TAXPAYERS' RIGHT IN CHALLENGING THE MISMANAGEMENT OF PUBLIC FUNDS IN NIGERIA: TOWARDS A LIBERAL APPROACH

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Abstract

Corruption has been recognised as a bane to development in Nigeria. The extant rules of standing in the Nigerian legal system empower the Attorney General and the Economic and Financial Crimes Commission (EFCC) as the competent authorities for instituting an action against public officials for misappropriation of public funds. However, available data on conviction rates for cases instituted against corrupt officials has revealed that the current system is ineffective. This begs the question; is a private citizen/ taxpayer competent to institute an anti-corruption action bearing in mind that corruption cases are criminally prosecuted? Should the fact that the funds constitute taxpayers' funds vest standing in the taxpayer? This paper analyses the Nigerian law on the subject. It also examines whether the *actio popularis* principle entrenched in the Fundamental Rights Enforcement Procedure Rules, 2009 ("FREP Rules, 2009") provides an opportunity for the private citizen/ taxpayer to institute an action where the misappropriation of public funds violates the human rights obligation of the state. This paper also examines the standing of private citizens to prosecute anti-corruption cases under international law and in the European Union. This paper argues that in order to make the fight against corruption effective, the Court would have to adopt a liberal approach to the interpretation of the standing rules in Nigeria and give life to the *actio popularis* principle captured in the FREP Rules, 2009.

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1. Introduction

Nigeria, as we know today, is a country where corruption has become a way of life and has penetrated deep into every fabric of the government and the society at large. The pervasiveness of corruption in the country has become a menace which undermines democratic governance and impedes economic growth and development. The overwhelming influence of corruption at all levels of government and in the various sectors of the country led to the enactment of the Corrupt Practices and Other Related Offences Act 2000 and the Economic and Financial Crimes Commission (Establishment) Act 2002 which created the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and the Economic and Financial Crimes Commission (EFCC), respectively. Despite the creation of these specialised anti-corruption agencies, they have not been effective in combatting corruption in Nigeria[1].

The current trends of corrupt practices in Nigeria have created a system of kleptocracy where billions of dollars are being siphoned illegally from public coffers into private hands every year[2]. This was confirmed by the acting chairman of EFCC who

[1] A. Albert & F.C. Okoli, *EFCC and the Politics of Combatting Corruption in Nigeria (2003 – 2012)*, 23 J. Fin. Crime 725 (2016).
[2] M Page, *Nigeria's kleptocracy has been stealing public funds forever. Here's how to stop it*, Washington Post, 22 July 2016.

noted that over $3.6 billion (1.3 trillion naira)[3] was stolen from public purse between 2011 and 2015[4].

Although the 1999 Constitution[5] and the EFCC Act[6] vest the power to prosecute corruption-related offences in the Attorney-General and the EFCC respectively, these agencies have failed to nip the issue in the bud or make any significant progress in the anti-corruption fight. A number of factors appear to be militating against the effectiveness of the specialised agencies of Government[7] in their fight against corruption and they include; political interferences[8] in the anti-corruption fight, lack of technical capacity of the staff engaged in the specialised agencies, inadequate funding which results in operational incapacity, etc[9]. Consequently, corruption continues to remain a bane to national development in the country and pose a threat to the actualisation of economic and social rights[10]. It is therefore clear that building strong institutions in the fight against corruption is imperative if Nigeria is to ever have a real shot at development[11].

However, while the specialised anti-corruption agencies continue to perform sub-optimally in the fight against mismanagement of public funds, there is need to examine the question of whether the average Nigerian citizen ought to have the

[3] In addition to the fiscal cost associated with the failure of the government to effectively combat corruption, there are other ways in which corruption affects the fabric of the Nigerian society, such as; increased social evils (tribalism, fraud, nepotism), erosion of moral values, disregard for the rule of law, absence of transparency in government, etc. See P. Nmah, *Corruption in Nigeria: A Culture or Retrogressive Factor*, 13 OANJAS 116 (2017).

[4] L. Papachristou, *Nigeria: US 3.6 Billion Dollars in Public Funds Stolen, Says Anti-Graft Body*, 2 OCCRP 12 (2019). In addition, PwC Nigeria estimates that by 2030, corruption will cost Nigeria approximately 37 percent of GDP if left unabated.

[5] Section 174.

[6] Section 6 (m).

[7] The Office of the Attorney General (Ministry of Justice), EFCC, and ICPC.

[8] There have also been claims by observers that the EFCC has been utlised by the ruling party in Nigeria to selectively prosecute anti-corruption cases against members of the opposition party. See O. Adeshokan, *Nigeria's EFCC Boss Suspended from Office following Secret Tribunal*, The Africa Report, 17 July 2020.

[9] E. Onyeama et al., *The Economic and Financial Crimes Commission and the Politics of (in) effective Implementation of Nigeria's Anti-Corruption Policy*, 1 ACE Working Paper 7 (2021).

[10] T. Osipitan & A. Odusote, *Nigeria: Challenges of Defence Counsel in Corruption Prosecution*, 10 AUDJ 71 (2014).

[11] See N. Okonjo *Nigeria lacks institutions, systems, to prevent corruption*, Premium Times, 17 February 2015.

right to institute an action against such persons stealing from public funds. This is particularly in light of the fact that the money which has been looted and forms the subject matter of the offence is the collective wealth of Nigerians, that is, Nigerian taxpayers. The justification for considering the right of private citizens to challenge the mismanagement of public funds is that the private citizen is not affected by the political and institutional issues which prevent the specialised agencies from being effective. It is against this background that this paper seeks to examine the traditional rules of *locus standi* of taxpayers in anti-corruption cases in Nigeria. The second part of this paper shall address the *locus standi* of the taxpayer to institute anti-corruption cases in Nigeria. The third part addresses the potential or otherwise in utilising the principle of *actio popularis* in human rights jurisprudence to circumvent the limitations placed on the right of the taxpayer by the *locus standi* rule. The fourth part of this paper examines the rules which have evolved in other jurisdictions for protecting the right of the taxpayer to challenge the mismanagement of public funds. The fifth and final part of this paper concludes the paper and makes recommendations for protecting the right of the taxpayer to challenge the mismanagement of public funds in Nigeria.

