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## I. Introduction

Human rights have enjoyed tremendous attention at both the international and domestic level. This is because the question of human rights is fundamental to mankind.<sup>1</sup> For a long time they have remained an issue strictly within national jurisdiction<sup>2</sup> and it was not until the 1940s when they became internationalized. This process of internationalization is traceable to some international instruments which recognize the need to promote and preserve human rights for the ultimate attainment of world peace.<sup>3</sup>

The first step of making human rights internationalized (worldwide) was achieved through the adoption of the Universal Declaration of Human Rights (UDHR) in 1948.<sup>4</sup> The second step commenced in 1966 with the adoption of two treaty instruments for the protection of human rights: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>5</sup> With these two treaties, the world is now endowed with a Bill of Human Rights by which the legitimacy of any government will be measured.

The question arises whether human rights in addition to being binding should also be enforceable. The answer is that once agreement has been reached on setting forth true rights, the necessary consequence is that such rights must indeed be incorporated into a system which secures their effectiveness through appropriate procedures and mechanisms.

Nigeria has ratified many international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR),<sup>6</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR),<sup>7</sup> the Covenant Against Torture and other cruel and Inhuman or Degrading Treatment (CAT),<sup>8</sup> the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)<sup>9</sup> and the Convention on the Rights of the Child (CRC).<sup>10</sup> Nigeria is also a party to the African Charter on the Rights and Welfare of the Child (ACRWC) and the African Charter on the Rights of Women in Africa.<sup>11</sup>

The provisions of these and other international human rights instruments including the UDHR<sup>12</sup> have been incorporated into our constitutions beginning from the post independence constitution of 1960,<sup>13</sup> the Republican Constitution of 1963<sup>14</sup> and the 1979 Presidential Constitution.<sup>15</sup> Furthermore, in

\* LL.M, LL.B, B.L. Lecturer, Faculty of Law, Lagos State University

\*\* Lecturer, Faculty of Law, Lagos State University.

<sup>1</sup> Azinge, E., "Milestone Decision on Human Rights", in (ed) A. U. Kalu and Y. Osinbajo; *Perspective on Human Rights*. Vol. 12, 1992, P. 197.

<sup>2</sup> The Magna Carta, 1215 in England, the French Declaration of 1789 and Virginia Bill of Rights, 1776.

<sup>3</sup> Azinge, E., *Op. Cit* at no. 1, P. 200. The internationalization of Human Rights through Modern Treaties found its origin in the United Nations Charter (See the Preamble and Article 1(3) of the 1945 Charter. See Umzurike, O. U., "The African Charter on Human and Peoples Rights", 177 *AJL*, 1983 pp. 902 - 912.

<sup>4</sup> Universal Declaration of Human Rights (UDHR), adopted and proclaimed by GA Res 217 - A (III), 10 December 1948. See also Tomuschat, C "Human Rights Between Idealism and Realism" Volume XII/T, Oxford. p.4.

<sup>5</sup> See C. Tomuschat, *Ibid*

<sup>6</sup> Adopted and opened for signature and accession by the General Assembly Resolution 2200A (XXI) of 16 Dec. 1966. Nigeria ratified on 29<sup>th</sup> July, 1993. See <http://treaties.un.org> Accessed 01/10/2012.

<sup>7</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) OF 16 Dec. 1966. Nigeria ratified on 29th July, 1993. <http://treaties.un.org>. Accessed 01/10/2012

<sup>8</sup> Nigeria ratified June 28th, 2001. <http://www2ohchr.org>. Accessed 01/10/2012

<sup>9</sup> Nigeria ratified in 1985. <http://www2ochr.org>. Accessed 01/10/2012.

<sup>10</sup> Nigeria ratified on April 19th, 1991.

<sup>11</sup> See "Nigeria: Defending Human Rights; Not everywhere, not every right. (International fact finding Mission Report). <http://www.omct.org>. Accessed 06/01/2013

<sup>12</sup> *Op. cit* at. No. 4

<sup>13</sup> Chapter II, 1960 Constitution of Nigeria.

<sup>14</sup> Chapter II, 1963 Constitution of Nigeria.

