss the matter facilitates the affected person's effective access to justice. As correctly held by the court in *the Ogoni* matter, the duty to protect is a positive duty that requires 'the State to take positive measures to protect beneficiaries of right against political, economic and social interference by other non-state actors'.[168] Failure to provide effective remedies on matters questioning the constitutionality of laws that may have an impact on millions of vulnerable people does not seem to be a positive measure towards ensuring effective access to justice.

As discussed in Chapter 2 state obligations are interrelated and interdependent, implementation of international human rights requires observance of all state obligations. The failure of Nigeria to meet its obligations to protect human rights makes it impossible to imagine it meeting any other obligations. For instance, the negative obligation to respect, described as meaning that the State should refrain from interfering with the enjoyment of human rights would require Nigerian courts to do away with laws that are inhibiting the enjoyment of human rights. It is unclear how

[167] See T. Akinola Aguda, Human Rights and the Right to Development in Africa 9Lagos: Nigerian Institute of International Affairs, 1989, p29 – 30.
[168] F Coomans. The Ogoni Case before the African Commission on Human and People's Rights. *The International and Comparative Law Quarterly* Vol.52. No.3 (Jul. 2003) pp 753.

courts will be able to do away with unconstitutional laws when applicants are prevented from accessing courts by technical rules from seeking protection and remedies before the court. The obligation to fulfil has been described as including the adoption of national policies specifically designed to ensure the enjoyment of human rights and to the extent of available resources providing certain rights when groups or individuals are unable to access them. This requires awareness of these groups of people that may not be able to access human rights and putting in place measures to facilitate such access. Restrictive rules of procedure, preventing vulnerable groups from accessing courts are in direct violation of all these obligations. However, it is commendable that Nigeria adopted the Fundamental Rights Enforcement Procedure Rules (FREPR) in 2009 to enhance access to justice for vulnerable groups.

The FREPR states in its preamble that any interpretation made of the Constitution, its relevant chapters and the Africa Charter should never restrict the applicant's rights but should advance the realisation of such rights.[169] It further states that the Courts should 'proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented'.[170] The Act goes further to encourage courts to welcome public interest litigation and to not dismiss or 'struck out' matters for lack of *locus standi*. The act expands the scope of *locus standi* as follows:

> In human rights litigation, the applicant may include any of the following:
>
> i. Anyone acting in his interest,
> ii. Anyone acting on behalf of another person.
> iii. Anyone acting as a member of, or in the interest of a group or class of persons.
> iv. Anyone acting in the public interest, and
> v. Association acting in the interest of its members or other individuals or groups.

FREPR goes beyond the scope of *locus standi* in section 46(1) of the Constitution. Although its interpretation of *locus standi* is preferable FREPR carries little to no legal effect. This is because (1) these rules are contained in the preamble and (2) this particular provision has been deemed to override the Constitution section 46(1),

[169] Fundamental Rights (Enforcement Procedure) Rules (FREPR), 2009 para 1
[170] FREPR para 3 (d)

however, that would be impossible as sections 1(1) and 1 (3) entrench the principle of supremacy to the Constitution. As long as FREPR is not given 'a proper and correct juridical classification' in which it will not seek to override the Constitution, its provisions remain unenforceable. The impact of Nigeria's failure to meet its International State obligations and give effect to the FREP Rules has had appalling effects on several vulnerable groups, especially sexual minorities.

3.3. **Conclusion**

Chapter 2 introduced to the research, the consistent global acceptance of the right to access to courts to remedy human rights violations. This chapter, building on that, and the fact that legal systems must be tailored to accommodate vulnerable groups, held that Nigeria has failed to tailor its legal systems to ensure access to courts for all particularly the marginalized. This chapter has through case law proved that although the Nigerian Constitution reflects the need to promote and protect human rights, *locus standi* has exacerbated the struggle for the protection of the marginalised groups in Nigeria.

This chapter has highlighted the socio-economic factors, such as poverty, illiteracy, and discriminatory laws as factors that Nigerian courts should consider in relation to the right to access to courts. Awareness of these factors is in line with the international state obligations discussed in Chapter Two to respect human rights by refraining from laws and rules that inhibit the enjoyment of human rights. This chapter has shown through case law that the restrictive approach to locus standi in Nigeria has left questions of the constitutionality of certain laws unanswered.

In conclusion, the chapter took note of the Fundamental Enforcement Procedure Rules of 2009 that promote the liberal approach to *locus standi.* The chapter supported and emphasized the need to ensure that provisions contained in these rules are given weight by the courts. Giving effect to FREP Rules has the potential to prevent continuous violation of sexual minorities' human rights by allowing public interest litigation on behalf of queer communities. The following chapter highlights why there is a great need to give effect to FREPR and a liberal approach to *locus standi* specifically for sexual minorities to ensure their ability to access justice through courts.

