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1.00 INTRODUCTION

Fundamental Human Rights were for the first time enshrined in Chapter III of the Independence Constitution of 1960. Aimed at creating a society which protects political freedom as well as the social and economic well-being of Nigerians, it reflected in all successive Constitutions.[1] Rules of enforcement were however not put in place until 1979 and in the absence of such rules of enforcement, human rights enforcement was hitherto, by means of prerogative writs of Habeas Corpus, Certiorari, Mandamus and prohibition[2] and was commenced in different ways, including an application under section 31(1) of the 1960 Constitution, by writ of summons, originating summons or notice of motion.[3] These methods were however relatively ineffective as they were "cumbersome, some-what technical and lacking in flexibility for the proactive pursuit of human rights claims"[4]. The ineffectiveness was also attributable to several military interventions which have had profound and far-reaching effects on the promotion and protection of democratic values and fundamental freedom in Nigeria.[5] The result was proliferation of cases of breach of fundamental human rights where justice was either not served or served way too late.

To bring speed and dynamism to the enforcement regime, the then Chief Justice of Nigeria, Hon. Justice Atanda Fatai-Williams issued the Fundamental Rights (Enforcement Procedure) Rules, 1979. This was pursuant to section 42(3) of the Constitution of the Federal Republic of Nigeria 1979, which empowered the Chief Justice of Nigeria to make rules for the practice and procedure of the High Court towards the enforcement of the provisions of Chapter IV of the Constitution. After 30 years of usage and the onslaught of more complexities and hindrances to the attainment of justice, the 1979 Rules were replaced in 2009 by a new set of Rules which set out novel

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[1] The National Action Plan for the Promotion and Protection of Human Rights in Nigeria. <www.ohchr.org/Documents/Issues/Education/Training/actionsplans/Excerpts/Nigeria09_13.pdf> Accessed May 24,2020.

[2] Onyekachi Duru, 'An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009', <http://ssrn.com/author=1874278> accessed on April 30, 2020

[3] A. Sanni, 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and People's Rights in Nigeria: The need for Far-reaching Reforms" African Human Rights Law Journal, <www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962011000200010> Accessed May 20, 2020.

[4] O. Duru, Supra, note 2

[5] Supra, note 1

provisions guiding enforcement of fundamental rights in Nigeria. The Fundamental Rights (Enforcement Procedure) Rules 2009, although borne with nothing more than good intentions, is however not without its own problems and presents a case for reforms in the reformed human rights enforcement regime in Nigeria.

1.1 Conceptual Clarifications

'Fundamental Human Rights' are fundamental because they have been guaranteed by the fundamental law, that is, the Constitution. They are inalienable rights which can only be derogated from in circumstances permitted by the Constitution, and no more. In ***Ransome-Kuti & Ors v. Attorney General of the Federation***,[6] the Supreme Court examined the nature of Fundamental Human Rights. Eso JSC held as follows:

> *"…it 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 so that the rights could be immutable to the extent of the non- immutability of the Constitution itself"*

Fundamental Human Rights are enshrined in Chapter IV, Sections 33 – 45 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the **"1999 Constitution"**) They include the right to life;[7] right to dignity of the human person;[8] right to personal liberty;[9] right to fair hearing;[10] right to private and family life;[11] right to freedom of thought, conscience and religion;[12] right to freedom of expression and the press;[13] right to peaceful assembly and association;[14] right to freedom of movement;[15] right to freedom from discrimination;[16] right to acquire and own immoveable property anywhere in Nigeria;[17] and right to freedom from compulsory acquisition of moveable or immoveable property.[18] The African Charter on Human and People's Rights (Ratification and Enforcement) Act ("African Charter") also contains provisions that guarantee

[6] (1985) 2 NWLR (Part 6) 211 @ 229-230
[7] Section 33 of the Constitution of the Federal Republic of Nigeria 1999; Article 4 of the African Charter on Human and Peoples Right
[8] S. 34 CFRN; S. 5 ACHPR
[9] S. 35 CFRN, S. 5 ACHPR
[10] S. 36 CFRN; S. 7 ACHPR
[11] S. 37 CFRN; S. 18 ACHPR
[12] S. 38CFRN; S. 8 ACHPR
[13] S. 39 CFRN
[14] S. 40 CFRN; Ss 10 & 11 ACHPR
[15] S. 41 CFRN; A.12 ACHPR
[16] S. 42 CFRN; A. 2 ACHPR
[17] S. 43 CFRN; A. 14 ACHPR
[18] S. 44 CFRN

these fundamental rights. In addition to those enshrined in the Constitution, the African Charter contains provisions such as the right to: a general satisfactory environment favorable to their development;[19] seek and obtain asylum in other countries when persecuted;[20] work under equitable and satisfactory conditions;[21] enjoy the best attainable state of physical and mental health;[22] education;[23] and self-determination.[24]