<sup>15</sup> Chapter IV, 1979 Constitution of Nigeria.

the 1999 Constitution (as amended), two chapters spanning 26 sections are devoted to human rights subject for their protection and enforcement.<sup>16</sup>

Chapter II<sup>17</sup> provides for fundamental Objectives and Directive Principles of State Policy.<sup>18</sup> The chapter provides for the sovereignty of the people, the political, environmental, social, economic and foreign policy objectives of the country. It also provides for the directive on Nigerian cultures, obligation of the mass media, national ethics and duties of the citizen. Although section 13<sup>19</sup> imposes a duty and responsibility on all organs of government and all authorities and persons to conform to, observe and apply the provisions of this chapter of the constitution, section 6(6) (c)<sup>20</sup> of the same constitution makes the obligation non-justiciable. This non-justiciability of economic, social and cultural rights otherwise known as 'second generation rights' in the trilogy of the general construct of human rights is one of the recurrent themes in political and legal discourse in Nigeria.<sup>21</sup> One of such arguments was that of Professor Osita Eze who opined that to the extent that socio-economic rights are not guaranteed, then to that extent will civil and political rights remain palliatives for the masses.<sup>22</sup>

Chapter IV of the Constitution<sup>23</sup> on the other hand provides for fundamental human rights which are expressly justiciable. These rights include: the right to life,<sup>24</sup> dignity,<sup>25</sup> personal liberty,<sup>26</sup> fair hearing,<sup>27</sup> private and family life,<sup>28</sup> freedom of expression and the press,<sup>29</sup> peaceful assembly and association,<sup>30</sup> freedom of movement,<sup>31</sup> freedom from discrimination,<sup>32</sup> and the right to acquire and own immovable property anywhere in Nigeria.<sup>33</sup>

Human rights that are enforceable in law are those rights which are recognized by law as fundamental rights as distinguished from mere aspirations or individuals ideas of rights.<sup>34</sup> The Nigerian Constitution does not provide for the enforcement procedure but section 46<sup>35</sup> provides that any person who alleges that his fundamental right has been, is being or likely to be contravened in any state may

<sup>16</sup> Chapters II and IV, 1999 Constitution of the Federal Republic of Nigeria.

<sup>17</sup> *Ibid.*

<sup>18</sup> See specifically sections 14 – 24 of the Constitution. *Ibid.* These rights are also known as Economic Social and Cultural Rights.

<sup>19</sup> Section 13, 1999 Constitution. *Op. cit* at no. 16

<sup>20</sup> Section 6(6) (c), *Ibid.* see also the case of *Okogie v. Attorney General of Lagos State* (1981) 1 NCLR, 218.

<sup>21</sup> See Dakas, CJ Dakas, "A Panoramic Survey of the Jurisprudence of Indian and Nigerian Courts on the justiciability of Fundamental Objectives and Directive Principles of State Policy", in Epiphany Azinge and Bolaji Owasanoye (eds.), *Justiciability and Constitutionalism: An Economic Analysis of Law* (Lagos: NIALS Press, 2010, pp. 262 – 263.

<sup>22</sup> See Julius Ihonvbere (ed.), *The Political Economy of Crisis and Underdevelopment in Africa: Selected Works of Claude Ake* (Lagos: Jad Publishers Ltd., 1989), at 91. See also Justice Baghwati in *Minerva Mills v. Union of India* (1980) Air SC 1789 at 1843.

<sup>23</sup> Chapter IV, 1999 Constitution. *Op. Cit* at No. 16

<sup>24</sup> Section 33, *Ibid.*

<sup>25</sup> Section 34, *Ibid.*

<sup>26</sup> Section 35, *Ibid.*

<sup>27</sup> Section 36, *Ibid.*

<sup>28</sup> Section 37, *Ibid.*

<sup>29</sup> Section 39, *Ibid.*

<sup>30</sup> Section 40, *Ibid.*

<sup>31</sup> Section 41, *Ibid.*

<sup>32</sup> Section 42, *Ibid.*

<sup>33</sup> Section 43, *Ibid.*

<sup>34</sup> See Duru, O. "An Overview of Fundamental Rights Enforcement Procedure Rules, 2009" <http://ssrn.com>, SSRN – id2156750(1).pdf, accessed 16/02/2013. See also *Ransome Kuti v. Attorney General of the Federation* (1985) 2 NWLR, 211 SCN. Where the Supreme Court said that fundamental right is a right which stands above the ordinary laws of the land and which in fact is antecedent to the Political Society itself. It is a primary condition to a civilized existence and what has been done by our constitution since independence is to have these rights enshrined in the Constitution.