Chapter 4

4. Silent Violation of the Rights of Sexual Minorities.

4.1. **Introduction.**

To fully appreciate the extent to which sexual minorities have been denied access to justice, it is perhaps important to reflect on section 46(1) again. The Constitution provides as follows:

> Any person who alleges that any of the provisions of the Chapter **has been,** is **being** or l**ikely** to be contravened in any State in relation to him may apply to High Court in that State for redress'. *(my emphasis added)*

In the matter of *Chief Uzoukwu and others v Ezeonu II, Igwe of Atani and others,* the Court correctly held that section 46(1) had 'three major limbs'[171] The first one is when the act of contravention with a right has been completed, the second one is when the act of contravention has not been completed but already taking place and the third one is anticipatory contravention. This is when the plaintiff has reason to believe that his rights could be in danger and seeks to prevent such contravention. In *Chief Uzokwu* the court held that in this third limb, the

> Applicant need not wait for the last act of contravention. It might be too late to salvage the already damaged condition. Therefore, the third limb gives him the power to move to court to seek redress immediately if he senses some move on the part of the respondent to contravene his fundamental rights.[172]

The third limb is more difficult to prove as compared to the other limbs as the evidence cannot be merely speculative. The difficulty in proving this third limb (anticipatory harm) must be considered alongside the difficulty in bringing matters that challenge the constitutionality of certain laws and the challenges faced by sexual minorities in proving existing contraventions. The research begins by providing a brief background on the status of homosexuality under Nigerian Criminal law to highlight the role these laws play in the denial of justice.

4.2. **Homosexuality under the Nigerian Criminal Law**

The Constitution of the Republic of Nigeria stipulates that, for conduct to be considered a criminal act, it must be prohibited by written law.[173] The legislative powers and functions to enact laws are divided between the 36 states and 774 local

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[171] *Chief Uzouwu & others v Ezeonu II, Iggwe of Atani & Others* (1991) 6 NWLR (pt 200) 784
[172] Ibid.
[173] n 15 above s36

governments each with legislative competence.[174] In these 36 states, enacting laws comes with the responsibility to align these laws with their culture, custom, and religion as applicable. Due to this federal structure of the state, it is challenging to analyse its criminal law relating to homosexuality as there are several legislative statutes regulating the offence but each with its unique penalty and definition of what constitutes a sodomy offence.[175]

The colonization of Nigeria by the British Empire mid-nineteenth century meant not only an introduction of the English language and way of life but also the inception of the English common law into the Nigerian customary law resulting in a dual legal system. [176]The latter legal system is rooted in the tradition, customs, and culture of indigenous communities in Nigeria that each community regards as obligatory rules of conduct and are treated as laws.[177] Nigerian customary law consists of Ethnic customary laws and Islamic customary laws.

The English common law introduced in Nigeria a 'validity test' which was a three-rule test that customary laws had to satisfy to be regarded as law. The customary laws had to (1) not be repugnant to natural justice and a good conscience (2) not be indirectly or directly incompatible with any law (3) not contrary to public policy[178]. It was based on this test that in the matter of *Eugine Meribe* v *Joshua Egwu* the court decided that homosexual acts were 'repugnant to natural justice'.[179] English common law codified its laws through the Criminal Code[180] which had a 'sodomy clause' officially criminalizing homosexuality in Nigeria. [181]

a. Criminal Code Act: Homosexual Offences

The Criminal Code Act has jurisdiction across Nigeria except in states where the Penal Code Federal Provisions Act applies. The provisions in the Criminal Code Act against homosexuality mirrored the sections contained in the English Offences Against the

[174] Schedule part I & II of the 1999 Constitution of the Federal Republic of Nigeria
[175] s 4(7) of the Constitution grants legislative powers to all states. Different states, as a result, have enacted different Acts to regulate homosexuality including the Sharia Penal Code which applies predominantly in the northern parts of Nigeria.
[176] MA Ajomo & IE Okagbue 'Human Rights and the administration of criminal justice in Nigeria' (1991) 25
[177] W Anyim 'Research Under Nigerian Legal System' Understanding the Sources of Law for Effective Research Activities in Law Libraries (2019) Library Philosophy and Practice (e-journal) 2383.
[178] Obilade: *The Nigerian Legal System* Sweet & Maxwell 1979.
[179] In this case, the court held that in the Igbo culture woman to woman, marriage was repugnant to natural justice. 1976 LPELR-SC 48/1975.
[180] Nigeria Criminal Code Act 1916
[181] Criminal Code Act s 214

Persons Act[182] which prohibited homosexual conduct. Homosexual offences are regulated in Chapter 21 as offences against morality. Section 214[183] makes 'carnal knowledge of any person against the order of nature' an offence with a conviction of fourteen years imprisonment. Section 217 states that any 'male person' who engages in 'gross indecency with another male, is guilty and liable to imprisonment and may be arrested without a warrant'.[184]

Unlike section 214 which requires a warrant to arrest individuals in violation of that section, section 217 offenders can be arrested without any warrant. Law enforcement officers in Nigeria, therefore, have wide discretion to arrest male persons who display any behaviour that they perceive as gross conduct in public or private.

b. Penal Code and the Sharia Penal Code Acts: Homosexual Offences.