'Enforcement' is simply the act of compelling observance of or compliance with a law, rule or obligation.[25] Conversely, it is the act of bringing to justice persons who have flouted or disobeyed a law, rule or obligation. Enforcement of fundamental human rights is entrenched in section 46(1) of the 1999 Constitution. It provides that any person who alleges that any of the provisions of chapter IV has been, is being or likely to be contravened in any state in relation to him may apply to a high court in that state for redress. Section 46(2) empowers the High Court to hear and determine any application made to it in pursuance of section 46(1) and make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any rights which are called into question. Section 46(3), which is in pari materia with section 42(3) of the 1979 Constitution, empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of the High Court for the section in question.

2.0 ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHTS IN NIGERIA

In Nigeria, there are conventional and unconventional ways of enforcing human rights.[26] The conventional way of enforcement follows after the provisions of the law (statutory or common law). This include instituting an action under common law or subscribing to the enforcement procedures stated in the constitution as further elucidated in the rules of enforcement. Unconventional ways of enforcement usually involves settlement out of court by mediation,

[19] Article 24 ACHPR
[20] Article 12(3) ACHPR
[21] Article 15 ACHPR
[22] Article 16 ACHPR
[23] Article 17 ACHPR
[24] Article 20 ACHPR
[25] <https: //www.lexico.com/en/definition/enforcement> accessed on April 17, 2020
[26] J. Shuaibu, 'An appraisal of the Enforcement of Human Rights under the Fundamental Rights Enforcement Procedure Rules 2009 in Nigeria' <http://kubanni.abu.edu.ng/jspui/bitstream/123456789/9143/1/AN%20APPRAISAL%20OF%20THE%20ENFORCEMENT%20OF%20HUMAN%20RIGHTS%20UNDER%20THE%20FUNDAMENTAL%20RIGHTS%20%28ENFORCEMENT%20PROCEDURE%29%20RULES%202009%20IN%20NIGERIA.pdf> Accessed May 25, 2020

conciliation and other alternatives to litigation.[27] Where the choice of enforcement involves litigation, resort would more often be had to the following applicable laws:

a. Constitution of the Federal Republic of Nigeria, 1999 (as amended);
b. African Charter on Human and People's Rights (Ratification and Enforcement) Act; and
c. Fundamental Rights (Enforcement Procedure) Rules 2009[28]

2.1 Enforcement Under Fundamental Rights (Enforcement Procedure) Rules, 1979

The first ever fundamental rights enforcement Rules was made in Nigeria in 1979. It came into effect on January 1, 1980.[29] The FREP Rules, 1979 was meant to foster a quick dispensation of justice when it comes to fundamental human rights and to simplify and aid enforcement procedures of victims of infringement. However, the Rules soon became a clog in the wheel of administration of justice due to a number of factors. These include the rigid common law approach Nigerian courts have adopted in their interpretative role with regards to locus standi and other factors which turned the FREP Rules, 1979, into a highly technical and formal procedural instrument.[30]

Another major shortcoming of the 1979 Rules was the requirement for leave of court as a condition precedent for commencement of actions.[31] In interpreting this requirement in the case of ***Udene v. Ugwu***[32] the court held that it was mandatory. Thus failure to obtain leave was not a mere irregularity. This requirement, according to Abiola Sanni, was "regarded by some as circuitous and unnecessary in the enforcement of fundamental rights, a call which led to its abolition under the subsequent FREP Rules."[33] Forming another challenge was the limitation period foisted on an enforcement action. Under the FREP Rules 1979, an application for leave for the enforcement of fundamental rights must be brought within 12 months of the violation or threat of violation, or such other period as may be prescribed by any enactment, provided that where time has not been prescribed by any other law, the applicant could only make such application for leave out of time upon court's satisfaction of the cause of delay.[34] In ***Oguegbe v Inspector-General of Police***[35] the application for leave to enforce the applicant's fundamental right to personal liberty was refused