2. The *locus standi* of the taxpayer in anti-corruption cases in Nigeria

The term '*locus standi*' implies the legal capacity of a person to initiate a proceeding in a court of law. It is the right of a party to appear and be heard on a question before the court or tribunal[12]. *Locus standi* is a threshold issue and its determination one way or another has an impact on the access to justice of a litigant and power of the court to exercise jurisdiction[13]. Accordingly, this rule has posed serious problems to both the litigants and the Courts in the past[14]. Against the backdrop of the need to explore the option of having private citizens challenge the mismanagement of public funds, there is need to question whether apart from the Attorney General and the EFCC, citizens ought to have the requisite standing

[12] Senator Adesanya v. President of Nigeria & Anor, 2 NCLR 358 (1981).
[13] O. Oyewo, *Locus Standi Administrative Law in Nigeria: Need for Clarity of Approach by the Courts*, 13 IJSRIT 79 (2016).
[14] E. Taiwo, *Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision*, 9 AHRLJ 549 (2009).

to bring an action against government officials for acts of fraud perpetrated in relation to taxpayers' money. In other words, can a taxpayer have *locus standi* to institute an action against the government for the misappropriation of tax funds? There is no clear answer to this question under Nigerian legal jurisprudence. The only constitutional provision that seemingly confers this right to a taxpayer in public interest litigation is Section 6(6) (b) of the 1999 Constitution of the Federal Republic of Nigeria. Based on this provision, a claimant must show that his civil rights and obligations have been affected and that he has sufficient interest in the subject matter of the action in order have the standing to sue[15]. Nigerian courts have overtime interpreted this provision strictly in determining the standing of a claimant. This is exemplified in the Supreme Court case of Senator Adesanya v President of Nigeria[16], where the court held that a plaintiff will have *locus standi* only in matters where he has a sufficient or special interest or injury. Undeniably, this approach to the interpretation of *locus standi* in public interest litigation makes it difficult to challenge unconstitutional conduct and recklessness in the management of public funds in Nigeria[17].

In Hon Wunmi Bewaji v. Chief Olusegun Obasanjo[18], the appellant initiated a suit at the Federal High Court claiming that being a citizen of Nigeria and a taxpayer, his civil rights and obligations under the provisions of Section (6)(6)(b) of the 1999 Constitution had been adversely affected by the imposition of petroleum taxation by the respondents. The suit was struck out on ground of lack of *locus standi*. On appeal, Omoleye JCA held thus: «Under public law, an ordinary individual or a citizen or a taxpayer without more will generally not have *locus standi* as a plaintiff. This is because such litigations concern public rights and duties which belong to and are owed all members of the public including the plaintiff. It is only where the individual has suffered special damage over and above the one suffered by the other members of the public generally that he can sue personally […] In the instant case, I am of the view that there is not in issue any legal right

[15] Senator Adesanya case cit. at 12 above, 385-386.
[16] *Ibidem*.
[17] R. Salman & O. Ayankogbe, *Denial of Access to Justice in Public Interest Litigation in Nigeria: Need to learn From Indian Judiciary*, 53 JILI 594 (2011)
[18] 9 NWLR 1093 (2008).

peculiar to the Appellant. There is therefore nothing relating to his legal position which the court can declare.

Similarly, in Fawehinmi v Mrs Maryam Babangida[19], the defendant, the First Lady of Nigeria between 1985 and 1993, initiated a project known as the Better Life Programme on which a large portion of public funds was expended. Chief Fawehinmi initiated this action to challenge the unauthorized and extra-budgetary expenditure of public funds on the programme. The court adopted the strict and narrow interpretation of *locus standi* and held that a citizen and a taxpayer in Nigeria lacked the standing to challenge the expenditure of public funds by the office of the First Lady on the programme.

From the abovementioned cases, it is clear that an average citizen and a taxpayer will usually have no standing to sue in anti-corruption cases for the mismanagement of public funds unless the taxpayer is able to show that he has suffered a direct injury or damage over and above that suffered by the public generally[20]. This restrictive application of *locus standi* has however been heavily criticized as giving government officials the latitude to misappropriate taxpayers' money without taking into consideration the interests of the citizens. It has therefore led to the burning question of whether a taxpayer should stand aloof without challenging the government on what it is using the taxpayers' money to do.

The case of Fawehinmi v President FRN and Ors[21] provides a positive interpretation in this regard. In this case, the appellant who was a former political chairman and a taxpayer, initiated an action against the government about the payment of the salaries and allowances of two ministers in foreign currency which is contrary to the provisions of Certain Political, Public and Judicial Office Holders (Salaries and Allowances, et cetera) Act. While the Government argued that Appellant has no standing since he could not show a sufficient interest or threat of injury he would suffer in the matter over and above those of the general public, the appellant on his own part contended that he is a taxpayer and that he has *locus standi* to challenge the government on what it is using the taxpayers' money to do. The trial court struck out the suit on the ground that the appellant had no locus to the suit. On appeal to the

[19] Unreported Suit No. LO/532/90.
[20] Bewaji's case cit. at 18.
[21] 14 NWLR 275 (2007).

Court of Appeal, it was commendably held that if a taxpayer lacks the standing to challenge the action of the government, who then would. Aboki JCA, in delivering the lead judgment held that: «It will definitely be a source of concern to any taxpayer, who watches the funds he contributed or is contributing towards the running of the affairs of the state being wasted when such funds could have been channelled into providing jobs, creating wealth and providing security to the citizens. If such an individual has no sufficient interest of coming to court to enforce the law and to ensure that his tax money is utilized prudently, who else would have sufficient interest in such matter other than him […] In our present reality, the Attorney General of the Federation is also the Minister of Justice and a member the Executive Cabinet. He may not be disposed to instituting an action against the Government in which he is part of, it may tantamount to the Federal Government suing itself. Definitely, he will not perform such a duty».