With the Criminal Code applying specifically in the South States of Nigeria, to reflect the Islamic laws on homosexuality the Penal Code Act has been domesticated in the northern states of Nigeria and is enforceable and applicable in the 19 states, 12 of the 19 states have individually created Sharia Codes which seek to codify customary Islamic approaches to criminal justice. The dual existence of these acts enables courts to try a person who violates homosexual laws either under the Penal Code or the Sharia Code if they are Muslim[185]. Section 284 of the Penal Code Act states that:

> Whoever has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to a fine[186].

What is interesting about the Penal Code is that like the Criminal Code, it refers to 'gross indecency' in section 285 without providing any standards against which conduct must be tested, to be considered gross. Employing the definition of gross and indecency as used in the Black's Law Dictionary the phrase can be interpreted as any behaviour that is 'repulsive' and 'outrageously offensive in a vulgar or sexual way'[187]. What constitutes a repulsive and offensive act is a subjective question and will therefore differ from one person to another. Not providing clear and explicit terms for

[182] English Offences Against the Persons Act of 1861 s 61-63.
[183] Criminal Code Act
[184] Criminal Code Act.
[185] S 3 of the Sharia Penal Code Law of Zamfaria state.
[186] Penal Code s 284.
[187] Brayan A. Garner 2014 Black's Law Dictionary, 368

what amounts to gross indecency leaves room for multiple interpretations, confusion, and uncertainty and as stated above, leaves Police officials with broad discretion in deciding who may be guilty of the offence which in turn leads to the rise in unlawful arrests. The code prescribes lashing as a punishment if the person is not married and stoning to death if the person is married.[188]

c. The Same-Sex Marriage Prohibition Act 2013.

The Same Sex-Marriage (Prohibition) Act[189] was signed into law in 2014 and has jurisdiction across Nigeria. This act sought to criminalize not only homosexual conduct but same-sex marriage between individuals of the same sex. The act provides that:

> A marriage contract or civil union entered between persons of the same sex:
>
> a. Is prohibited in Nigeria; and
>
> b. Shall not be recognized as entitled to the benefits of a valid marriage.[190]

The SSMPA extends the prohibition of same-sex marriages to foreigners in the Nigerian territory who are nationals of countries where same-sex marriage is allowed alternatively Nigerian nationals who conclude the marriage in another country. The act seems to be contradicting existing legal practice in Nigeria where foreign marriages are recognized and afforded legal protection[191]. Stripping foreigners of their marital rights may also be construed as indirectly disrespecting the sovereignty of the countries they come from. The Act does not stop at prohibiting marriages between queer couples only, but it also goes further to prohibit any gatherings, organizations, or meetings of same-sex persons, directly infringing on several constitutional rights of the persons involved. It is in this instance that it is worth questioning the principle of the supremacy of the Constitution of the Federal Republic concerning the SSMPA.

The SSMPA, directly and indirectly, contains provisions that infringe on several human rights and even set state practices. The act conflicts with the right to freedom of association[192], the right to privacy and family life[193], directly discriminates against

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[188] S 131 Penal Code.
[189] Same-Sex Marriage Prohibition Act 2013
[190] S 1 SSMPA
[191] S 49 Marriage Act 2004.
[192] S 40 of the CFRN 1999
[193] S 37 of the CRFN 1999

sexual minorities and denies them the right to equality[194]. The SSMPA discriminatory provisions are in clear defiance of several international law treaties.

The pertinent question however for this research is, how do these laws limit access to justice through courts for sexual minorities? None of the provisions mentioned above restricting homosexuality restricts sexual minorities' access to courts, therefore it can be argued that they still do enjoy their section 46(1) right. That is however not the case, and this is because sexual minorities are affected by socioeconomic factors such as illiteracy, poverty, and inequality. Like many Nigerians, these factors are the first hurdle they must overcome to access courts. In addition to these factors, queer Nigerians exist in a society profoundly religious and cultural. Due to culture, religion, and lack of information on Queer issues, sexual minorities continue to face violence, blackmail, extortion, and invasion of privacy from their communities and families. These experiences are equally extended to those who are 'suspected' of homosexuality. The stigma attached to queerness in Nigeria, makes it nearly impossible for queer bodies to confide even to their closest family members or friends due to fear of condemnation and blackmail, how much more to a system that has readily labelled them as criminals?