[27] Ibid
[28] M. Stanley-Idum & J. Agaba, *Civil Litigation in Nigeria,* (Nelag & Company Limited: Lagos, 2017)
[29] A. Sanni, Supra, note 3
[30] Ibid
[31] Order 1 r 2(2) 1979 '[n]o application for an order enforcing or securing enforcement within that state of any such rights shall be made unless leave therefore has been granted in accordance with this rule'
[32] (1992) 2 NWLR (Part 491) 57
[33] Ibid
[34] Ibid
[35] (1999) 1 FHCLR 59

on grounds that the action was brought 30 months after the alleged infringement.[36] Sanni expressed the view that "refusing to entertain actions for the enforcement of fundamental rights after only one year compared to six years under the Statute of Limitation for civil actions was a grave error on the part of the drafters of the FREP Rules, 1979".[37]

Furthermore, an applicant was required to, in bringing the initial *ex parte* application for leave, support same with a statement setting out his name, description, the relief sought, the grounds upon which the leave is sought; and a verifying affidavit confirming the facts he relied upon. Where such leave is granted, he would then be required to bring another application on notice with virtually the same set of documents.[38] This amounted to a needless duplicity of processes, technicality and ultimate delay in the dispensation of justice.[39]

2.2 Locus Standi and Public Interest Litigation under the 1979 Rules

Apart from these drawbacks to enforcement caused by the text of the FREP Rules 1979, the common law principles of locus standi and the restrictive interpretation of section 42(3) of 1979 Constitution also contributed to the poor dispensation of justice as it pertains to access to court and capacity to sue. The courts had usually insisted that unless a person has the *locus standi*, he is a meddlesome interloper and as such, a suit at his instance would be incompetent. This position was further reinforced by the provision of Section 46(1) of the 1999 Constitution (as amended) that only a "**… person who alleges** that any of the provision of this chapter (IV) has been, is being, or is likely to be contravened in any state in relation to **him** may apply to a High Court for redress" and same was re-echoed in Order 1 Rule II of the 1979 FREP Rules.

The Courts adopted a restrictive approach in interpreting these provisions, thereby erecting impediments to the growth and development of public interest litigation in Nigeria.[40]. In ***Senator Adesanya v President of the Federal Republic of Nigeria & Ors.,***[41] the plaintiff challenged the constitutionality of the appointment of the Chairman of the Federal Electoral Commission (FEDECO). The Supreme Court held that the plaintiff lacked the locus standi to bring the action since he had no justifiable interest affected by the action and since he had not shown that he would

[36] A. Sanni, Supra, note 3
[37] Ibid
[38] Ibid
[39] Ibid
[40] T. A. Adekola, 'Public Interest Litigation in Nigeria – A Veritable Tool for Good Governance', </www.researchgate.net/publication/307558509_PUBLIC_INTEREST_LITIGATION_IN_NIGERIA_A_VERITABLE_TOO L_FOR_GOOD_GOVERNANCE> Accessed on May 20, 2020
[41] (2007) 14 NWLR (Part 1054) 275 @ 334

suffer any injury or damage as a result of the action.[42] The reasoning behind the restrictive approach was that there was need to leave the gate shut against meddlesome interlopers and floodgate of frivolous and vexatious proceedings.[43] Although, due to judicial rascality, there was a commendable relaxation of the restrictive approach at some point, the doctrine of locus standi remained for a long time, a 'formidable albatross in human rights litigation in Nigeria.'[44]

3.0 REFORMS BROUGHT ABOUT BY THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES, 2009

The Fundamental Rights (Enforcement Procedure) Rules 2009 ("FREP Rules 2009") was signed into law on November 11, 2009 by the then Chief Justice of Nigeria, Hon. Justice Idris Legbo Kutigi in exercise of powers conferred on him by section 46(3) of the 1999 Constitution. The rules contain the procedure to be followed in the enforcement of fundamental rights in Nigeria. They were made in an attempt to simplify the practice and procedure for the enforcement of fundamental rights in Nigeria and an attempt to solve some of the ills earlier pointed out in the 1979 Rules while at the same time abrogating the old Rules.[45] The purpose of the FREP Rules is made obvious in the pre-amble to the Rules especially as contained in its overriding objectives. For example, Paragraph 3 of the Rules on its overriding objectives requires that the Constitution and the provisions of the African Charter be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them. In order to achieve this purpose, courts are enjoined to respect all municipal, regional and international bills of rights cited to it or brought to its attention including the African Charter on Human and Peoples' Rights. Some of the other reforms brought about by the FREP Rules are delineated below:

3.1 Locus Standi and Public Interest Litigation

Worthy of note as a direct impact on the position of locus standi and public interest litigation in enforcement of rights in Nigeria, is the provisions of Paragraph 3(e) which provides:

[42] E. A. Taiwo, 'Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: A need For a More Liberal Provision', African Human Rights Law Journal, https://www.researchgate.net/publication/317450111_Enforcement_of_fundamental_rights_and_the_standing_r ules_under_the_Nigerian_Constitution_A_need_for_a_more_liberal_provision. Accessed May 14, 2020

[43] Ibid

[44] J. A. Dada, 'Impediments to Human Rights Protection in Nigeria', (2012) Vol. 18, *Annual Survey of International & Comparative Law*; https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/6/. Accessed May 14, 2020

[45] M. Stanley-Idum & Agaba Supra, note 28

"The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates, or groups as well as any non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

(i) Anyone acting in his own interest;
(ii) Anyone acting on behalf of another person;
(iii) Anyone acting as a member of, or in the interest of a group or class of persons;
(iv) Anyone acting in the public interest, and
(v) Association acting in the interest of its members or other individuals or groups"

This provision removed the strict principle of locus standi in human rights enforcement by enjoining the courts to avoid dismissing applications on the basis of *locus standi*. It also expressly enjoins the court to encourage public interest litigation. It finally and more expressly, lists the persons who may institute an action in court, which is a major departure from what used to be obtainable under the 1979 Rules. Therefore, in line with the introduction to paragraph 3 of the preamble, the court now encourages and welcomes public interest litigation in human rights and no human rights case may be dismissed or struck out for want of *locus standi*. In ***Dilly v. Inspector General of Police & Ors.***,[46] the appellant brought an application via an originating summons under the FREP Rules 2009 seeking to enforce the right to life of her son who died in police custody after he was arrested. After hearing the application, the High Court dismissed same on the basis that the Appellant could not enforce the right to life of her deceased son. In answering the question who can apply to enforce a fundamental right, the Court of Appeal, per Nimpar JCA, relied on the overriding objectives of the FREP Rules and held thus:

> "…*if therefore public interest litigation is now allowed under the extant rules and no application should fail for want of locus standi, on what basis can the application by the applicant fail on the ground that the mother of the deceased lacks locus standi to make the application? Would the fact that the victim is deceased deny his next of kin the right to litigate the breach of that right to life?*
>
> *…. Insisting that only the citizen of subject of an infringement can approach the court when such right is violated would create an absurdity. This would imply the non-realization of the fundamental right expressly created by the constitution."*

The application succeeded with ₦5 Million awarded to the Appellant as damages. This is one of many cases that reflect the changing position of the courts toward locus standi and public interest litigation in the light of FREP Rules, 2009. This development has been applauded by several

[46] [2016] LPELR-41452[CA]

writers and has widened the gates of public interest litigation in Nigeria.

3.1 Expansion of Applicant's Rights and Claims that can be Brought

The 2009 rules also make some groundbreaking provisions by extending the rights for which enforcement can be sought to the African Charter on Human and People's Rights (ratification and enforcement) Act.[47] More specifically, Fundamental Rights in the Rules is described to include 'any' of the rights stipulated in the African Charter.[48] This move according to Duru, has brought the rules in tune with the decision of the Supreme Court in ***Ogugu v State***[49] where it was held that the provisions of the African Charter is enforceable in the same manner as those contained in the Constitution.[50]

3.2 Mode of Commencement

The requirement for leave, a major impediment under the 1979 Rules, has been dispensed with by the FREP Rules. By virtue of Order II Rule I and II of the new Rules, an applicant shall commence an action by filing a motion on notice or any other originating process accepted by the court, and such action filed shall, subject to the provisions of the Rules, lie without leave of Court.[51] The application shall be accompanied by a statement, affidavit in support, with or without exhibits and a written address. Human rights actions may now be initiated by any originating process acceptable to the court. Thus, it is no longer open to the respondent to seek to strike out an application on the basis that it was commenced via a writ of summons or originating motion or originating summons.[52]

By the rules therefore, enforcement actions may be commenced by any of the four modes of commencement, namely: writ of summons, originating summons, originating motion and petition. A fundamental objective to enforcement procedure is the need for expeditious hearing and by virtue of this, originating summons has been adjudged the best suited for determination of questions and interpretation of documents; in other words, non-contentious enforcement matters. Where the facts are contentious, the originating motion is generally advised.[53] Worthy of note is the requirement for frontloading of a written address which is also calculated to aid expeditious hearing of enforcement proceedings. The originating process (whichever mode) is required to be supported by:

[47] Order II r 1 Fundamental Rights (Enforcement Procedure) Rules, 2009
[48] Order 1 R 2 FREP Rules
[49] (1994) 9 NWLR (Part 366) 1
[50] O. Duru, Supra, note 2
[51] Order II R 2 FREP Rules
[52] A. Sanni, Supra, note 3
[53] ***National Bank of Nigeria & Anor v Lady Alakija*** (1978) 9 and 10 SC 59

a. A statement setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought and an affidavit setting out the facts upon which the application is made; and [54]
b. A Written address which shall be a succinct argument in support of the grounds of the application[55]

3.3 Statute of Limitation

The application for the enforcement of fundamental rights is no longer affected by limitation.[56] The right of an applicant to file an application for the enforcement of fundamental rights can be exercised at anytime, regardless of when the violation occurred.[57] This is unlike the 1979 Rules which limited the enforcement period to 12 months from the date breach occurred.

3.4 Provisions Mandating Expeditious Hearing of Cases

In order to aid expeditious hearing of cases, Order IV Rule 1 provides that an application must be fixed for hearing within 7 days from the day the application was filed. The same goes for Order IV Rule 3 which makes provision for the expeditious hearing of an applicant's application if the court is satisfied that undue hardship may be caused to the applicant before the service of the application. The ex parte application must however show sufficient grounds why delay in the application would cause untold hardships.

3.5 Jurisdiction

Under the 1979 Rules, the requirement as to venue of court was that the court with jurisdiction for enforcement must be that which is situated in the state where the infringement occurs. As such, where an infringement occurs in Lagos for example, a suit instituted in Ogun State for enforcement will not be entertained. This posed no problem for State High Courts. But it was a problem for applicants who conceived that their application needed to be filed in the Federal High Court. This was because there was a time the Federal High Court did not have presence in every State. Order II Rule I of the 2009 FREP Rules sought to resolve the issue by providing thus:

> *Provided that where the infringement occurs in a State which has no Division of the Federal High Court, the Division of the Federal High Court administratively*

[54] Order II R 3 FREP Rules
[55] Order II R 5 FREP Rules
[56] Order III R 1 FREP Rules
[57] O. Duru, Supra, note 2

responsible for the State shall have jurisdiction. Form No. 1 in the Appendix may be used as appropriate.

However, with the presence of a division of the Federal High Court in every state of the Federation, this proviso has served out its purpose. Note however that both the Federal and State High Courts have jurisdiction over fundamental rights enforcement.

4.0 REFORMING THE REFORMER

No doubt, the effort towards achieving more relaxed and flexible enforcement procedures as evidenced in the FREP Rules of 2009 is commendable. However, the FREP Rules 2009 is fraught with a number of problems which still hinder the accomplishment of its overriding objectives. Furthermore, it has been more than ten years since the 2009 Rules came into force and a lot has happened during these years. The Rules is therefore in need of reforms to meet with current challenges. Some areas of the FREP Rules that require reform are as follows:

4.1 The Issue of the Shared Jurisdiction of Court

The FREP Rules 2009 like its precursor vests jurisdiction to hear fundamental right enforcement matters on the High Court, both State and Federal. This has often led to controversies. Much judicial ink has been spilled on the extent of the shared jurisdiction. Applicants have often been left confused when it comes to determining when an application should go to the Federal High Court or a State High Court. This confusion is further aided by judicial decisions which appear to swing to both sides of the pendulum. In ***Tukur v. Government of Gongola***[58] it was held that the State High Court could only entertain 'claims' in respect of a 'subject-matter' over which it has jurisdiction, while the Federal High Court could also do so within its laid down jurisdiction.[59] In that case, the applicant had been deposed as the Emir of Muri. The Supreme Court held that the Federal High Court lacked jurisdiction over his application as the claims was on chieftaincy, a matter for the State High Court. Similarly in ***Ubi Ujong Inah and 4 others v. Marcus Ukoi***[60], Court of Appeal held that "…the application for the enforcement of fundamental rights in accordance with the reliefs sought is not cognizable before the Federal High Court as those reliefs do not touch or arise from matters within the express jurisdiction of the court…"

[58] (1989) 4 NWLR (Part 117) 517
[59] M. Stanley-Idum & J. Agaba, Supra, note 28
[60] (2002) 9 NWLR (Part 773) 563

However, in ***Alhaji Lawan Zakari v Inspector-General of Police***[61], the appellant had filed a motion *ex parte* at the High Court of the Federal Capital Territory, Abuja, seeking an order for leave to enforce his fundamental right to personal liberty. The respondent filed a notice of preliminary objection challenging the jurisdiction of the Court to hear the matter on grounds that only the Federal High Court could entertain it. The judge upheld the objection and dismissed the application. But the Court of Appeal reversed the decision and held that both the Federal and State High Courts are competent to entertain the application. The popular decision of the Supreme Court in ***Grace Jack v. University of Agriculture Makurdi***[62] followed this position. In that case, the Appellant filed for enforcement in Benue State High Court seeking nullification of her dismissal and reinstatement. The Supreme Court held that both the Federal High Court and the State High Court have concurrent jurisdiction to enforce fundamental rights under the Constitution.