The *ratio* of the Court in this case aptly captures the challenge in having the Attorney General (a member of the executive) instituting action against members of the executive for misappropriation of funds. Also, there is no doubt that the above decision completely deviates from the restrictive rule in *Adesanya's case* and provides a taxpayer with the requisite *locus standi* to sue. This is significant as it provides evidence of Nigerian courts clothing the taxpayer with the standing to sue for the mismanagement of public funds[22]. This liberal approach of *locus standi* has been applied in several cases including the case of Williams v. Dawodu[23], Shell Petroleum Development Co. Ltd. & 5 Ors. v. E.N. Nwaka & Anor[24], and Ladejobi v Oguntayo[25].

Notwithstanding the court's reasoning in *Fawehinmi v President FRN,* the Federal High Court in *Falana v National Assembly*[26] struck out a suit initiated by a prominent human rights activist to challenge the powers of members of the National Assembly to award enormous salaries and allowances to themselves. Although the applicant had claimed that as a taxpayer,

[22] See I. Olateru-Olagbegi, *An Examination of Taxation as a Means of Establishing Locus Standi for the Taxpayer in Anti-Corruption Cases in Nigeria*, 6 Unilag L. Rev. 12 (2017).
[23] 4 NWLR 189 (1988).
[24] 10 NWLR 64 (2001).
[25] 18 NWLR 153 (2004).
[26] Unreported FHC/L/CS/13.

the amount of money being spent on the legislators was bogus and an unnecessary public expenditure, the court held that he lacked the standing to sue as he was unable to prove that he had suffered a greater injury than other Nigerian citizens as a result of the actions of the legislators.

In the fight against corruption, citizens and tax payers should be able to institute an action against looters of public funds which include taxpayers' money and which could have otherwise been used for the general development and growth of the country. Furthermore, there is doubt as to whether the Attorney General can diligently prosecute in this instance considering the fact that he is a member of the government and it may amount to the government suing itself. Evidence has also shown that prosecuting agencies such as the EFCC do not diligently prosecute many high profile anti-corruption cases and this has ultimately led to the acquittal of perpetrators of massive fraud and looting on grounds of legal technicalities[27]. It is therefore necessary for a citizen and taxpayer who wishes to challenge the misappropriation of public funds by government officials to be granted the *locus standi* to institute an action. Such a taxpayer should not be chased out of court on the ground that he is a meddlesome interloper or busy body who has no interest in the matter and is merely looking for trouble. *Locus standi* should not be the reason a public-spirited taxpayer would not be allowed to challenge unconstitutional actions of the government.

One of the reasons that have been canvassed for the refusal to allow taxpayers institute actions challenging the actions of government is that it will lead to a floodgate of litigation. However, as was noted by one legal writer, what should be considered is not the number of litigants but the dispensation of justice[28]. This is simply because the funds are paid by the taxpayers in a social contract with expectation of developments, and where they are mismanaged or stolen, they should have a right to challenge this. To insist on the contrary is to make the archaic *locus standi* rule a shield for corrupt officials who know that the specialised anti-corruption agencies are ineffective.

Additionally, the dictum of Pats-Acholonu JCA in Shell Petroleum Development Co. Ltd & 5 Ors v EN. Nwawka and

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[27] I. Bolu, *The Anti-Corruption Legal Framework And Its Effect On Nigeria's Development*, Mondaq, 13 May 2016.
[28] B. Amadi, *Socio-Legal Approaches to the Enforcement of Tax Compliance in Nigeria*, 11 NAUJILJ 161 (2020).

Anor[29], is instructive on the issue of the fear of floodgates of litigation being a bar to the right of the public-spirited taxpayer to challenge the actions of government officials. The learned Justice of the Court of Appeal noted as follows: «The development of the law of *locus standi* has been retarded extensively due to fear of floodgate of persons meddling into matters not even remotely connected with them. In my opinion, let them sue and let the court remove the wheat from the chaff... I believe that it is the right of any citizen to see that law is enforced where there is an infraction of its being violated in matters affecting the public law and in some cases of private law such as where widows, orphans are deprived, and a section of the society will be adversely affected by doing nothing. The justice of a taxpayer's suit lies in granting him the purpose for which the tax is paid and not on the number of suits that could be instituted thereto. The only way the issue of floodgate could be reasonable curtailed is ensuring judicious and judicial use of taxpayer's money. No taxpayer would go to court when he is seeing the dividend of his tax fund».

The dictum of the learned Justice above puts the floodgate argument in context. There is no doubt that the floodgate argument does nothing but stunts the development of the law in this regard and consequently the development of the nation. The learned justice however failed to provide for tests or conditions a taxpayer will be required to satisfy in order to exercise this right. Surely, allowing all taxpayers is inimical to achieving justice in the circumstance and will simply fail to achieve the objective behind allowing taxpayers challenge the actions of government in relation to the mismanagement of public funds.

Interestingly, the current position of the law is difficult to reconcile against the backdrop of the Freedom of Information Act which provides that every citizen, whether interested or not, has the right to request for information which is in the custody of any public official[30]. The interesting question therefore becomes, when the taxpayer requests for this information and finds discrepancies in the information provided or discovers the mismanagement of public funds, can the taxpayer then institute an action against the public official or public authority? The answer, based on the position adopted by the courts and analysed above; is no. it would

[29] 10 NWLR (2001).
[30] Section 1.

therefore mean that the law appears to be providing for a right without a remedy[31].

3. Can the *actio popularis* principle contained in the FREP Rules affect the justiciability of a taxpayers' right?

The *actio popularis*, otherwise known as public interest litigation, encompasses an action brought by a person or group in the interest of the public. It was developed under the Roman law for the purpose of granting better access to court to any member of the public who wishes to challenge the breach of a public right or duty. Public interest litigation serves as a medium for protecting, transforming and liberating the interest of marginalized groups[32].