<sup>35</sup> See Section 46(1), 1999 Constitution. *Op. cit* at no. 16 See Section 46(3), *Ibid.* A similar provision was also made under section 42(3) 1979 Constitution of Nigeria.

apply to a high court in that state for redress. While section 46(3) empowers the Chief Justice of Nigeria to make rules with respect to practice and procedure of a High Court for the purpose of this section.<sup>36</sup>

This article is an overview of the procedure for the enforcement of fundamental human rights in Nigeria. It will examine the highly technical and formally procedural nature of some sections of the 1979 Fundamental Human Rights (Enforcement Procedure) Rules, and the Procedural changes made by the 2009 Procedure Rules. It will also examine some of the shortcomings of the new (2009) Rules and suggest the way forward.

## 2. Procedure for human rights enforcement

Although human right has been a part and parcel of the successive Nigerian Constitutions since independence in 1960, until the return to civil (democratic) rule in 1979, the protection of human rights was largely ineffective.<sup>37</sup> A contributory factor to this ineffectiveness is the absence of procedural rules as required by section 32, 1963 Constitution of Nigeria which empowered the Federal Legislature to entertain complaints of an infraction of human rights.<sup>38</sup> Since no rules were made by the federal or regional legislature at that time, fundamental rights litigation proceeded in a number of ways. For example in *Aoko v. Fagbemi*,<sup>39</sup> it was by way of application under section 30(1) of the 1960 Constitution of Nigeria. In *Whyte v. Commissioner of Police*,<sup>40</sup> an action for the protection of the right to a fair hearing commenced by way of an originating motion. In *Akande v. Araoye*,<sup>41</sup> it was by a writ of summons. Fundamental Human Rights Enforcement Procedure Rules were first introduced on October 1, 1979 after the 1979 Constitution came into force pursuant to section 42 (3) of that Constitution.<sup>42</sup> The introduction of the 1979 Fundamental Rights Enforcement Procedure Rules was aimed at bringing greater dynamism to the enforcement of fundamental rights in Nigeria.<sup>43</sup> However, emerging from a military regime, Nigerian Courts were not well versed in the enforcement of human right.<sup>44</sup> Two decades later, evidence showed that the judicial interpretation of the 1979 Rules has turned into a highly technical and formally procedural instrument.<sup>45</sup>

The first example is the requirement of leave. Order 1, Rule 2(1) of the 1979 Rules require an applicant who intends to enforce fundamental human rights to seek the leave of the High Court to do this. The application is made *ex parte* and must be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought and by an affidavit verifying the facts relied on. In the case of *Udene v. Ugwu*,<sup>46</sup> the Court of Appeal held that the requirement of leave is mandatory and cannot be regarded as mere irregularity. The grant of leave under

<sup>36</sup> See section 46 (3), 1999 constitution. A similar provision was also made under section 42(3), 1979 Constitution of Nigeria.

<sup>37</sup> Nwauche, E. "The Nigerian Fundamental Rights Enforcement Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria", *African Human Rights Law Journal*, Vol. 10, No. 2, 2010, p. 502.

<sup>38</sup> *Ibid.*

<sup>39</sup> (1961) 1 All NLR, 400

<sup>40</sup> (1966) NMLR, 215

<sup>41</sup> (1968) NMLR, 283. See Also *Akunna v. Attorney General Anambra State* 1977 5 SC 161, where the action was commenced by notice of motion.

<sup>42</sup> *Op. cit* at no. 36. The then Chief Justice of Nigeria, Atanda Fatayi Williams Operationalised Section 42(3) of 1979 Constitution, which empowered the Chief Justice of Nigeria to make rules for the Practice and Procedure of a High Court towards the exercise of the original jurisdiction vested in the High Court to hear and determine any application for redress made to it by any person who alleges that any of the provisions of chapter III of the Constitution have been, are being or are likely to be contravened in any state. The Rules came into effect on January 1, 1980.