In its 2019 report TIER reported that the laws discussed above leveraged the cultural and religious beliefs against homosexuality. In its report 'invasion of privacy, arbitrary arrests and unlawful detention' are cases largely perpetrated by state actors. It reported that these discriminatory laws are the driving force of the continued violation of human rights of sexual minorities' rights in Nigeria so much that 'LGBTQI people find it extremely difficult to approach relevant government agencies for redress, for fear of stigma, more violence and discrimination'. Furthermore, cases of Police Officers evoking fear of legal reprisal by arbitrary arrests based on illegally obtained information and circumstantial evidence have weakened the trust in law enforcement institutions. The fear of stigma from the community, further violation by the Police officers, and lack of trust in law enforcement is a second hurdle faced by sexual minorities in accessing courts. When they eventually can access courts, queer persons are faced with a hurdle, technical rules that prevent them from accessing courts, *locus standi*.

[194] S 42 of the CRFN 199

4.3. **Sexual minorities and** *Locus standi*

Before outlining how *locus standi* has been a nail in the coffin for access to courts for Nigerian queer persons, it is important at this point to quickly reflect on where these two obstacles fit in the three limbs of section 46(1). Many of the cases included in human rights reports are violations that have already been completed or/and are still taking place, placing them in the first and second limbs of section 46(1). These violations should be easier to seek remedy for as compared to the third limb. However, due to the stigma faced by queer persons, violations by Police officials influenced by discriminatory laws against queerness and the lack of trust in the legal system, these cases remain unreported in the law enforcement system and go un-remedied. If sexual minorities are unable to seek redress after a violation, during a violation, it would perhaps aid to have measures in place to facilitate the protection of their rights before the violations, which is the third limb, when their rights are 'likely' to be contravened. This means enabling sexual minorities to access courts to challenge the constitutionality of laws that make it impossible for them to access courts and laws that violate their human rights. It is at this point that the restrictive interpretation of *locus standi* becomes the final block to access to justice for sexual minorities.

At the beginning of this chapter, the research reflected on cases challenging the constitutionality of laws that could 'likely' violate human rights but were dismissed by the court on the basis that the Plaintiffs in the matters lacked *locus standi*. The research highlighted that these dismissals were rooted in a strict interpretation of *locus standi* requiring proof of direct interest in the matter which required a party to reveal their identity in relation to the matter before the court. The vulnerability of sexual minorities does not negate them from the requirement to establish 'sufficient interest' in any matter they bring before the court. However, establishing sufficient interest in the case of sexual minorities goes beyond simply proving to the court that the Plaintiff has been violated, is being violated or will be violated. For sexual minorities establishing sufficient interest means revealing their sexual orientation before a court that enforces discriminatory laws, a society that will condemn them and a legal system that may find them guilty of their identity and silence any challenge they are attempting to bring before the court. This as Ovye Affi correctly holds in *The Judiciary*

and the Protection of the human rights of Homosexuals in Nigeria,[195] revealing their sexual orientation puts them at risk of criminal prosecution under the SSMPA for admitting to being a homosexual or supporting LGBTQI movements. The matter between *Teriah Joseph Ebah v Federal Government of Nigeria* is a clear illustration of how courts have denied queer person access to justice using the requirement of 'sufficient interest'. The court in this matter held that:

> The applicant has no *locus standi* to bring this action on behalf of the 'Gay Community in Nigeria' In any case there is nobody or organisation in Nigeria called the lesbian, gay, bisexual, and transgender (LGBTQI) community. Even the applicant himself did not describe himself as gay.[196]

The grounds for dismissal of a matter challenging the constitutionality of laws affecting an entire group of people are clear from the last sentence - the failure to describe oneself as gay. If Mr Teriah could not challenge the constitutionality of same-sex relationship prohibiting laws due to failure to identify as a queer person, then two hypothetical situations may exist. The first one requires us to assume that Mr Teriah is gay, and he does inform the court of his sexual orientation as grounds to challenge the constitutionality of the SSMPA. Mr Teriah will be admitting guilt of a criminal offence, punishable with 14 years' imprisonment or even the death penalty. The prospects of success of his application to the court after admission to an offence which is the very cause of the application are debatable and go outside the scope of this research. The damage to his human dignity to be suffered is unimaginable. The second hypothetical situation that exists and has the potential to aid this clear denial of justice is public interest litigation on behalf of sexual minorities. In this instance, an action can be brought within the limbs of section 46(1) without needing to disclose a party's sexual identity.

Mr Teriah's argument was based on this second hypothetical scenario of acceptance of public interest litigation as a form of protecting the rights of sexual minorities'. Although his argument did not hold water before the court, it is worthy to highlight

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[195] Affi O. The Judiciary and the Protection of the Human Rights of Homosexuals in Nigeria. *A mini dissertation submitted to the faculty of law at the University of Pretoria* 2019

[196] *Mr. Teriah Joseph Ebah v Federal Republic of Nigeria*. Federal High Court 2014

how *locus standi* has been a tool for the denial of access to justice even for queer activists and human rights NGOs.