The decision in ***NDLEA v. Babatunde Omidina***[63] leads to more confusion. On October 12, 2011 the respondent was arrested by the NDLEA officials on suspicion of illegal possession of narcotic drugs. On October 19, 2011, he filed an application at the Lagos State High Court for the enforcement of his fundamental rights. The High Court awarded him the sum of N25,000,000 against the NDLEA. The Court of Appeal held that by virtue of section 251(1)(m) of the 1999 Constitution, the Federal High Court has exclusive jurisdiction in matters relating to drugs and poison. Moreso, Section 26 of the National Drug Law Enforcement Agency Act, stipulates that *"The Federal High Court shall have exclusive jurisdiction to try offenders under this Act".*

The Supreme Court has held that actions against state governments cannot be instituted in the Federal High Court.[64] This has raised more confusion. Would the State High Court then have exclusive jurisdiction over enforcement of human rights against State Governments? In ***Mr. Gaul Ihenacho & 4 Ors. v NPF & 2 Ors***.[65] the Court of Appeal clarified the Supreme Court's decision in ***Tukur's Case*** and upheld the jurisdiction of the Federal High Court over the fundamental rights application where the lower Court declined jurisdiction on grounds that the application related to revenue of a State government. Similarly, in ***Mrs. Comfort Kolo v NPF & 3 Ors***.[66] the Court of Appeal sitting as a Full Court again clarified existing decisions misinterpreting the decision of the Supreme Court in ***Tukur's Case*** on the scope of the jurisdiction of the Federal High Court in

[61] (2000) LPELR-6780(CA)
[62] (2004) 5 NWLR (Part 865) 208
[63] (2013) 16 NWLR (PART 1381) 589
[64] ***Executive Governor, Kwara State v Mohammed Lawal*** (2005) 25 WRN 142
[65] (2017) 12 NWLR (PART 1580) 424
[66] (2018) LPELR-43635 (CA)

fundamental rights applications. The Five Justices unanimously upheld the Appellant's contention that despite the mention of a matrimonial dispute in the facts, the Federal High Court was wrong to yield jurisdiction to the State High Court, the subject-matter being fundamental rights enforcement simpliciter.

Later in ***EFCC & Ors v. Mr. Dubem Chukwurah***[67] the Court of Appeal followed ***Kolo's Case*** and rejected the contention that the Federal High Court lacked jurisdiction over the fundamental rights application because the subject-matter was allegedly issuance of a dud cheque. There are possibly several other decisions swaying in either sides of the pendulum. The FREP Rules 2009 missed the opportunity to address this confusion. It will therefore likely persist until clarification comes from the Supreme Court. It is perhaps time to reform Rules to clarify and lay the issue to rest.

4.2 Overriding Objectives Contained in the Preamble to the 2009 Rules

The Preamble to the Rules contain many provisions that have gone a long way to put a glimmer of hope in enforcement proceedings. However, Sanni, like other writers, has questioned why such provision should be set-out in the preamble to the Rules considering the legal effect of preambles on interpretation of statutes as well as their weight in law. According to him, a preamble is said to be a mere introductory statement that carries little or no weight in law. It is too abstract and is usually just a statement of fact, unlike the wording of the actual law.[68] He argues:

> *"…thus, the so-called Preamble of the FREP Rules does not really conform to a preamble. In the case of Jacobson v Massachusetts, it was held that the Preamble does not have any legal power within the Constitution. It is an introduction to the document as a whole and does not, in and of itself, allow the exercise of any kind of legal power.* ***Even with regards to the preamble of a constitution, the only power that can arise from the Constitution must come from elsewhere, not its Preamble.*** *Whilst the spirit of a constitution can be understood through its preamble, this is not so for actual legal power which would usually not arise from a preamble. This means that the preamble to a constitution may provide a strong basic framework for understanding the intent behind the Constitution as a whole, but it cannot be taken as directly legally relevant in providing rights or powers either to the citizens or the state.* ***It follows that the Preamble to the FREP Rules cannot provide any substantive rights or powers as it purports to do."***

It is submitted that situating such important provisions, such as parties that can sue and relaxation of the locus standi rule, in the preamble is not neat. This is because it poses a future risk to the validity of those provisions when they are challenged and argued to their logical conclusion.