According to one writer, the scope of public interest litigation: «cuts across every facet of human endeavour, ranging from but not limited to the following: infringement of human rights or violation of rights of marginalised groups, environmental degradation, failure and or neglect to provide and or maintain public infrastructures, employment and housing discrimination, environmental regulation, reform of prisons amongst a host of other areas where the interest of members of the public are adversely affected».

Nigeria's return to democratic governance in 1979 created a new space for civic activism and judicial review of governmental actions which civil rights and rule of law activists took advantage of, leading to a significant amount of public interest litigations coming to court[33]. In Adesanya's case, the question was raised as to whether a Senator who had participated in proceedings in the Senate for the confirmation of the Chairman of the Federal Electoral Commission (but had objected to the confirmation), had the requisite *locus standi* to institute an action on the ground that the appointment was unconstitutional. The Supreme Court held that he

[31] Although the law provides for a restrictive remedy in Section 1(3) of the Act when it states that a person can institute an action against the public authority where the public authority refuses to provide the information requested for. It does not however provide for a remedy where the person is dissatisfied with the information provided (in terms of mismanagement and not where the person is dissatisfied because information was not provided or incomplete information was provided).

[32] G. Akinrinmade *Public Interest Litigation as a Catalyst for Sustainable Development in Nigeria*, 6 OIDAIJSD 86 (2013).

[33] J. Otteh, *Litigating For justice: A Primer on Public Interest Litigation* (2021).

lacked the requisite locus to institute the action because he had participated in the debate that led to the confirmation of the appointment[34].

The case of Ukaegbu v. Nigerian Broadcasting Corporation[35] complicated public interest groups' search for representative legitimacy because the Court of Appeal formulated a distinction between the right of access to court and the right to establish a right of action that is personal to the litigant. Several decisions of the court have employed this distinction to throw out public interest group litigations on the grounds that the lead representatives of such actions did not have sufficient interests in the matter and that they did not show a direct damage or injury suffered over and above any other citizen in Nigeria[36]. In Shell Petroleum Development Co. Ltd. v. Otoko[37], the plaintiffs instituted an action in a representative capacity at the Bori High Court in Rivers state claiming compensation for deprivation of the use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The Court rejected the action and held that "it is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause or matter." The Supreme Court however adopted a liberal approach in Fawehinmi v Akilu[38] on the capacity of a private individual to initiate proceedings against suspected criminals. The Supreme Court held that the applicant as a person, a Nigerian, a friend and legal adviser to Dele Giwa, a journalist, had a right under the law to see that a crime is not committed and if committed, to lay a criminal charge against anyone known or reasonably suspected to have committed the offence. This decision clearly moves away from the restrictive views of *locus standi* adopted by the court in *Adesanya's case.*

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[34] It has however been noted that the floodgates of litigation did not open since Adesanya's case as conservative jurists had feared, as courts vacillated in many other subsequent cases over the true meaning of the Adesanya decision. See Otteh as above.

[35] 14 NWLR 551 (2007).

[36] See the decision of Archibong. J in Rita Dibia v NBC (FHC/L/CS/492/2004) where he relied totally on Ukaegbu v. NBC.

[37] 6 NWLR 693 (1990). See also Adediran v Interland Transport Ltd, where the plaintiffs instituted an action for nuisance due to noise, dust and obstruction of roads in the estate. The court held that the public or group cannot sue in a representative capacity and claim special damages when they do not suffer equally.

[38] 4 NWLR 797 (1987).

Section 46(3) of the 1999 Constitution empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure for the enforcement of human rights in Nigeria. Pursuant to this provision, Hon. Justice Idris Legbo Kutigi CJN (as he then was), promulgated the Fundamental Rights (Enforcement Procedure) Rules, 2009 (hereinafter 'FREP Rules') which replaced the previous FREP Rules of 1979. The Rules outline the procedure for the commencement of an action for the enforcement of fundamental human rights in Nigerian courts[39]. While the *actio popularis* principle is not expressly contained in the provisions of the 1999 Constitution, it is reflected in preamble 3(e) of the FREP Rules which provides that the court shall encourage "public interest litigations in the human rights field" and that "no human rights case may be dismissed or struck out for want of *locus standi*". This provision has subsequently been used to expand the applicability of *locus standi* in relation to fundamental human rights cases[40]. With the operation of the *actio popularis* contained in the FREP Rules, an applicant in a human right litigation may therefore include anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members or other individuals or groups[41].

There are arguments that the provisions of preamble 3(a) of the FREP Rules are inconsistent with the provisions of Section 6(6)(b) of the Constitution as the former discards the "sufficient interest test" interpreted by the Supreme Court in Adesanya's case and subsequently followed in a plethora of cases[42]. According to one writer, the FREP Rules have set a high standard for the court by seeking to override the express provisions of the 1999 Constitution on the extent of the judicial powers of the Courts[43]. Relying on the provisions of Section 1(1) and (3) of the

[39] A. Ekeke, *Access to justice and locus standi before Nigerian Courts* (2019).
[40] Olumide Babalola v A.G Federation & Anor (2018) CA/L/42/2016.
[41] FREP Rules 2009 preamble 3(e).
[42] Owodunni v. Registered Trustees of Celestial Church of Christ, 10 NWLR 315 (2000); Olawonyi v A.G Northern Region, 1 All NLR 1 (1961); Shell Petroleum Development Co. Ltd. v. Otoko, 6 NWLR (1990) 693; Busari v. Oseni 4 NWLR 557 (1992).
[43] A. 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*, 11 AHRLJ 526 (2011).

Constitution[44], he submits that all the provisions of the FREP Rules which are inconsistent with the Constitution stand the risk of being declared null and void to the extent of their inconsistency[45]. This view can be seen in SERAP and others v Nigeria[46], which was initiated under the FREP Rules 2009. The Federal Government contended that the enactment by the former Chief Justice of Nigeria Idris Legbo Kutigi of the FREP Rules 2009: «exceeded his Constitutional powers by liberalising the rules on *locus standi*, permitting public impact litigation, and allowing the inclusion of the African Charter on Human and Peoples' Rights in the Rules».

