AFRICAN HUMAN RIGHTS LAW JOURNAL

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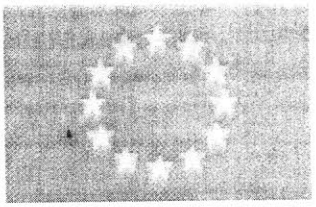
AFRICAN HUMAN RIGHTS LAW JOURNAL

Volume 11 No 2 2011



The financial assistance of the European Union
is gratefully acknowledged.

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ISSN 1609-073X

Cover design: Colette Alves

Typeset in 10 on 12 pt Stone Sans by ANdtp Services, Cape Town

Printed and bound by Shumani Printers

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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

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Summary

The article traces the evolution of FREP rules in Nigeria and highlights the problems which gave rise to FREP Rules, 2009. The article discusses the new rules and acknowledges that their objectives are laudable. For instance, the new Rules had to a large extent solved the thorny issues of how to commence human rights actions, expensive filing costs, service and limitation of action. However, the article notes that it is unusual for Rules of Court to have a preamble. The FREP Rules, 2009, therefore, depart from the usual standard. The fact that the laudable objectives of the FREP Rules are contained in a preamble may minimise their legal effect since preambles do not have the same legal force as substantive provisions. What is more, a number of provisions of the Rules are inconsistent with the provisions of the Constitution of Nigeria, 1999, and stand the risk of being declared null and void to the extent of their inconsistency in adversarial proceedings. There are a few provisions in the FREP Rules, 2009, which may be adverse to the interest of victims of human right violations compared to the FREP Rules, 1979. These include the abolition of application for leave of court and the requirement to front-load evidence together with a written address before commencing an action. These requirements

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may be counter-productive as counsel will require more time for research. Also, the Court of Appeal decision and the argument that FREP Rules have a constitutional flavour are misconceived and may be counter-productive as it will introduce rigidity into the review of the rule. The challenges posed with the enforcement of human rights in Nigeria are multi-faceted (constitutional, judicial and social). Therefore, a simplistic attempt to solve them through a review of the FREP Rules is surely inadequate. The article calls for legislative intervention to make the provisions of chapter II enforceable and to amend section 12(1) which requires domestication of treaties and conventions as a precondition for their enforcement.

> Human rights remain unfulfilled promises for large numbers of people throughout the world, despite their recognition in national constitutions and in widely ratified international treaties and regardless of the availability at the national level of judicial mechanism for their enforcement.[1]

1 Introduction

Constitutional commitments to human rights are futile unless enforced by and through institutions established for that purpose, particularly those empowered to interpret the constitution.[2] The human rights community in Nigeria is excited by the Fundamental Rights Enforcement Procedure Rules, 2009 (FREP Rules) recently made by the Chief Justice of Nigeria pursuant to section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 (1999 Constitution). The FREP Rules attempt to deal with some of the shortcomings in the previous FREP Rules, those of 1979.[3]

The FREP Rules begin with an unusually long Preamble which, *inter alia*, enjoins judges to apply and interpret the Constitution, human rights laws and the FREP Rules in a liberal manner so as to advance the rights and freedoms guaranteed by the African Charter on Human and Peoples' Rights (African Charter) and the Universal Declaration of Human Rights (Universal Declaration). The courts are also enjoined to proactively pursue enhanced access to justice, especially for the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented. An attempt is also made to liberalise the concept of *locus standi* in human right cases. This article argues that some of the improvements, though laudable, may have been exaggerated by

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1 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 54 *Journal of African Law* 258.

2 NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 47 55.

3 The FREP Rules, 1979 were made by the former Chief Justice Fatayi Atanda Williams in exercise of the power conferred on him by sec 42(3) of the Constitution of the Federal Republic of Nigeria, 1979. The Rules commenced on 1 January 1980. This was the first set of rules specifically made for the enforcement of fundamental rights in Nigeria.

commentators. The writer expresses doubts as to whether the FREP Rules are an appropriate vehicle for the enforcement of the provisions of the African Charter in Nigeria and posits that far-reaching reform is required for a robust enforcement system.