<sup>43</sup> Duru, O. *Op. cit* at no. 34

<sup>44</sup> Nwauche, E., *Op. cit* at no. 37

<sup>45</sup> *Ibid.*

<sup>46</sup> (1997) 3 NWLR (Pt. 49) 57

the 1979 Rules was at the discretion of the trial court and often this discretion was exercised wrongly thereby shutting out credible witnesses.<sup>47</sup>

Secondly, the 1979 Rules stipulate time limits within which an action must be initiated and this was to be strictly enforced. Under Order 1, Rule 3 of the 1979 Rules, an application for the enforcement of fundamental human rights must be made "within twelve months from the date of the happening of the event, matter or act complained of, or such other period as may be prescribed by any enactment or except where a period is so prescribed, the delay is accounted to the satisfaction of the court or judge to whom the application... is made." Another example is the requirement that the motion on notice or summons for an order of the Court to Protect Fundamental human rights must be entered for hearing within fourteen days after such leave has been granted. In the case of *Ogwuche v. Mba*<sup>48</sup> and *Ezeaduka v. Maduka*<sup>49</sup> this requirement was held to be mandatory and non-compliance rendered the subsequent proceedings void.<sup>50</sup>

Thirdly, the judiciary created a threshold principle distinguishing between principal and accessory/subsidiary claims in human rights enforcement. This distinction was first articulated in *Tukur v. Government of Taraba State*<sup>51</sup> and was followed in a long line of cases<sup>52</sup> that Nigerian Courts will not entertain an action for an enforcement of a fundamental human right contained in the 1979 Rules unless it is the Principal claim. That is, if an action for the enforcement of a fundamental human right is an accessory or subsidiary claim, the action must be started by a writ of summons.<sup>53</sup> For example, claims that there was a breach of the right to a fair hearing in the withholding and cancellation of examination results were regarded as subsidiary claims<sup>54</sup> and could not be commenced under the 1979 Rules. Conversely the court maintained that a principal claim must be commenced under the 1979 Rules.

Fourthly, another principle that severely affected the enforcement of human rights under the 1979 Rules was the requirement of standing to sue (*locus standi*). In *Adesanya v. President, Federal Republic of Nigeria*<sup>55</sup> the Supreme Court stated that the relevant person for determining standing was set out by Section 42(1) 1979 Constitution to be the person whose fundamental human rights are in issue. This interpretation was to the detriment of Public interest litigation. Numerous attempts were made to ameliorate the harshness of the principle and it was not until the case of *Owodunni v. Registered Trustees of Celestial Church*<sup>56</sup> that a change became inevitable. In that case, the Supreme Court adopted the opinion of Ayoola JSC in *NNPC v. Fawehinmi*<sup>57</sup> that the majority of the Supreme Court in *Adesanya's case* did not decide that section 6(6)(b) laid down a requirement of standing.<sup>58</sup> In the case of *Fawehinmi v. Federal Republic of Nigeria*,<sup>59</sup> the Court of Appeal decided that the requirement of *locus standi* was unnecessary in constitutional issues as it will merely impede judicial functions and that every Nigerian should have access to seek an interpretation of the constitution.

<sup>47</sup> Nwauche, E. *Op. cit* at no. 37

<sup>48</sup> (1994)4 NWLR (Pt. 336) 75

<sup>49</sup> (1997) 8 NWLR (Pt. 518) 635. See also *Umoh v. Nkan* (2001) 3 NWLR (Pt. 710) 512 and *Chukwuogor v. Chukwuogor* (2006) 7 NWLR (Pt. 979) 302.

<sup>50</sup> *Din v. Attorney General of the Federation* (1986) 1 NWLR (Pt. 17) 471

<sup>51</sup> (1997) 6 NWLR (Pt. 510) 549

<sup>52</sup> For example. *Sea Trucks Ltd. v. Anigboro*, (2002) All FWLR (Pt. 321) 119; *Achebe v. Nwosu* (2003) 7 NWLR (Pt. 818), p. 103

<sup>53</sup> Nwauche, E.S. "The dubious distinction between principal and accessory claims in Nigerian human rights jurisprudence" (2008) 52 *Journal of African Law*, 66 – 68.

<sup>54</sup> See *West African Examinations Council v. Adeyanju* (2008) 9 NWLR (Pt. 1092) 270 and *West African Examinations Council v. Akinkumi* (2008) 9 NWLR (Pt. 1091) 151.

<sup>55</sup> (1981) 1 All NLR 1. In this case, the Court recognized the requirement of personal standing as fundamental for any action including complaints against human rights abuse on the strength of section 6(6) (b) of the 1979 Constitution.

<sup>56</sup> (2000) 6 Sc 60

<sup>57</sup> (1998) 7 NWLR (Pt. 559) 598

<sup>58</sup> See Ogowewo, T "Wrecking the Law: How Article III of the Constitution of the United States led to the Discovery of the Law of Standing to Sue in Nigeria" (2000) 26 *Brooklyn Journal of International Law*, 527; Ogowewo, T, "The Problem with Standing to Sue in Nigeria", (1995) 39, *Journal of African Law* 1.