As stated previously, FREPR encourages courts to prefer a liberal approach to *locus standi,* and not dismiss matters based on lack of it. One of the overriding objectives that according to the FREP rules courts should give effect to is to welcome public interest litigation in human rights cases. The objective set out that any interested person may institute proceedings on behalf of another person or in the interest of a group of persons or the public. These are the provisions that Mr Teriah relied on in making his application. However, the court relied on the strict interpretation of section 46(1) and dismissed the matter. The court erred in considering section 46(1) without considering provisions empowering the enforcement of human rights as provided for in section 46 (2) of the Constitution. The failure to engage with section 46 (2) as the foundation of FREPR led to the court neglecting to address the substantive challenge brought before it. The court failed to engage with the overriding objectives contained in FREPR and by extension failed to interpret the Constitution expansively to afford the protection of human rights to all. We cannot ignore arguments of the supremacy of the Constitution over FREP Rules, and by extension section 46(1) over the objectives of FREPR, however, we also cannot be naïve to the fact that 'FREP rules address unique cases of public interest litigation, which may not have been expressly stated in the Constitution'[197] and FREPR can be interpreted to exist alongside the Constitution. Disregarding FREPR does not advance the enforcement of human rights, it goes against section 46(2) of the Constitution and the very objectives of the Rules, and it backtracks the developments made by Nigeria in advancing the human rights of the marginalised.

When third parties are unable to bring matters before the court on behalf of sexual minorities, this then means sexual minorities do not enjoy the right to have their disputes resolved by courts, be it when they are violated or when there is a law that could likely lead to their violation. The inability to access courts in person due to socioeconomic factors, stigma, laws criminalizing their sexual identity, and *locus standi* mean (1) the state may never be held accountable for failure to meet its

[197] Abiola Sanni 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far reaching reform' African Human Rights Law Journal 2011 11.

international human rights obligations to ensure, protect and fulfil human rights (2) human rights violated or being violated will remain unreported and not remedied.

4.4. **Conclusion**

Section 46 (1) of the Constitution was carefully drafted to provide for the right to access justice before a right is violated, during and after the violation. Even though these three limbs of section 46 (1) can facilitate the protection of the rights of sexual minorities this chapter has built on the argument made in chapter three that *locus standi* remains an obstacle to access to courts for vulnerable groups. This chapter highlighted that for sexual minorities the struggle is aggravated by the discriminatory same-sex relations prohibiting laws. As stated in the introductory chapter and broadly demonstrated in this chapter, these laws do not only criminalise the identity of sexual minorities, but they also perpetuate stigma and violence against sexual minorities. With sanctions amounting to 14 years imprisonment and in other States, the death penalty, it is understandable why many sexual minorities do not report violations or even attempt to approach courts to protect their rights. This is because strict rules of *locus standi* require sexual minorities to reveal their sexual identities to prove 'direct interest' in the matter before the Court addressing the merits of the matter.

For sexual minorities establishing sufficient interest means revealing their sexual orientation before a court that enforces discriminatory laws, a society that will condemn them and a legal system that may find them guilty of their identity and silence any challenge they are attempting to bring before the court. The chapter referred to the matter between *Teriah Joseph Ebah v the Federal Government of Nigeria* to support the argument made in chapter three that the narrow interpretation of *locus standi* has on numerous accounts denied vulnerable groups access to justice by preventing interested parties acting on behalf of the public from challenging policies and laws that could be unconstitutional. The chapter has further argued that the failure of courts to consider the merits or substance of the matter before dismissing it directly violates state obligations under international law, to protect, ensure and fulfil human rights.

The chapter has reflected on the court's dismissal of the FREP Rules without any consideration of their role in advancing human rights. FREP Rules remain the only statutory instruments providing for a liberal interpretation of *locus standi,* encouraging

courts to welcome public interest litigation. If Nigerian courts fail to give effect to FREPR, the marginalised in Nigeria will remain without access to courts and their human rights violated.

CHAPTER 5

5. Realizing the Right to Access to Justice: Recommendations and Conclusion.

5.1. Introduction

The discussion in the chapters above has captured the challenges faced by sexual minorities when attempting to access courts for redress when their rights have been or are at risk of violation. The discussion leaned on the strict interpretation of *locus standi* being the main barrier to access to courts and it is the last straw that breaks the camel's back concerning access to justice. The research has further drawn a clear link between the impact of the strict interpretation of procedural rules and State obligations in international law to protect, respect and fulfil human rights, taking special attention to vulnerable groups. On this, the research in Chapter 3 has detailed how the strict interpretation of *locus standi* and same-sex relationship prohibiting laws have instilled fear in sexual minorities of relying on the legal system for the protection of their rights.