The article is divided into six sections. Section one is an introduction, while section two briefly considers the historical evolution of human rights provisions in Nigeria beginning with the 1960 Constitution. Section three discusses the main shortcomings of the FREP Rules of 1979 that gave rise to the latest version of the FREP Rules. Section four is devoted to major innovations contained in the FREP Rules, ostensibly aimed at addressing some of the shortcomings of the FREP Rules of 1979. Section five, which is the heart of the article, presents a legal analysis of a few critical legal issues arising from the provisions of the FREP Rules, with a view to assessing their strengths and possible weaknesses in advancing the laudable objectives of the reformers who promoted the revision of the FREP Rules.

2 Evolution of FREP Rules in Nigeria

Successive constitutions of Nigeria since independence in 1960 have always included provisions on human rights protection. The first Bill of Rights in Nigeria may be traced to the Independence Constitution of 1960. Shortly before independence, when the colonial government introduced the system of regional governments, minority ethnic groups expressed fears of domination and marginalisation. In response to these concerns, the colonial government set up a Minorities Commission in 1957.[4] Based on its recommendations, a bill of rights was

4 In the course of the quest for independence of Nigeria from British colonial rule, it became apparent that Nigerian political arrangements would be heavily weighted in favour of three groups that dominated the three colonial regions – North, East and West – into which the British imperial government had divided Nigeria. In the north, the Fulani allied with the Hausa whom they had ruled for a century before the onset of British colonialism in 1903, dominated the affairs of the region and persecuted the Tiv and several other minorities. In the east, the Igbo maltreated the Ibibio and other minorities. In the west, the Yoruba captured power and showed great hostility towards the Urhobo and Benin especially. Consequently, there were widespread fears expressed by such demographically smaller groups who became political minorities as a consequence of the 1954 federal arrangements in Nigeria. They feared that they would become politically endangered as minority groups following political independence from Great Britain. The British imperial government appointed a Minorities Commission in 1957 to look into such fears in the northern, eastern and western regions of Nigeria and to recommend measures for lessening them. In the course of its work, the Willink Commission submitted its report in 1958. See P Ekeh 'Willink Minorities Commission – Nigeria' (1957-58) Maps of Colonial Nigeria Showing Major Ethnic Groups and Minority Ethnic Areas http://www.waado.org/nigerdelta/ Maps/willink_commission/willink_minorities_commission.html (accessed 25 May 2011).

included in chapter III[5] of the 1960 Constitution[6] and the Republican Constitution of 1963.[7] A view has been expressed that this was done by the British colonial government to protect the economic interests of foreign nationals in an independent Nigeria. According to a group of East African lawyers:[8]

> In the late fifties and early sixties when the colonies were nearing independence, the issue of a bill of rights came to the fore. It was raised by the very power that had been suppressing it for years. But this time there was a good reason for it. The colonialists were leaving. The colonised were ascending into power. What of the property which accrued during the whole period of colonialism by the nationals and companies of the colonial powers? This had to be protected. Therefore the issue of the individual rights, especially the right to own property and the state protection of the same, became one of the main topics of discussion on independence. In the now notorious Lancaster House constitutional talk, the British made sure that a bill of rights was entrenched in the constitutions of its former colonies. Not that they cared a lot about individual rights and freedom of the indigenous people. They were concerned about the properties of their nationals still in the colonies after independence.

The truth of the above assertion was confirmed by the lukewarm attitude to the human rights issues in the post-colonial era in Nigeria. Only political rights were entrenched in the Constitution, while no serious thought was given to socio-economic rights.

Despite their constitutional recognition, the protection of human rights of the teeming majority of Nigerians was ineffective. This was exacerbated during the military interregnum[9] coupled with the absence of a specific expeditious procedure for the enforcement of fundamental rights.[10] In the absence of any rules promulgated by the federal and regional parliaments, fundamental rights litigation was commenced in several different ways, including an application under section 31(1) of the 1960 Constitution,[11] by writ of summons,[12] originating motion[13] or notice of motion.[14]

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5 Secs 17-32.