However, some writers are of the opinion that the Rules, having been made by the Chief Justice of Nigeria, are akin to subsidiary legislation[47]. It has been argued that since the Chief Justice derives his power to make the Rules under section 46(3) of the 1999 Constitution, the Rules have been elevated from the status of mere subsidiary legislation to the same status as the Constitution[48]. This view has also been upheld by the Court of Appeal in Abia State University, Uturu v. Chima Anyaibe[49], where it was noted that the FREP Rules form part of the Constitution and therefore enjoy the same force of law as the Constitution.

It seems that there is no settled law on the standing of litigants as public litigation and representative action has been

[44] Section 1 (1) of the 1999 Constitution provides thus: «This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria». Subsection (3) provides that «If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void».

[45] Sanni cit. at 43, 528.

[46] FHC/ABJ/CS/640/10.

[47] E. Nwauche, *The Nigerian Fundamental Rights (Enforcement Procedure) rules 2009: a fitting response to problems in enforcement of human rights in Nigeria?*, 10 AHRLJ 513 (2010).

[48] Since the 2009 FREP Rules were made pursuant to Section 46 (3) of the 1999 Constitution, they are deemed to be at par with the constitutional provisions. They possess the same force and potency of the Constitution. They are thus of a higher status than other laws in the hierarchy of laws in this country. In the event of any inconsistency between the FREP Rules and any other law, the former will prevail to the extent of such inconsistency.' See O. Duru, *An Overview of the Fundamental Rights Enforcement Procedure Rules* (2009).

[49] (1996) 1 NWLR (Pt 439) at 660-661.

allowed in a host of other cases[50] for the purpose of providing access to justice for the enforcement of human rights. Can the *actio popularis* principle which has undoubtedly fostered human rights litigation in Nigeria therefore affect the justiciability of a taxpayer's right to prosecute anti-corruption cases? The answer to this would be in the affirmative. There is no doubt that a relationship exists between challenging corruption and enforcing human rights[51]. The waste and mismanagement of public funds leaves governments with fewer resources to fulfil their human rights obligations, to deliver services and to improve the standard of living of their citizens[52]. The impact of corruption is often considered to be especially pronounced in relation to economic, social and cultural rights[53], which are contained in Chapter II of the 1999 Constitution and are known as the Fundamental Objectives and Directive Principles of State Policy. Chapter II places obligations on the government to ensure the security and welfare of the people; control the national economy in such a manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity; that the material resources of the nation are harnessed and distributed as best as possible, and that there are adequate medical and health facilities for all persons, among others[54]. However, these provisions are non-justiciable pursuant to Section 6(6) (c) of the Constitution[55]. It is therefore difficult for a taxpayer to initiate an action for the enforcement of the provisions of Chapter II or challenge the government on that basis or even call on the government to account for revenue collected under the Constitution or any local legislation[56]. An aggrieved taxpayer can however institute an action

[50] Dilly v Inspector General of Police & Ors CA/L/12/2013; Nosiru Bello v A.G Oyo State, 5 NWLR 828 (1986); Shobayo v. C.O.P, Lagos State suit No. ID/760M/2008; Ahmad v. S.S.H.A 15 NWLR 539 (2002).

[51] K. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EJIL 4 (2019).

[52] UNODC, Impact of corruption on specific human rights, 27 March 2021.

[53] *Ibidem*.

[54] K. Lerkwagh et al., *The protection of the rights of the taxpayer: a legal conundrum in Nigeria*, 6 IJL 47 (2020).

[55] See Bishop Olubunmi Okogie v. Attorney General, 2 NCLR 337 (1981), where the court held that the Fundamental Objectives of the nation and the Directive Principles of State Policy laid down in Chapter II of the Constitution are non-justiciable.

[56] However, in Registered Trustees of the Constitutional Rights Project v. President FRN & Ors, 14 UNLAG 669 (1987), the court held that the African

through the FREP Rules on behalf of other taxpayers as it has now been recognised that actions arising from income tax can give rise to an action under the FREP Rules[57] and the enforcement of community or group rights can be brought in a representative capacity where the plaintiff shows sufficient interest as seen in *Fawehinmi v. President FRN.*

4. The right of the taxpayer to challenge mismanagement of public funds in other jurisdictions

It is imperative to examine the extant position on how the *locus standi* of taxpayers to sue in anti-corruption cases is viewed, especially for countries whose courts have moved away from the strict and narrow interpretation of *locus standi* to a more liberal approach. The progressive trends in these jurisdictions will no doubt prove invaluable in persuading the Nigerian courts to relax the rigid rules of *locus standi* and pave way for a more liberal interpretation, particularly with respect to the standing of a taxpayer to challenge the misappropriation of taxpayers' public funds by government officials.

4.1. Specific Country Examples

4.1.1. United Kingdom

In the United Kingdom, the courts have adopted a liberal interpretation to the "sufficient interest" criterion of *locus standi*. In Inland Revenue Commissioners v. National Federation of Self-employed and Small Business Ltd[58], a group of taxpayers challenged the legality of a tax amnesty scheme created between Inland Revenue Commissioners (IRC) and a group of printing

Charter on Human and Peoples' Rights being an international treaty is superior to local legislation including Decrees of the Military Government of Nigeria. Consequently, it has been argued that since Nigeria is a member of the African Union and a signatory to the African Charter on Human and Peoples' Rights which has been domesticated, a Nigerian taxpayer may rely on the provisions of the Charter in order to ventilate his grievances despite the fact that Chapter II of the Constitution is non-justiceable. See Lerkwagh et al cit. at 55; O. Umozurike, *The Application of International Human Rights Instruments and Norms of Nigeria*, Paper presented at Human Rights Training Seminar for Law Students organised by Constitutional Rights Project, Nike Lake Hotel, Enugu 8-11 October, 1997.