<sup>59</sup> (2008) 23, WRN 65

The Court of Appeal recognized the limited impact of its judgement above because it suggested future constitutional amendments to provide access to court by any Nigerian in order to preserve, protect and defend the constitution.<sup>60</sup> It is true that the standing requirement was not part of the 1979 Rules and developed outside but its effect was draconian as Nigerian Courts regarded the principle as fundamental as the requirement of jurisdiction.<sup>61</sup>

The bottlenecks and highly technical nature of the 1979 Rules prompted the introduction of the 2009 Fundamental Rights (Enforcement Procedure) Rules. They were made pursuant to section 46, 1999 Constitution of Nigeria which like section 42, 1979 Constitution reposes in the Chief Justice of Nigeria the power to make rules with respect to the practice and procedure for the enforcement of fundamental human rights in Nigeria.

### 3. Significant changes made by FREP Rules, 2009

The new rules, unlike the previous (1979) rules, guiding the procedure to be followed in Court applications for the enforcement of fundamental human rights under the 1999 Constitution of Nigeria and the African Charter on Human and Peoples Right (Ratification and Enforcement) Act,<sup>63</sup> contain some innovations that will make the process easier for lawyers and litigants.

Some of the procedural changes introduced by the new rules are contained in the overriding objectives of the Rules. The preamble to the 2009 Rules sets out the overriding objectives of the rules as follows:-

- a) ***Expansive and purposeful interpretation of chapter IV of the 1999 Constitution:-*** Preamble 3(a) enjoins Nigerian Courts to expansively and purposefully interpret and apply the 1999 constitution especially Chapter IV as well as the African Charter with a view to advancing and realizing the rights and freedoms contained in them and affording the protection intended by them. It should be noted that by virtue of Section 6(6)(c) of the 1999 constitution, only civil and political rights provided for in Chapter IV of the constitution are enforceable in a Court of Law while Chapter II is not justiciable.<sup>64</sup> However, from the provision of preamble 3(a) the application of the African Charter can be affirmed. An expansive and liberal interpretation should recognize that socio-economic rights contained therein are enforceable in Nigeria.<sup>65</sup> The implication is that Chapter II and IV of the constitution as well as African Charter are enforceable in Nigerian Courts.
- b) ***Respect for Regional and International Bill of Rights:*** Paragraph 3(b) of the Preamble to the 2009 Rules provides that for the purpose of advancing but never for the purpose of restricting an applicant's rights, courts with jurisdiction over human rights cases "shall respect municipal, regional and international bill of rights cited to it or brought to its attention or of which the Court is aware, including human rights instruments in the African regional human rights system as well as the United Nations (UN) human rights system.

<sup>60</sup> Nwauche, E. *Op. cit* at no. 37

<sup>61</sup> *Ibid.*

<sup>62</sup> Hon. Justice Idris Legbo Kutigi, CJN (as he then was) made the Fundamental Human Rights Enforcement Procedure (FREP) Rules 2009, on 11 December, 2009.

<sup>63</sup> The African Charter on Human and Peoples' Rights was ratified and re-enacted as a Municipal law in Nigeria by the National Assembly on 17<sup>th</sup> March, 1983. The Charter became part of the Nigerian Law by virtue of the African Charter on Human and Peoples Rights (Application and Enforcement) Act, Cap 10 Laws of Federation, 1990.

<sup>64</sup> See *Okogie v. Attorney General Lagos State*, *Op. Cit* at no 20; *Oronto Douglas v. Shell Petroleum Development Company Ltd.* (1999) 2 NWLR (Pt. 591) 466.

<sup>65</sup> Nwauche, E, *Op.cit* at no 37. See also the ruling of the ECOWAS Community Court of Justice in *Socio-Economic Rights project v. Federal Republic of Nigeria*, ECW/CC/APP/08/08 (ruling delivered on 27<sup>th</sup> October, 2009) that Nigerians have a right to education as provided by sections 17 and 18 1999 Constitution and article 17(1) of the African Charter.

It should be noted however that section 12, 1999 constitution requires treaties to be domesticated in Nigeria before they can be implemented, although some international human rights treaties have been domesticated and implemented into law in Nigeria.