6 Brems & Adekoya (n 1 above) 2.

7 BO Nwabueze *Constitutionalism in the emergent state* (1973) 72.

8 'Legal Aids Committee. Essays in law and society' Faculty of Law, University of Tanzania, Dar es Salaam (1985) 12-13, quoted in F Falana *Fundamental rights enforcement in Nigeria* (2010) 4-5.

9 Nigeria gained independence in 1960. During the 51 years after independence Nigeria has been ruled by successive military governments for 29 years.

10 E Nwauche 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?' (2010) 10 *African Human Rights Law Journal* 502 503.

11 *Aoko v Fagbemi* (1961) 1 All NLR 400.

12 *Akande v Araoye* (1966) NMLR 215.

13 *Whyte v Commissioner of Police* (1966) NMLR 215.

14 *Akunnia v Attorney-General, Anambra State* (1977) 5 SC 161.

In 1979, upon the country's return to democracy after a spell under military rule, the Constitution of the Federal Republic of Nigeria, 1979 came into force on 1 October 1979. This Constitution not only retained the fundamental rights provisions in chapter IV, but also introduced a new dimension by providing for Fundamental Objectives and Directive Principles of State Policy in chapter II. Chapter II contains economic, social, cultural, educational, environmental and other objectives to which all the organs of government should adhere. However, these rights were expressly made non-justiciable by section 6(6)(c) of the Constitution. The then Chief Justice of Nigeria, Atanda Fatai Williams, invoked section 42(3) of the 1979 Constitution which empowered him to make rules for the practice and procedure for the High Court towards the enforcement of the provisions of chapter IV. The FREP Rules, 1979, came into effect on 1 January 1980.

3 Problems of enforcement under the FREP Rules, 1979

The FREP Rules, 1979, were intended to facilitate a speedier and less cumbersome resolution of complaints of human right abuse.[15] However, over the years it was discovered that the FREP Rules, 1979 had a number of shortcomings which were exploited by violators of human rights to justify their actions.[16] This problem was exacerbated by the rigid approach of the Nigerian courts in their interpretative role which turned the FREP Rules, 1979, into a highly technical and formal procedural instrument. Emerging from a military regime, the Nigerian courts, steeped in formalism and technicalities, were not well versed in the enforcement of human rights.[17] The 1989 Constitution and the extant 1999 Constitutions retained the provisions for Fundamental Rights and Fundamental Objectives and Directive Principles of State Policy in chapter IV and II respectively. The FREP Rules, 1979, continued to apply with all their shortcomings until 1 December 2009 when FREP 2009 became operative. Some of the shortcomings of the 1979 FREP Rules are discussed below.

3.1 Commencement of action

The requirement of leave of court was a condition for the commencement of a fundamental rights action under the 1979 Rules. Order 1 Rule 2(2) provided that '[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'. In *Udene*

15 Nwauche (n 10 above) 503.

16 Falana (n 8 above) xi.

17 Nwauche (n 10 above) 503-504.

v Ugwu,[18] the Court of Appeal held that the requirement of leave is mandatory and cannot be regarded as a mere irregularity. This position has been affirmed by a plethora of cases.[19] All that is required of an applicant seeking leave of the court *ex parte* is to make out a *prima facie* case for the grant of leave. In order words, the applicant is only required to make a full disclosure of the essential facts giving rise to the application. Leave is granted at the discretion of the judge. Such discretion must, however, be exercised judicially and judiciously based on the facts and circumstances of each case. If leave was obtained on the basis of non-disclosure or suppression of material facts or fraud, any person who is adversely affected by the said order is at liberty to apply to set it aside.[20] The application for leave is 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.

3.2 Limitation of 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 the satisfaction of the court of the cause of the delay.[21] In *Oguegbe v Inspector-General of Police*,[22] the application for leave to enforce the applicant's fundamental right to personal liberty was refused on the ground that the action was brought 30 months after the alleged infringement. The same principle has been applied in a plethora of cases.[23] 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.