Decriminalizing homosexuality will always be a right call towards realizing queer rights. This is because doing away with laws that perpetrate violence and stigma has the potential to elevate sexual minorities' trust in the justice system. The research however sees decriminalizing homosexuality as a progressive and continuous process with its impact realizable over time. The research argues in this chapter for measures that will enhance the protection of the human rights of Nigerian Queers, amid the same sex prohibiting laws, and during the process of calling for decriminalization. The research firstly reflects on judicial remedies under international law that are available to sexual minorities when they are unable to enjoy protection from their States. This research argues strongly for the liberal approach to *locus standi* to enable public interest litigation. It argues that it is only if NGOs and human rights activists and interested parties can challenge the laws that govern them on behalf of the marginalized that Nigeria will be able to respect its international obligations and give effect to its Constitutional objectives. The chapter further reflects on the wide interpretation of access to justice to argue for special alternative redress mechanisms.

Chapter 2 of this research briefly reflected on 3 States that have interpreted *locus standi* liberally to enhance the protection of human rights. Chapter 3 highlighted the

socio-economic context of Nigeria, where millions of people are affected by poverty and lack of education. These socio-economic factors and the political context within which human rights exist have been considered enough grounds to broaden the standing approach. The African Commission on Human and Peoples' Rights (the Commission) in the *Malawi African Association* matter held that awareness of socio-economic context 'reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels may not be accessible to the victims themselves or may be dangerous to pursue'.[198] The inaccessibility of national channels for victims to pursue is important to briefly reflect on within the boundaries of this research.

5.2. Recommendations

5.2.1. Remedies under International law: The African Charter on Human and Peoples' Rights.

International law contains procedures that allow victims to 'denounce violations of their human rights by a state party to the relevant treaty'.[199] For example, the state parties to the United Nations Charter may direct their grievances to the Commission on Human Rights. As indicated in Chapter 2 the lack of domestication of the UN Treaties means they carry less weight as compared to the African Charter which has been robustly applied and given full force of law in Nigeria. Furthermore, a reflection of judicial remedies available for sexual minorities in the context of this paper does not benefit the argument towards realising their right to access to courts. This is because treaty-based institutions, such as the Human Rights Committee[200], have maintained the strict interpretation of the victim concept within the boundaries 'of close personal or family relationships existing between the victim and representative'.[201] As a result, the HRC, CERD-Committee[202] and the CEDAW-Committee[203] have been regarded as 'highly unutilised' due to the restrictive approach to standing. Due to the full enforcement according to the Charter, it is important to note how the Charter can provide judicial protection for sexual minorities in Nigeria.

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[198] *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).
[199] Shelton. D. Remedies in International Human Rights Law. *Oxford University Press.* Page 137
[200] Article 28 of the ICCPR.
[201] *Nbenge v Zaire* Communication No. 16/1997, UN Doc CCPR/C/18/D/16/1997.
[202] Article 8 of the CERD
[203] Article 17 of CEDAW.

The Protocol to the African Charter established the African Court and the African Commission with a mandate to protect the provisions of the African Charter. Article 5 of the protocol states that there are three ways in which a matter can reach the court. The first one is if it is submitted by the African Commission on behalf of individual complainants. The second way is if it is submitted by a state party on behalf of its people, and the third way is if it is submitted by an African NGO subject to section 34 (6), which requires the state party to have made a declaration accepting the competence of the court to hear the matter. As it currently stands, Nigeria has made no declaration to enable its NGOs to directly approach the court. This then means aggrieved sexual minorities in Nigeria can only access the African Court through the commission and if Nigeria submits the communications to the court itself. The chances of Nigeria submitting its failure to protect human rights to the African Commission are close to none, limiting access to the court of the commission. Interestingly, the African Commission has over the years broadened the standing approach from permitting individuals to lodge complaints subject to revealing their identity to admitting matters where victims are not identified or are represented by an organisation.[204] One of the reasons the commission broadened its approach to legal standing has already been mentioned above i.e., awareness of the socio-economic context of the victims of human rights violations. The Committee further understood human rights contained in the Charter protecting 'individual and people's human rights as a collective' with an 'individualised approach to standing' having the potential to defeat the very purpose and spirit of the African Charter.[205] The Committee in *Constitutional Rights Project and Another v Nigeria*[206], in support of a liberal approach to *locus standi*, also held that to carry out its mandate as detailed in article 45 of the Charter, it has to 'interpret the Charter in a culturally sensitive manner, taking into account the needs of the continent and the different legal traditions in Africa'.[207] Furthermore, in the *SERAC* case, the Commission made it clear that there is no reason why a flexible and purposive interpretation applied when dealing with