[67] (2018) LPELR–43972 (CA)
[68] A. Sanni, Supra, note 3

4.0 Inconsistencies with the Constitution

Some writers have also expressed dissatisfaction with certain provisions of the 2009 Rules. It has been argued that some provisions run contrary to the letters of the Constitution. First, the provisions expanding the scope of eligible applicants and accepting public interest litigation is contrary to Section 46(2) of the Constitution which limits applicants to persons whose rights have been, is being or is likely to be infringed. The fact that the provision which alters a constitutional provision is contained in a mere preamble to a Rules is equally undesirable. While applauding the good intentions of the Rules, Sanni opines that when the provisions of the Rules are taken to their logical conclusion, they may be voided. He holds this view regardless of the decision in ***Abia State University v. Chime Anyaibe***[69] which he argues is erroneous. The case was decided under the FREP Rules 1979 with respect to the legal effect of the Rules on the Constitution. It was held that although the FREP Rules 1979 were made under power derived from section 42(3) of the 1979 Constitution, they have the same force as the constitution and are deemed to be at par with the provisions of the Constitution. The Court of Appeal noted as follows:

> *"I think an action under the fundamental Rights (Enforcement Procedure) Rules, 1979 is a peculiar action. It is a special action. The procedure is provided by the Rules which were made pursuant to section 42(3) of the 1979 constitution. For the court to have jurisdiction, the procedure specifically provided for must be strictly followed. As I have already stated earlier in this judgment, the rules have the same force of law as the constitution itself."*

The effect is that insisting that the Rules have the same force of law as the Constitution poses a problem to ease of amendment. It follows that the FREP Rules 1979 ought to have been amended the same way a Constitution would be amended. It goes without saying that the FREP Rules 2009 did not follow this procedure, thereby leaving room for a possible challenge in future.[70] Also, regardless of the judicial interpretation to the contrary, the fact remains that a rule made pursuant to the Constitution remains a body of rules and its superiority may only be exercised against other statutes excluding the Constitution. Therefore, inconsistencies to the Constitution contained in the Rules, when challenged may be adjudged null and void to the extent of their inconsistencies.

4.1 Position of Enforcement of Socio–Economic Rights

Flowing from the foregoing is the issue of whether Socio–Economic Rights contained in the African Charter have become enforceable as Chapter IV rights. The African Charter contains more than just the civil and political rights that are contained in Chapter IV. It makes further provisions

[69] (1996) 3 NWLR (Part 439) 646
[70] A. Sanni, Supra, note 3

for certain categories of rights usually referred to as the Social and Economic Rights. Some of these rights are tagged 'Fundamental Objectives and Directive Principles of State Policy' under Chapter II. They create mere duties on the part of the government and its agencies with no corresponding rights on the part of its citizens.[71] It is therefore believed that section 6(6)(c) declared these set of rights non-justiceable in themselves. It provides thus:

> *"The judicial powers vested in accordance with the foregoing provision of this section shall not* ***except as otherwise provided by this constitution*** *extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and Directive Principles of State Policy set out in chapter II of this constitution."*

This begs the question of whether the Rules is capable of rendering justiceable, that which has been declared non-justiceable by the 1999 Constitution. Worthy of note is the part of section 6(6)(c) which states that '***except as otherwise provided by the constitution'.*** This suggests that the provisions on non-justiceability may not be absolute where there are constitutional provisions that provide otherwise. This brings us back to the position in ***Abia State v. Anyaibe***[72] to the effect that the Rules have the same force of law as the constitution. The question therefore is, can the provision of the Rules expanding rights to include those contained in the African Charter be said to have satisfied the proviso of '***except as otherwise provided by this constitution'*** in light of ***Abia State v Anyaibe***? The writer disagrees with the decision, and maintains that the Rules does not satisfy that proviso. The Rules is subordinate to the Constitution. It cannot and cannot operate to alter the provisions of the Constitution but rather to fulfill it. Furthermore, although the African Charter has been domesticated, it equally remains subordinated to the Constitution. Thus only the express provisions of the Constitution can render these rights justiceable. This means that the Rules might be creating a false impression that need be cleared by reforms.

5.0 CONCLUSION AND RECOMMENDATIONS

The FREP Rules 2009 requires wide-ranging reforms so as to deal with provisions which are inconsistent with constitutional provisions, and also bring the Rules at par with changes that have occurred post-2009. Some aspects of the needed reforms require constitutional amendment for clarity. For example the issue of jurisdiction and locus standi cannot be rested with mere

[71] Section 13 CFRN 1999 provides: "It shall be the duty and responsibility of all organs of government and all authorities and persons exercising legislative, executive or judicial powers to conform to, observe and apply the provision of this Chapter of the Constitution."