3.3 Duplicity of processes

The FREP Rules, 1979, duplicated the process for the enforcement of fundamental rights. An applicant would first bring an *ex parte* application

18 (1997) 3 NWLR (Pt 491) 57.

19 See also *University of Calabar v Esiaga* [1987] 4NWLR (Pt 502) 719; *Madeibo v Nwakwo* [2001] 29 WRN 137; *Attorney-General of the Federation v Ajayi* [200] WRN 105; *WAEC v Akinkunmi* [2002] 7 NWLR (Pt 766) 327; (2202) 28 WRN 13, *Achebe v Nwosu* [2002] 19 WRN 42; *Ahmad v Sokoto State House of Assembly* (2002) 44 WRN 52 [2002] 15 NWLR (Pt 791) 519.

20 *Anigboro v Sea Truck (Nig) Limited* [2001] 10 WRN 78 94.

21 Order 1 Rule 3(1) FREP Rules, 1979.

22 (1999) 1 FHCLR 59.

23 *Fred Egbe v The Honourable Justice Adefarasin* [1985] 1 NWLR (Pt 3) 594 (1987) All NLR 1 (2003) 14 WRN 57; *SD Agboola & Others v Saibu & Another* (1991) 2 NWLR (Pt 175) 566; *Michael Obiefuna v Alexander Okoye* (1961) All NLR 357.

for leave, supported by 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.[24] Secondly, if granted leave, he would have to bring another application on notice with virtually the same set of documents.[25] Where the motion on notice is not filed within 14 days after the grant of leave, the effect is that the leave has become spent and void. In such a situation, the applicant cannot be permitted to ask for an extension of time within which to file the motion or summons.[26] The needless and frustrating duplicity of processes under the 1979 Rules was a major drawback.

3.4 Jurisdictional dichotomy between the Federal High Court and the State High Court

The Rules created confusion on which is the appropriate court between the Federal High Court and the State High Court in the enforcement of fundamental rights in Nigeria. While Order 1 Rule 2 gave jurisdiction to a High Court in the state where the cause of action arose, Order 1 Rule 1 defined a court to mean the Federal High Court or the High Court of a state. In *Alhaji Lawan Zakari v Inspector-General of Police*,[27] the appellant had filed a notion *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. At the hearing of the motion, the learned judge *suo moto* asked the appellant's counsel to address him on whether the Court was competent to entertain the suit in view of section 230(1)(s) of Decree 107 of 1993 and section 42 of the 1979 Constitution. He therefore ordered the appellants to put the respondents on notice. The respondent subsequently filed a notice of preliminary objection challenging the jurisdiction of the Court to hear and determine the matter on the ground that only the Federal High Court could entertain it. The judge upheld the preliminary objection and dismissed the application. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. The Court of Appeal set aside the decision and held that both the Federal and State High Courts are competent to entertain an application for the enforcement of fundamental rights. This principle was subsequently applied by the Supreme Court in *Jack v University of Agriculture, Makurdi*.[28] However, the Supreme Court in a subsequent decision held that actions against state governments cannot be instituted in the Federal High Court.[29]

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24 Order 1 Rule 2(3) of FREP Rules, 1979.

25 Order 2 Rule 1(1) of FREP Rules, 1979.

26 See *Boniface Ezechukwu v Peter Maduka* (1997) 8NWLR (Pt 518) 625 670.

27 [2002] 6 NWLR (Pt 670) 666.

28 (2004) 14 WRN 91.

29 *Executive Governor, Kwara State v Mohammed Lawal* (2005) 25 WRN 142.