[204] See *Civil Liberties Organisation v Nigeria (*2000) AHLrLR 188 (ACHPR 1995), *Krishna Achutan on behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi* Communication 100/93 and *Kenya Human Rights Commission v Kenya (2000) AHRLR (ACHPR 1995).*
[205] Mariam Hamidu. The open-door approach to *Locus standi* by the African Commission on Human and Peoples' Rights in respect of its non-state complaints procedure: which requires reform. Submitted in [atrial fulfilment of the LLM Degree at the Faculty of Law, Universidade Eduardo MOndlane 27 October 2006 page 37.
[206] *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999).
[207] n 190 above page 38.

provisions of the charter cannot be applied when dealing with procedural rules such as standing.[208]

The Commission's reasons for broadening the standing standard are of great importance to the discussion at hand. This is because, in Chapter 3, the research argued that the fear and stigma exacerbated by anti-homosexuality and discriminatory laws weaken trust in the legal system and the requirement to disclose their identities and sexual orientation to establish standing denies them access to courts. The liberal approach by the Committee means that sexual minorities can hold the state accountable for human rights violations without having to disclose their identities, it is enough to the Commission that they identify as members of a particular group.

Article 50 of the African Charter states that the Commission can only deal with a matter if all local remedies have been exhausted. In the matter between *Nixon Nyikadzino v Zimbabwe,*[209] the commission held that 'the whole point of asking complainants to exhaust local remedies before approaching the Commission is to give the Respondent State a chance to redress the alleged human rights violations through its structures and organs. This is derived from the principle of complementary which dictates the international or regional mechanisms do not and cannot substitute national courts, it is only when national courts or tribunals fail to deliver justice that international or regional organs will have jurisdiction to receive cases'.[210]

A state's failure to 'deliver justice' as the court said in the *Nikadzino* matter is tested against the 'criteria for exhausting local remedies'.[211] The complainant bringing a matter before the court must have exhausted only the local remedies that are 'available, effective and sufficient'.[212] To succeed in proving that all local remedies have been exhausted or that there are none to exhaust, the complainant must convince the commission that there is 'no domestic legal action which can lead to resolving the complaint at the national level'.[213] In *Annual Justice Council v Ethiopia* the court referring to a decision by the Human Rights Committee in *A v Australia* held that a

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[208] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2000) AHRLR 60 (ACHPR 2001)
[209] African Communication *Nyikadzino v Zimbabwe* Communication No.340/07, 2014 (4 June 2014)
[210] *Nixon Nyikadzino v Zimbabwe.*
[211] African Commission. *Dawda Jawara v Gambia,* Communication No 147/95 & 149/96 (2000)
[212] Ibid.
[213] Minority Rights Group International. Guidance: Exhausting domestic remedies under the African Charter on Human and People's Rights, page 3.

claim of lack of local remedies, unavailability or ineffectiveness must not be 'mere doubts' but the complainant must have pursued the available remedies.

The discussion in Chapter 3 highlighted how the narrow interpretation of *locus standi* in Nigeria limits sexual minorities' access to local remedies. The chapter also reflected on how same-sex relationship-prohibiting laws have rendered domestic legal actions unavailable to queer persons in Nigeria. As a result of these obstacles to accessing local remedies, this research argues that the approach adopted by the court in *Konate v Burkina Faso*[214] should apply to the case of sexual minorities in Nigeria. In this case, the court held that in a case where the complainant had no legal standing before his local courts, such local remedies are deemed ineffective and unavailable. Furthermore in the matter between *Actions Pour la Protection v The Republic of Cote D'Ivoire*[215] the court held that in cases where the highest 'judicial authority has already pronounced itself on the issues in contention, albeit in a different case, such a remedy may be deemed ineffective'[216] as 'there is no need to go through the same judicial process the outcome of which is known'.[217] The case law included in the discussion in Chapter 2 has proved without doubt, how superior judicial authorities interpret *locus standi* to the detriment of human rights of the marginalised. Queer individuals interested human rights activists and interested bodies and NGOs cannot be expected to go up the hierarchy of courts when there is abundant evidence of denial of access to courts through *locus standi* in superior courts. This paper therefore argues that the narrow interpretation of *locus standi* in Nigeria has rendered the domestic remedies ineffective and unavailable to sexual minorities as a result, complaints brought on their behalf by NGOs and human rights organisations should be admissible before the Commission and by extension should be referred to the Court.

5.2.2. **Reforming of Local Judicial Remedies Frameworks**

a. Purposive interpretation Of Locus standi

The discussion above on the impact of the strict interpretation of procedural rules on human rights has shown that there is a great need for reform not only of the legislative

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[214] African Court, *Lohe Issa Konate v Burkina Faso,* application 004/2013, Judgement, 5 December 2014 para 112.