[57] Panapina World Transport Nig. Ltd. v. Lagos State Board of Internal Revenue & 2 Ors, 10 TLRN 174 (1999); Egbounu v. B.R.T.C. 12 NWLR 29 (1997).

[58] AC 617 (1982).

industry workers who evaded taxes due on earnings for casual labour for several years. The scheme was made on the condition that no investigations would be made concerning payment of all taxes owed in previous years provided the printing workers registered for tax purposes. Although the House of Lords held by majority that the National Federation lacked *locus standi* due to its failure to show any illegality in the amnesty granted by the IRC, Lord Diplock noted in dissent thus: «It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped».

4.1.2. India

In India, the restrictive doctrine of *locus standi* in public interest litigations and judicial review has been relaxed through judicial activism[59] notwithstanding the fact that the country's constitution makes no provision for the liberalization of the doctrine. Public interest litigation has now become an effective tool used for the purpose of addressing issues relating to the poor and marginalized in the country[60]. The case of Hussainara Khatoon v State of Bihar[61] is one of the earliest cases where the Indian courts adopted a liberal approach to the principle of *locus standi*. The case involved the rights of prisoners under trial and the harsh and disturbing conditions of prisons in the State of Bihar. Standing was granted to an advocate who filed a petition on behalf of the prisoners for the purpose of ensuring the safeguard of their personal liberties. The right of a taxpayer to challenge misuse of funds by a local authority has also been recognized by the courts in India. In R. Varadarajan v Salem Municipal Council[62], the court noted that the petitioner, as a taxpayer, is entitled to make a complaint that the Municipal Council should not spend municipal funds for the maintenance of a statue that has been erected in

[59] S. Sen, *Public Interest Litigation in India: Implication for Law and Development*, 16 MCRGKI 7 (2012).
[60] T. Ngcukaitobi, *The evolution of standing rules in South Africa and their significance in promoting social justice*, 18 SAJHR 601 (2002); See also A. Verma, *Impact of public interest litigation on public administration*, Ipleaders, 20 October 2020.
[61] AIR 1979 SC 1377.
[62] AIR 1973 Mad 33.

violation of an Act. The Indian authorities on this issue are uniform and have clearly shown that a claimant can sue in his individual capacity if he is sufficiently interested in the municipal fund[63].

4.1.3. United States

In the United States, the standing of a taxpayer was initially examined in Frothingham v Mellon[64] and Massachusetts v Mellon[65] where the Supreme Court considered the question of whether a plaintiff can rely on his status as a taxpayer to challenge the constitutionality of a federal statute. The Court unanimously rejected the concept of taxpayer standing and noted that a plaintiff lacked the requisite standing to challenge a federal statute as unconstitutional solely on the basis that he was a taxpayer since his interest in the treasury moneys is shared with millions of others and is too small to determine[66]. However, in Flast v Cohen[67], the Supreme Court narrowed the rule in Frothingham for the purpose of determining the standing of a taxpayer to challenge the unconstitutional use of tax funds. The case involved a group of taxpayers challenging the government for the unconstitutional use of federal funds on religious schools which contravenes the First Amendment ban on the establishment of religion. While allowing the appeal, the Court adopted two tests in order to determine the standing of a taxpayer to challenge the federal government on public expenditure.

First, the plaintiff must show a logical connection between his status as a taxpayer and the type of legislative enactment attacked. Second, he must show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power, rather than simply proving that the enactment is generally beyond the powers delegated to the Congress. Some jurisdictions within the United States have accorded standing to a taxpayer to challenge an unconstitutional action of the government with respect to public funds. In Florida,

[63] Yasan v Municipality of Bholapur, 22 LL.R.Bom. 646 (1898); Municipal Corporation, Bombay Municipality v Govind Laxman, 34 AIR Bom. 229 (1949); Narendra Nath v Corporation of Calcutta, 45 AIR Cal 102 (1960); Chittibabu v Commissioner, Corporation of Madras and o.rs W.P. Nos. 1567 and 1568 of 1969.
[64] 262 U.S. 447 (1923).
[65] 89 262 U.S. 447 (1923).
[66] Frothingham, cit. at 64.
[67] 392 U.S. 83 (1968).

the taxpayer has the standing to institute an action against the government on two grounds; where the actions of the government in relation to public funds is unconstitutional and when the action of the government caused the taxpayer to suffer harm that has not been suffered by other taxpayers[68]. In Missouri, an aggrieved taxpayer may institute an action against a governmental unit for an alleged illegal or improper act[69]. Based on the decision of the Court in Collins v Vernon[70], the reasoning behind this rule lies in the fact that: «a taxpayer has equitable ownership in public funds and the illegal expenditure of these funds subjects that taxpayer to further liability in the replenishment of money which was misappropriated»[71].

The Supreme Court of Alabama also reiterated this position in Alabama State Florists Association, Inc. v Lee County Hospital Board[72], where it held that the plaintiffs as taxpayers have the standing to maintain a suit for the purpose of preventing the misappropriation of county funds[73]. In the state of Virginia, a taxpayer who has suffered no special damages will have no standing to sue to recover money alleged to be illegally paid out until he first requests the appropriate authorities to sue or shows that such a request would be unavailing[74].