3.5 Dichotomy between principal/ancillary claims

According to Order 1 Rule 2 of the Rules, any person who alleges that any one of the fundamental rights provided for in the Constitution and which he is entitled to 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. This provision has been interpreted to mean that only rights that are principally provided for under chapter IV of the Constitution could be enforced using the Rules. In other words, rights ancillary to those clearly spelt out under chapter IV of the Constitution could not be enforced under the previous Rules.[30]

However, in the celebrated case of *Garba v University of Maiduguri*,[31] the Supreme Court dismissed the contention of the respondent's counsel that the right to a fair hearing sought to be enforced by the appellants was ancillary to the right to studentship. In rejecting the argument, the Court held:

> There is no doubt that the action of the applicant is hinged on a constitutional provision, and I do not agree, with respect to Chief Williams, that this case is based solely on breach of contract ... It would be safer for the courts in this country to err on the side of liberalism whenever it comes to the interpretation of the fundamental provisions in the Constitution than to import some restrictive interpretation.

Ironically, the Supreme Court has overturned the ruling in the case of *Garba v University of Maiduguri*[32] on the spurious dichotomy between principal and ancillary claims. Thus, it has been held that the right of students to a fair hearing cannot be enforced under the Fundamental Rights Enforcement (Procedure) Rules 2009.[33] In *University of Ilorin v Oluwadare*,[34] the Supreme Court (*per* Onu JSC) stated:

> The right to studentship not being among the rights guaranteed by the 1999 Constitution, the only appropriate method by which the respondent could have challenged his expulsion was for him to have commenced the action with a writ of summons under the applicable rules of court.

It is difficult to agree with the above reasoning. It was not doubted that the respondents were human beings before they became students. The fact that they were students only relate to the circumstances in which their rights to a fair hearing were violated. The circumstances in which the rights of different people could be violated will of course vary from one case to the other. The respondents' case therefore was not based on their right to studentship as such, but a right to be heard

30 See *Gongola State v Tukur* [1989] 4 NWLR (Pt 117) 517; *Anigboro* (n 20 above).

31 [1986] 2 NWLR (Pt 18) 559.

32 As above.

33 Falana (n 8 above) 70.

34 (2006) 45 WRN 145. See also *Akintemi & Others v Prof CA Onwumechili & Others* (1985) All NLR 94 (1985) 1 NWLR (Pt 1) 68. See also the case of *Egbuonu v BRTC* (1997) 12 NWLR (Pt 531) 29 50.

before their guilt or innocence was determined by the appellant. The fact that the respondents had prayed the court to forestall their rustication before the determination of the suit does not make the right to studentship the principal claim. If the appellant had rusticated the respondents after subjecting them to a disciplinary procedure which was fair and transparent, it would have been futile for them to invoke the FREP Rules on the ground that their right to a fair hearing had been breached. It is unfortunate that the judges had chosen to impose a limitation on their interpretative power which is not apparent from the wording and language of the Constitution.

3.6 Committal proceedings

Order 6 Rule 2 of the 1979 Rules provided as follows:

> In default of obedience of any order made by the court or judge under these Rules, proceedings for the committal of the party disobeying such order will be taken. The Order of Committal is in the Form 6 of the Appendix.

There was a *lacuna* in the Rules on the procedure to be adopted in initiating contempt proceedings against a party who is in disobedience of a court order. In *Malcom Fabiyi v University of Lagos*,[35] the respondent objected to the filing of the contempt proceedings under Order 6 Rule 2 on the ground that Forms 48 and 49 had not been served on the respondents pursuant to the provisions of the Lagos State High Court (Civil) Procedure Rules. The learned judge, Fafiade J, dismissed the preliminary objection on the grounds that service of such forms was not required under the FREP Rules. In the face of this *lacuna*, the courts had to resort to the relevant High Court (Civil Procedure) Rules with respect to committal proceedings. In *Bonnie v Gold*,[36] Akintan JCA (as he then was) stated:

> ... as the Fundamental Rights Rules, is silent on the procedure to be followed in enforcing the order for contempt made under it, the appropriate rules made for the enforcement of such order in the High Court (Civil Procedure) Rules would be applicable. It follows therefore that the appropriate Forms 128 and 129 would have to be issued and properly served on the respondent. Thus, in the instant case, the appropriate rules and the forms prescribed in the High Court (Civil Procedure) Rules, 1988 of Bendel State, would be applicable. The appellants failed to follow the rules laid down in the aforementioned High Court (Civil Procedure) Rules. That omission therefore vitiates the application. The lower court was therefore right in dismissing the said application.