- c) **Public Interest Litigation and Standing to Sue (Locus Standi):** Under paragraph 3(d) of the preamble to the 2009 FREP Rules, courts with jurisdiction over human rights shall proactively pursue enhanced access to justice for all classes of litigants especially the poor, the illiterate, the uninformed, the vulnerable, incarcerated and the unrepresented. Closely connected to this is paragraph 3(e) of the preamble which provides that a court shall encourage and welcome public interest litigation in the human rights field and no human rights case may be dismissed or struck out for want of standing to sue. In particular, human rights activists, advocates or groups as well as any non-governmental organization may institute a human rights application on behalf of any potential applicant.

The applicant may 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, 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 and associations acting in the interest of its members or other individuals or groups.

The standing rule set out above is a clear departure from the position under the 1979 Rules and suggests that the strict constructionist approach exhibited in the Supreme Court Case of *Adesanya*<sup>66</sup> is no longer good law. This perhaps may be one of the provisions of the 2009 FREP Rules that will be eagerly and happily embraced by Nigerian citizens.

- d) **Accords Priority to Human Rights Cases:** Paragraph 3(g) of the Preamble states that human rights suits shall be given priority in deserving cases. Where there is any question as to the liberty of the applicant or any person, the case shall be treated as an emergency. From the foregoing provisions, it is clear that the 2009 FREP Rules are deliberately designed to enhance the acceleration of the hearing of fundamental rights cases.<sup>67</sup>

Other significant procedural changes made by the 2009 FREP Rules include the following:

- a) **Enhancement of the applicant's rights and freedom:** Order 1, Rule 2 defines a fundamental right to mean any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. That is fundamental right includes all the rights guaranteed by both the Nigerian constitution and the African Charter.<sup>68</sup>

Order II Rule 1 in a similar fashion, stipulates that any person who alleges that any of the fundamental rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the court in the state where the infringement occurs or is likely to occur for redress.

By specifically including breach of fundamental rights provided in the African Charter as basis for instituting a human rights suit, the FREP 2009 Rules, has expanded an applicant's rights and freedoms. An applicant's right is no longer limited to those provided in Chapter IV 1999 Constitution but extends to the socio-economic rights in the African Charter to which he is entitled.<sup>69</sup>

<sup>66</sup> *Adesanya v. President, Federal Republic of Nigeria*, Op. Cit at no. 55

<sup>67</sup> Falana, F., *Fundamental Rights Enforcement in Nigeria* (Lagos: Legal Text Pub. 2010) at 182 – 187.

<sup>68</sup> *Op. cit* at no. 64

<sup>69</sup> The above provision of Order II Rule 1, has also brought the Rules in line with the decision of the Supreme Court in *Ogugu v. State* (1994) 9 NEWLR (Pt. 366) 1 where the Supreme Court held that the provisions of the African Charter on Human and Peoples' Right is enforceable in the same manner as those of Chapter IV, 1999 Constitution by application made under section 42, 1979 constitution. See also *Duru, O.C, Op. cit* at no. 34

- b) ***Fast Tracks Human Rights Litigation through frontloading:***<sup>70</sup> Under Order II Rule 5 of the new Rules, “every application shall be accompanied by a written address which shall be succinct argument in support of the grounds of the application”. Order XII Rule 2 provides that oral argument of not more than 20 minutes shall be allowed from each party by the court on matters not contained in their written addresses.

In order to ensure that the non-attendance of counsel does not delay proceedings, Order XII Rule 3 provides that when all the parties written address have been filed and come up for adoption and neither of the parties is absent, the Court shall either on its own motion or upon oral application by the Counsel for the party present, order that the addresses be deemed adopted if the Court is satisfied that all the parties had notice of the date for adoption and a party shall be deemed to have notice of the date for adoption if on the previous date last given, the party or his counsel was present in court.

- c) ***Simplifies mode of commencement of action:*** Order II Rule 2 provides that an application for the enforcement of a fundamental right, “may be commenced by any originating process accepted by the court...”.

This leaves the mode of commencement to the discretion of the judges. However, the exercise of this discretion must not be contrary to the intention and objective of the new Rules.

Order II Rule 2 also dispenses with the prior requirement that an application for the enforcement of fundamental rights must commence with the leave of court.<sup>71</sup>

In addition, Order II Rule 4 allows any person who has personal knowledge of the facts or who has been informed by the applicant of the facts to make an affidavit on behalf of the applicant whose rights have been infringed upon and seeking redress for same. That is the applicant does not have to be personally present (if he is in custody) before the Commissioner for Oaths to swear to his statement or the affidavit. However, it must be stated that the applicant is unable to depose personally to the affidavit.