4.2. European Union

This section of the paper shall analyse the framework for combatting corruption in the European Union against the right of the taxpayer to institute actions in anti-corruption cases. Despite the image posed by members of the European Union as being transparent and accountable, the Global Corruption Barometer (GCB) in a survey of 40,000 individuals, 62% believed that acts of

[68] O. Ifeoluwagbeminiyi, *The Locus Standi of a Taxpayer to Challenge Public Expenditures*, www.academia.edu
[69] Champ v Poelker 755 S.W.2d 383 at 387; Newmeyer v Mo. & Miss. R.R. Co. 52 Mo. 81 (1873).
[70] 512 S.W.2d 470 (Mo. App. 1974) at 473.
[71] See also Everett v County of Clinton 282 S.W.2d 30, 34 (Mo. 1955).
[72] 479 So. 2d 720, 722 (Ala 1985).
[73] See also, Thompson v Chilton County 236 Ala. 142, 181 So.701 (1938); Court of County Revenues for Lawrence County v Richardson 252 Ala. 403, 41 So. 2d 749 (1949); Zeiler v Baker 344 So. 2d 761 (Ala. 1977); Henson v HealthSouth Med. Centre 891 So. 2d 863, 866 (Ala. 2004).
[74] 171 Va. 421 (Va. 1938) at 424.

corruption involving the government was a major problem[75]. These numbers are reflective of the fact that most South Eastern and Eastern European countries have been embroiled in corruption allegations[76].

An anti-corruption report was established by the European Commission in 2011, with the aim of assessing the effects of EU members with regards to their fight against corruption[77]. This was an initiative created alongside the Council of European Group of States against Corruption (GRECO), a partnership with saw the creation of a detailed anti-corruption policy[78]. The EU and the Council of Europe have been able to put in place, a number of Conventions allowing the criminalisation of corruption, as well as ensuring that specialised agencies in the nations, private individuals, and now an EU sanctioned body, sue for acts of corruption. The Conventions include:

4.2.1. Criminal Law Convention on Corruption

The Treaty was introduced to protect the society from the adverse effects of corruption and ensure that proper legislative measures are put in place. It also highlights the fact that corruption not only affects the rule of law, but also ridicules democracy and human rights[79]. The Convention provides that countries should criminalise acts of active corruption, as well as acts of passive corruption involving a public official. The Convention ensures that countries have a central body whose duty it is to prosecute corruption actions[80]. Article 20 states that: «Each party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The party shall ensure that the staff of such entities has adequate training and financial resources for their tasks«.

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[75] See Transparency International European Union Report (2021), available at www.transparency.org/en/gcb/eu/european-union-2021

[76] A. Popescu, *Corruption in Europe: Recent Developments*, 13 CES 150 (2014).

[77] *Ibidem*, 152.

[78] Supra n. 2.

[79] Criminal Law Convention on Corruption CETS 173/1 (1999).

[80] Criminal Law Convention on Corruption CETS 173/6 (1999).

Essentially, the Convention highlights the fact that private individuals cannot seek criminal actions against public officials with matters that have to deal with corruption.

4.2.2. Civil Law Convention on Corruption, 1999

The Treaty, which was established with the aim of fighting corruption, as well as ensuring that individuals who have been affected by the acts of corruption can receive fair compensation for the damage suffered[81]. The Treaty provides that state parties ensure that effective remedies are inputted in its law, ensuring that persons who have suffered certain damages due to acts of corruption are able to defend their right – including getting compensation for the damages[82].

According to the Treaty, corruption can be described as: «Requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospected thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof»[83].

Thus, the Treaty ensures that private individuals who have interests in various acts of corruption can sue when they are directly affected. Further, countries signed to the Treaty are to input into their internal law, provisions that enable persons who have suffered certain damages to have the right to initiate legal action in a bid to access full compensation for the damage[84]. It also provides that the compensation also includes material damage, profits that have been lost, as well as non-pecuniary losses[85].

Article 4 of the Treaty additionally provides for the conditions which parties have to prove to ensure that the occurred damage can be compensated. They include:
1. Where the defendant has committed a corrupt act, or failed to prevent the occurrence of a corrupt act;
2. Where the plaintiff has suffered damage;

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[81] Civil Law Convention on Corruption CETS 174/1 (1999).
[82] See Civil Law Convention on Corruption CETS 174/2 (1999). Article 1 of the Convention states that "Each party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage".
[83] Civil Law Convention on Corruption CETS 174/2 (1999).
[84] *Ibidem*.
[85] *Ibidem*.

3. Where there is the existence of a causal link between the corrupt act and the damage which occurred.

Having established the fact that private individuals can sue for acts of corruption, the Treaty further provides that the State can be held responsible for acts committed by a public official. Article 5 of the Treaty states that countries must provide in its laws, proper procedures which individuals who have been affected by the act of corruption by a public official in the exercise of their duties, can claim compensation for from the State[86]. It is however provided that where the plaintiff is partly or wholly at fault, the compensation be reduced or not granted[87].

4.2.3. Convention against Corruption involving Public Officials, 2005

The Convention was introduced to ensure that necessary measures are implemented by the European Union States to ensure that acts of corruption involving public officials is duly criminalised[88]. Additionally, the Convention was established to combat corruption by European or national officials of EU countries, as well as ensuring that judicial cooperation amongst EU countries is well fostered[89].

The Convention provides that countries put in place effective means to ensure that active and passive corruption within their territories are criminalised[90]. Also, effective and proportionate sanctions must be in place to dissuade corrupt act[91]. Article 8 (2) of the Convention states that Member states who opt not to extradite the individual to a member State based on his nationality, must submit the case to its competent authorities with the aim of prosecution where it is appropriate[92].

It is however important to note that despite these laws, EU nations have not fully implemented them, with countries like Hungary being accused of mismanagement of EU funds, as well as

[86] Civil Law Convention on Corruption CETS 174/2 (1999), Article 5.
[87] Civil Law Convention on Corruption CETS 174/2 (1999), Article 6.
[88] Convention against Corruption involving Public Officials] OJ C195/1 (2005), Preamble.
[89] *Ibidem*.
[90] Convention against Corruption involving Public Officials] OJ C195/2 (2005), Article 2 and 3.
[91] Convention against Corruption involving Public Officials] OJ C195/3 (2005), Article 5.
[92] Convention against Corruption involving Public Officials] OJ C195/4 (2005).

an inability to effectively prosecute acts of corruption within the country, and a compromise of the Hungarian judiciary[93].