In practice, forcing victims of human rights violations to fall back on the High Court Rules on enforcement of judgment usually results in the loss of valuable time. Since the objective of the FREP rules is to facilitate the

35 Unreported Suit ID/33m/93 of 15 June 1994.

36 (1996) 8 NWLR (Pt 465) 230 237.

speedy enforcement of fundamental rights, it is counterproductive to have a speedy declaration of rights and a slow enforcement of rights.

3.7 Requirement of *locus standi*

Order 1 Rule 2 of the FREP Rules, 1979, provided as follows:

> Any person who alleges that any of the fundamental rights provided for in the Constitution 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.

In furtherance of this rule it has been held in a plethora of cases[37] that it is the person whose fundamental rights have been, are being or are likely to be violated that can challenge such a violation. The FREP Rules, 1979, contained many assumptions, such as the capacity of vulnerable people to pay exorbitant filing fees, the sensitivity of a judge to the plight of a detainee in police custody, and the compliance of police officers to judicial.

However, some judges have managed to save applications filed on behalf of human right victims through judicial activism. In *Captain SA Asemota v Col SL Yesufu and Another*,[38] the wife of a detained army officer had sued in her own name to enforce the fundamental right of her husband to personal liberty. The learned trial judge, Somolu J (as he then was), amended the application *suo moto* by substituting the husband's name for hers in order to bring it in conformity with the FREP Rules.

In *Richard Oma Ahonarogo v Governor of Lagos State*,[39] the applicant, a legal practitioner, filed an application for the enforcement of the right to life of the 14 year-old Augustine Eke who was convicted of armed robbery by the Firearms and Robbery Tribunal in Lagos State. The main ground of the application was that the convict could not be sentenced to death as he was a minor by virtue of section 368 of the Criminal Procedure Law of Lagos State. The preliminary objection of the respondent challenging the *locus standi* of the applicant and the jurisdiction of the court was dismissed by Onalaja J (as he then was). It was the judge's view that the applicant, as a legal practitioner, had the *locus standi* to enforce his client's fundamental right to life.

In *Ozekhome v The President*,[40] the 2nd to 24th applicants were detained under the State Security (Detention of Persons) Decree 2 of 1984. The *locus standi* of the first applicant in the action was challenged

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37 *Olusola Oyegbemi v Attorney-General of the Federation* (1982) 3 NCLR 895; *Alhaji Shugaba Abruraham Darman v Minister of Internal Affairs* (1981) 2 NCLR 459; *University of Ilorin v Oluwadare* [2003] 3 NWLR (Pt 806) 557; *Governor of Ebonyin State v Isuama* 92003) 8 WRN 123 (2002) 19 WRN 42.

38 (1981) 1 NSCR 420.

39 Unreported case. See JHRLP Vol 4 Nos 1, 2 & 3, cited by Falana (n 8 above) 31.

40 1 NPILR 345 359.

by the respondent. In dismissing the preliminary objection, Segun J (as he then was) said:

> The 2nd to 24th plaintiff/respondents are in jail and they have sufficient interests to come out. To get out, they need the services of the 1st plaintiff/respondent – a legal practitioner. This lawyer has statutory rights to perform certain duties as a legal practitioner to his clients. These statutory rights are clearly spelt out in section 2 of the Legal Practitioners Act 1975 (see also Rules 7,4,14C and 29 of the Rules of Professional Conduct in the Legal Profession made pursuant to the Legal Practitioners Act, 1975). The combined effect of the law and the Rules show that the 1st plaintiff/respondent has sufficient interest in the matter. He has been briefed and he is now taking steps to ensure success of the litigation. I hold that he is an interested party on the face of the summons.