- d) ***Renders Statute of Limitation in applicable:*** Order III Rule 1 provides that an application for the enforcement of the rights “shall not be affected by any limitation statute whatsoever”.<sup>72</sup> The effect of this provision is that an application to secure enforcement of a fundamental right cannot become statute barred so as to extinguish the right of an applicant to institute an action in court.

- e) ***Mandates speedy and expeditious hearing of cases:*** Order IV Rule 1 of the new Rules also provides that an application shall be fixed for hearing within 7 days from the day the application was filed. The purpose is to emphasize the urgency attached to the hearing and determination of fundamental right cases.

Order IV Rule 3 further provides for the expeditious hearing of an applicant’s matter if the Court is satisfied that undue hardship may be caused to the applicant before the service of the application especially when the life/liberty of the applicant is involved. However, the application *ex parte* shall state sufficient grounds why delay in hearing the application would cause exceptional hardship.

- f) ***Improves service of Court Process:*** Order V Rule 2 provides that service of the originating process shall be effected on all the parties directly. However, service effected on respondents agent shall amount to personal service. Order V Rule 7 also allows substituted service through a

<sup>70</sup> See Dakas, CJ Dakas, “Judicial Reform of the Legal framework for Human Rights Litigation in Nigeria: Novelities and Perplexities” [www.nials.org](http://www.nials.org). Accessed 20/01/2013.

<sup>71</sup> This provision is a clear departure from Order 1 Rule 2(1) and Order II Rule 1(1) 1979 FREP Rules which require that an application for the enforcement of fundamental rights must commence with the leave of court on the basis of an *ex parte* application.

<sup>72</sup> This provision is unlike Order 1 Rule 3, 1979 FREP Rules which requires that action must commence within twelve months from the date of the happening of the event, matter or act complained of.

range of specified mechanisms “Where it appeared to the Court either after or without an attempt at personal service of the Court process that for any reason, personal service cannot be conveniently effected...” This will invariably save time and checkmate the excesses of respondents who deploy antics to evade personal service.

Good as the 2009 FREP Rules are, they are not without some shortcomings which include the following;

- i) The overriding objectives of the new Rules<sup>73</sup> are not Part of the substantive provisions of the new Rules.
- ii) The liberalization of *locus standi* under the new Rules, desirable as it is, could be vulnerable to a charge of over-reaching Section 46(1) pursuant to which eligibility to seek redress in the context of human rights litigation is limited to any person who alleges contravention of any rights in relation to him”.<sup>74</sup>
- iii) The respect language of paragraph 3 (b) of the preamble to the new Rules as desirable as it is, could also be vulnerable to a charge of over-reaching section 12 of the Nigerian Constitution, Pursuant to which 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 domesticated into law by the National Assembly.<sup>75</sup>
- iv) The issue of principal and ancillary relief. For an application to succeed in matters for the enforcement of fundamental right, brought under S. 46(1) of 1999 Constitution and Order II Rule 1, FREP Rules, 2009, the applicants relief must relate to the principal claim and not subsidiary or ancillary issue.

The Courts in some decided cases on fundamental human rights have increased restriction on the scope of the application for the enforcement of fundamental human rights cases. Indeed applications alleging serious human rights violations are routinely struck out or dismissed on the grounds that they are mere ancillary reliefs.<sup>76</sup> The violation of the fundamental rights of workers to freedom of association is viewed as an ancillary relief which cannot be enforced under Fundamental Rights (Enforcement Procedure) Rules. In the recent case of *Igwe v. Ezeanoche*,<sup>77</sup> the Court of Appeal held that, whenever the Court is confronted with an application brought under the Fundamental Right (Enforcement Procedure) Rules, it is important that the Court should critically examine the relief sought by the applicant, the ground for seeking the relief and the facts contained in the statement accompanying the application relied on for the relief sought. Where the facts relied on disclose infringement of the fundamental right of the applicant or the main basis of the claim, then it is a clear case for the enforcement of such rights through the Fundamental Rights (Enforcement Procedure) Rules, but where the main or principal claim is not the enforcement of a fundamental right, the jurisdiction of the court cannot be properly invoked or exercised as the Court will be incompetent to do so.