[215] African Court, Ac*tions Pour La Protection des Droits De L'Homme (APDH) v The Republic of Cote D'Ivoire.* Application 001/2014 para 100-102

[216] AfCHPR Commentary, accessed at https://afchpr-commentary.uwazi.io/en/entity/3n794air59oazchlolh0py14i?raw=true on 12/05/2023.

[217] *Reverend Christopher R. Mtikila* (Preliminary Objection of Inadmissibility) Judgement of 14 June 2014, paragraph 82.3.

framework giving effect to human rights for the marginalised but also as Okgbule correctly puts it, 'reform of the judicial process in line with the global concern for human rights protection'.[218] The approach taken by the African Commission in interpreting the law and its rules purposively and liberally should set an example for Nigerian courts to fully adopt the liberal approach to *locus standi*.

Okogbule argues that for judicial reform to be effective it must first start with a review of 'the relevant court rules inhibiting access to justice'.[219] In this regard, the research has identified *locus standi* as a procedural rule that limits access to justice for sexual minorities. It is suggested that the procedural rules inhibiting sexual minorities or NGOs from accessing court be reviewed and interpreted in line with the objectives of the Constitution. A review and interpretation of *locus standi* liberally are likely to have an immediate impact on the protection of human rights as compared to developing new judicial mechanisms. As the court held in *Senator Adesanya* above, 'It is better to allow a party to go to court and to be heard than to refuse them access to courts'.[220] When sexual minorities can at the very least make courts aware of the impact the discriminatory laws have on them, while not being restricted by procedural rules, there will be no what the court in *Adesanya* referred to as 'free for all in the media as to which law in constitutional and which law is not'.[221] A review of *locus standi*, therefore, opens a door for challenging the constitutionality of the very discriminatory laws that instigate violence against sexual minorities. Regardless of the outcome of such challenges, sexual minorities and/ or through NGOs and human rights activists retain the power to challenge the State when it fails to protect, respect, and fulfil human rights.

To make access to justice attainable for sexual minorities, the Nigerian legislature should consider making the overriding objectives of the Fundamental Rights Enforcement Procedure Rules (FREPR) part of the substantive provisions in the instruments. This has the potential to give more legal weight to the provisions as compared to when they are part of the preamble. It is recommended that Nigerian courts draw inspiration not only from the African Commission but also from the States

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[218] Okogbule, NS. Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects. *SUR International Journal on Human Rights* no 3 2005, 106.
[219] n 208 106.
[220] *Adesanya* n 153 above.
[221] *Adesanya* n 153.

discussed in the Chapter that have moved towards the liberalisation of the rule on *locus standi* such as India, Kenya, and South Africa.

b. Alternative Dispute Resolution Mechanisms

Alongside the review of procedural rules, this research recommends the establishment of specialised dispute resolution mechanisms for sexual minorities. These specialised dispute resolution mechanisms can be in the form of specialised courts, or a special committee, with a narrow focus on advancing the protection of the rights of sexual minorities. This specialised court should be equipped with judicial officers and officials of the court who are aware of principles of substantive equality, trained on how to deal with sensitive matters concerning the violation of the rights of sexual minorities, and with expertise derived from an actual commitment to advancing human rights and not only formal education which may lead to formalistic legal reasoning that does not take into account the special vulnerability of sexual minorities. This specialised court or committee will also give effect to the provisions contained in FREPR by allowing public interest litigation on behalf of sexual minorities.

5.3. **Conclusion**

Access courts remain the most effective route to access justice. Through courts, litigants can have their disputes addressed by a competent court of law and have their rights vindicated. *Locus standi* as a procedural rule to access courts if interpreted restrictively can prevent certain persons from accessing courts constituting a denial of access to justice.

A consideration of other states that have developed the interpretation of *locus standi* proves that the Common law approach was not developed in line with the transformative and modern legal thinking that considers principles of access to justice such as equality, effectiveness, and non-discrimination.

The research has proved that the restrictive common law approach to *locus standi* in Nigerian courts has led to the court's failure to utilise the litigation opportunities presented to them to test the constitutionality of anti-homosexuality laws, as a result leaving sexual minorities without any protection or measure to attempt to redress their violated rights. Nigeria’s failure to protect sexual minorities by denying them and interested parties access to courts, constitutes a direct violation of international human rights law. The failure of the courts to deal with the merits of matters brought before them especially where the rights of the marginalised and vulnerable are involved due

to rules of procedure also does not reflect the objectives of the Constitution and any of the International and Regional framework treaties.

To effectively provide for the right to judicial remedies for sexual minorities, Nigeria must reconsider the discriminatory laws against sexual minorities and the relaxation of procedural rules that limit public representation. By drawing on international law, it has been shown that public interest litigation has the potential to be an effective tool to protect the rights of sexual minorities in Nigeria.

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