[72] Supra, note 69

amendment of Rules. The Bill of Rights in the South African Constitution contains similar liberal provisions on scope of applicants for enforcement of fundamental rights as in the FREP Rules 2009[73]. Thus the issue of locus standi should be given constitutional importance. In summary, the following reforms are hereby recommended:

1. An amendment of section 46(1) of the Constitution in a manner that reflects the wide scope of applicants expressed in paragraph 3(e) of the FREP Rules 2009 is proposed. This will give support to the desirable legal standing innovation in the extant Rules.

2. Sections 46(2) and 6(6)(c) of the Constitution require amendment to reflect the expansion of enforceable rights to include those in the African Charter especially those rights that fall under the socio-economic rights which are not enforceable under the Constitution.[74]

3. The overriding objectives of the FREP Rules contained in the preamble need to be transferred to the substantive body of the Rules to give them their desired legal effect and validity and prevent possible challenge in the future.[75]

4. Section 46(1) of the Constitution should be amended to clearly spell out the jurisdiction of each court as it pertains to enforcement of fundamental human rights. The Rules can then be also amended to give effect to the constitutional clarification of jurisdiction.

5. Obsolete provisions in the Rules need to be expunged. This will include the provision giving jurisdiction to the Federal High Court over its areas of administrative coverage. This is doubtful, but in any event no longer necessary.

[73] Section 38 of the South African Constitution (Chapter 2: Bill of Rights)
[74] G. Awolo, 'Fundamental Human Rights Enforcement Procedure in Nigeria: An overview', (2014) Vol.3, EBSU Journal of International Law & Juridical Review; scanned copy available at <www.lasu.edu.ng/publications/law/grace_arowolo_ja_9.pdf> accessed May 20, 2020
[75] Ibid

REFERENCES

1. A. Sanni, 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and People's Rights in Nigeria: The need for Far-reaching Reforms', African Human Rights Law Journal; www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962011000200010. Accessed May 20, 2020

2. E. A. Taiwo, 'Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: A Need For a More Liberal Provision', African Human Rights LawJournal';www.researchgate.net/publication/317450111_Enforcement_of_fundamental_rights_and_the_standing_rules_under_the_Nigerian_Constitution_A_need_for_a_more_lib eral_provision. Accessed May 14, 2020

3. G. Awolo, 'Fundamental Human Rights Enforcement Procedure in Nigeria: An overview', (2014) Vol.3, EBSU Journal of International Law and Juridical Review, a scan available at www.lasu.edu.ng/publications/law/grace_arowolo_ja_9.pdf. Accessed May 20, 2020

4. J. Shuaibu, 'An appraisal of the Enforcement of Human Rights under the Fundamental Rights Enforcement Procedure Rules 2009 in Nigeria', published at kubanni.abu.edu.ng/jspui/bitstream/123456789/9143/1/AN%20APPRAISAL%20OF%20THE%20ENFORCEMENT%20OF%20HUMAN%20RIGHTS%20UNDER%20THE%20FUNDAMENTAL%20RIGHTS%20%28ENFORCEMENT%20PROCEDURE%29%20RULES%202009%20IN%20NIGERIA.pdf. Accessed May 25, 2020

5. J.A. Dada, 'Impediments to Human Rights Protection in Nigeria', (2012) Vol. 18, *Annual Survey of International & Comparative Law* published at https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/6/. Accessed May 14, 2020

6. M. Stanley-Idum & J. Agaba, *Civil Litigation in Nigeria*, (Nelag & Company Limited: Lagos, 2017)

7. Onyekachi Duru, 'An Overview of the Fundamental Rights Enforcement Procedure Rules, 2009', published at http://ssrn.com/author=1874278. Accessed on April 30, 2020

8. T. A. Adekola, 'Public Interest Litigation in Nigeria – A Veritable Tool for Good Governance';www.researchgate.net/publication/307558509_PUBLIC_INTEREST_LITIGATION_IN_NIGERIA-_A_VERITABLE_TOOL_FOR_GOOD_GOVERNANCE. Accessed May 20, 2020

9. The National Action Plan for the Promotion and Protection of Human Rights in Nigeria; at www.ohchr.org/Documents/Issues/Education/Training/actionsplans/Excerpts/Nigeria09_13.pdf. Accessed May 24, 2020