These controversies were also compounded with the fact that the EU could not prosecute individuals who stole from them[94]. Rather, individual States were empowered to carry out the prosecution of such persons, and should the country opt not to prosecute, the EU could do nothing about it[95]. However, in June 2021, the EU decided to remedy this by establishing the European Public Prosecutions' Office (EPPO), empowering it to prosecute criminal cases involving the misuse of EU funds[96], as well as offences including VAT and customs[97].

4.3. Whistle-blowers in the EU

The implementation of whistle-blower policies is one strategy through which private individuals have been able to contribute to the fight against corruption. Although, this approach does not necessarily avail the private citizen the opportunity to prosecute an anti-corruption case unless the legal regime specifically provides for an avenue to do so. Whistle-blowers have proven important in recent time, and their effect has seen them being open to threats from large organisations and States as it combats the wrongs in the society[98]. Traditionally, whistle-blowers have been mandated to report to independent bodies, and this has been implemented by the European Union in the enactment of the EU Whistleblowing Directive. It ensures that acts of retaliation are not meted out to those who disclose such information and Member States implement laws protecting whistle-blowers[99].

It is important to note that prior to the implementation of the Directive, the protection of whistle-blowers was not fully considered by Member States - with some protecting only public

[93] J. Rankin, *EU Urged to Suspend Funds to Hungary over 'grave breaches of the rule of law*, The Guardian, 7 July 2021.
[94] M. Steinglass *The EU's New Anti-Corruption Cop will Start Prosecuting Scammers*, The Economist, 8 November 2021.
[95] The Economist, The EU gets a Prosecutor's Office of its own, 19 August 2021.
[96] In November 2021, the EPPO led a raid in Czechia, after allegations of corruption and manipulation of public contracts, seizing over sixteen thousand euros and searching several houses.
[97] In November 2021, the EPPO led a raid in Palermo, Italy, against a criminal syndicate alleged to have smuggled tobacco products into Italy.
[98] https://whistleblowerprotection.eu.
[99] Directive of The European Parliament and of The Council L 305/17 (2019]).

employees; others mostly focusing on employees in the private sector; and other States providing for whistleblowing of certain acts[100].

The EU Directive further notes that:

1.Widens the scope of individuals eligible to be protected under the Directive[101];

2. Ensures confidentiality and protect the identities of whistle-blowers;

3. Ensures that proper compensation is in place to ensure victims of whistle-blowing are duly protected;

4. Widens the scope of organisations that are affected; amongst others.

Despite the protection provided for under the law, the law does not extend to matters affecting national security, as it is a national matter[102]. Thus, the EU can only mandate countries to implement the Directive, but cannot fully act on such issues[103]. This therefore means that whistle-blowers are still not fully protected, and are open to being targeted or harassed by erstwhile aggrieved parties seeking to protect their interests.

5. Conclusion and Way Forward

The inability of the prosecutorial authorities to effectively prosecute the anti-corruption cases has made an examination of the right of taxpayers to ensure effective prosecution of anti-corruption cases necessary. This is important as the fight against corruption requires ingenuity and a departure from the traditional rules that have made the fight ineffective over the years[104]. This will also be helpful in developing our legal jurisprudence on the standing to sue in public interest litigation. The liberal approach of *locus standi*, as expressed in Fawehinmi v President FRN and adopted in other jurisdictions, is no doubt the more preferable view to the interpretation of the taxpayer's standing. The nature of taxpayers'

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[100] N. Nielsen, *EU-Wide Whistleblower Protection Law Rejected*, EU Observer, 23 October 2013.

[101] J. Stappers, *European Union: What Is Happening with The EU Whistleblower Protection Directive in The Different Countries?*, Mondaq, 26 February 2020.

[102] Directive of The European Parliament and of The Council L 305/17 (2019). Article 3(2) and (3).

[103] Treaty on European Union. Article 4.

[104] Human Rights Watch, *Corruption on Trial? The Record of Nigeria's Economic and Financial Crimes Commission*, 25 August 2011.

money is such that is sacrosanct to the growth and development of a country and its citizens. Consequently, in the event of the misappropriation of taxpayers' money by government officials, the average Nigerian citizen and taxpayer ought to have the standing to institute an action to challenge such fraudulent act and corrupt practice where the prosecutorial authorities are not willing to do so. However, this further begs the question – should the fear of floodgates of persons meddling into matters not even remotely connected to them be completely ignored all in a bid to encourage public-spirited taxpayers to challenge extravagant public expenditures? The answer to this question would be in the negative.

While it is admitted that the doors of the court ought to be opened to taxpayers to challenge government actions where the governmental authorities are unwilling to prosecute, it is recommended that a test be adopted as laid down in the US case of *Flast v Cohen* for the purpose of preventing mere busybodies from bringing frivolous cases before the courts. Thus, a claimant who intends to challenge a public expenditure should be able to show a nexus between his status as taxpayer and the type of public expenditure challenged. Furthermore, where an action is instituted to challenge a legislation used as an instrument to perpetrate fraud against public funds, the taxpayer should be able to show that such legislation was enacted outside of the government's constitutional powers.

Additionally, the courts are to adopt the practice of judicial activism in pushing the frontiers of our laws towards a path for development. This can be done by relaxing the *locus standi* rules in line with the approach adopted by other jurisdictions. The *actio popularis* principle can also be adopted where the mismanagement has resulted in the failure of the government to respect the human rights of the citizens and the government is refusing to make the officials responsible for such violation accountable. This will establish the action as a human rights suit[105]. It is time for the Nigerian courts to wholly accept public interest litigation into the country's legal jurisprudence and use it as tool to tackle corruption which has become a clog in the wheel of progress.

[105] Interestingly, there is evidence to suggest that an action rooted in taxation can give rise to an action under the Fundamental Rights Enforcement Procedure Rules, 2009 as was the case in Panapina World Transport case cit. at 57.

While developing our jurisprudence on providing access to court for taxpayers where unscrupulous government officials siphon public funds, the protective mechanisms in the whistle-blower policies should also be improved to enhance the participation of the taxpayers in the preservation of the fiscus from the pilfering hands of corrupt government officials.