- v) There is also an irregularity between the provision of section 46(1) of the 1999 Constitution (which confers jurisdiction to entertain human right cases for contravention of Chapter IV of the Constitution on the High Court where the violation occurred) and Order II Rule 1, 2009 FREP Rules which confers jurisdiction (for contravention of fundamental rights provided for by the Constitution or Africa Charter) on the Court in the State where the infringement occurred. The Constitution should be

<sup>73</sup> The overriding objectives of the new Rules include the provision on public interest litigation, locus standi, enhanced access to justice, the expansive and purposeful interpretation and so on.

<sup>74</sup> Section 46(1), 1999 constitution of Nigeria and preamble 3(e) of the 2009 FREP Rules.

<sup>75</sup> Paragraph 3(b) 2009 FREP Rules.

<sup>76</sup> See the cases of *Achebe v. Nwosu* (2003) 7 NWLR Part 818 P. 103 at 14; *Tukur v. Government of Gongola State* (1989) 4 NWLR Part 117 P. 517. Where the Supreme Court upheld the position that for an application to come under Chapter IV of the Constitution, the breach must be principal and not ancilliary to the main claim. It thus held that the deposition of the applicant was the main claim and the absence of fair hearing in the process leading to deposition is merely ancilliary.

<sup>77</sup> (2010) 7 NWLR Part 1192, p. 61 at 69.

amended to reflect the provision of the new Rules on the matter that is, if by any court is meant a court of equal jurisdiction with a High Court.

Aside from the foregoing shortcomings of the FREP Rules, 2009, there are also some challenges that hinder aggrieved persons from enforcing their rights. These include:

- (a) Poverty of citizens where millions live within starvation level. To them fundamental right to food, education and even right to life is seen as an empty right.<sup>78</sup>
- (b) Lack of physical security in the country which has led to an appreciable escalation of the crime rate in the country and religious fanaticism especially in Northern Nigeria where the activities of *Boko Haram* has led to the death of thousands of people is a hindrance to the attainment of human rights.
- (c) Illiteracy. A good number of the people are illiterates who cannot appreciate or understand what rights they have.<sup>79</sup>

#### 4. The way forward

To make the new Rules achieve the desired purpose, it is hereby suggested; firstly, that the overriding objectives of the FREP Rules 2009 should be moved away from the preamble to the substantive part of the Rules. Secondly, the provisions of Section 6(6) (b) of the 1999 Constitution on standing to sue (*locus standi*) should be amended in a manner consistent with preamble 3(e) of the new Rules which has liberalized the right to sue. Thirdly, the non-justiciability provision of the 1999 Constitution regarding fundamental objectives and directive principles of State Policy contained in its chapter II needs to be amended, so as to reflect the expansive interpretation provided by the new Rules in preamble 3(a) to include rights guaranteed by the African Charter.

Fourthly, the distinction between ancillary and principal claims which is a creation of the judiciary should be done away with so that all human right cases whether involving principal or ancillary relief would be actionable under the new Rules. Fifthly, the respect language for regional and international bill of rights should be construed in a manner consistent with Section 12 of the 1999 Constitution of Nigeria. Sixthly, budgetary allocation should be increased towards the education of the large illiterate, masses of the people so as to be educated on what rights they have under the Nigerian Constitution. There should also be adequate provision for security of lives and property; and seventhly, non-governmental organizations, human rights activists should work pro-actively towards the realization of human rights of citizens in Nigeria.

#### 5. Conclusion

The Fundamental (Enforcement Procedure) Rules, 2009 is definitely a new liberal approach to the application for, and enforcement of fundamental rights as set out in Chapter IV, 1999 Constitution and the African Charter on Human and Peoples' Rights although there are still some areas to be improved upon in order to create a society devoid of constant human rights abuse.

Apart from this, there are lots of benefits derivable from the Rules which contain innovations that will make the process easier for lawyers and litigants. Lawyers and other human rights activists are to utilize the new procedure Rules to enlarge the frontiers of laws and constitutional provisions concerned with human rights violation in Nigeria.

<sup>78</sup> See *Minerva Mills Limited v. Union of India*, Op cit at no 22.

<sup>79</sup> See A. Oputa, 'Access to Justice, Law and Practice' Vol. No. 1, August 1988. Justice Oputa observed that "... people especially the illiterate masses of our country do not even know what their rights are. They may therefore not even know when those rights have been or are being infringed".