A strict adherence to the doctrine of *locus standi* cannot be justified under article 29(2) of the African Charter, which imposes a duty on every individual to serve their community by placing their physical and intellectual abilities at its service.[41] Article 27(2) further provides that the rights and freedom of each individual shall be exercised 'with due regard to the rights of others, collective security, morality and common interests'.

The activist views of the learned judges in the above three cases are indeed commendable. Rather than invoking the literal rules of interpretation which inexorably would have led to the striking out of these cases, their interventions have enthroned substantive justice above technical justice. These cases are also significant in the sense that they clearly indicate that not all the judges can be said to be guilty of the sweeping charge of narrow-mindedness and retrogression in interpreting the provisions of the FREP Rules.

4 Changes introduced by the FREP Rules, 2009

In order to address the shortcomings in the FREP Rules, 1979, the Nigerian Bar Association and the human rights community pleaded for the review of the Rules. The request for the amendment of the Rules was acted upon by the immediate past Chief Justice of Nigeria, the Honourable Legbo Kutigi, who enacted the new FREP Rules in 2009.[42] The new FREP Rules contain some provisions which are meant to address some of the problems of the FREP Rules, 1979.

4.1 Expansive preamble

The principal or overriding objectives of the FREP Rules are outlined in the Preamble. They relate mainly to the obligations of the court in the

41 L Dibia & E Andah 'The new Rights Enforcement Rules – Goodbye law triumphant, justice prostrate!' http://www.allAfrica.com (accessed 2 June 2011).

42 Falana (n 8 above) xi.

hearing, interpretation and adjudication of cases brought under the Rules. The court and parties shall 'constantly and conscientiously' give effect to the overriding objectives of the rules 'at every stage' of human right actions, especially 'whenever it exercises any power given to it by these rules or any other law and whenever it applies or interprets any rule'.[43] In sum, the courts are enjoined in paragraph 3 of the Preamble to observe the following objectives:

(a) to expansively and purposely interpret and apply the Constitution, especially chapter IV, as well as the African Charter with a view to advancing and affording the protection intended by them;
(b) to respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, including the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights;
(c) to make a consequential order as may be just and expedient;
(d) to pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented;
(e) to encourage and welcome public interest litigation in the human rights field. In particular human rights activists, advocates or groups and non-governmental organisations may institute human rights actions on behalf of any potential applicants. No human rights case may be dismissed or struck out for want of *locus standi*;
(f) to pursue the speedy and efficient enforcement of and realisation of human rights; and
(g) to give utmost priority to human rights cases especially those involving liberty.

It is important to point out that the court is called upon to observe the foregoing 'whenever it exercises any power given to it by these rules or any other law and whenever it applies or interprets any rule'.

4.2 Commencement of action

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 simply on the basis that it was commenced via a writ of summons or originating motion or originating summons. The filing fee has also been reduced drastically[44] and may not be more than an equivalent of about US $10 compared to about US $300 under the FREP Rules, 1979.[45]

43 See para 1 Preamble to FREP Rules.
44 See Appendix A to the FREP Rules.
45 Nwauche (n 10 above) 511.

The requirement of leave which was a *sine qua non* in the FREP Rules, 1979, has been dispensed with under the 2009 FREP Rules. Thus, by virtue of Order II Rule I of the new FREP Rules, an applicant shall commence an action by filing a motion on notice or any other originating process accepted by the court. The application shall be accompanied by a statement, affidavit in support, with or without exhibits and a written address. Also, the confusion created by the filing of a verifying affidavit has now been removed.[46] The application shall be fixed for hearing within seven days, thus obviating the need to file an affidavit of urgency. However, in situations where exceptional hardship may be caused to the applicant before the service or hearing of the substantive application, a motion *ex parte* for an interim order may be filed.[47]

4.3 Curtailing delaying tactics of the parties

Unlike what obtained under the FREP Rules, 1979, there is little room for delaying tactics on the part of any respondent. Under Order II Rule 6, a respondent who has a preliminary objection is now required to file it with a written address with or without a counter-affidavit. Upon being served with such processes, the applicant is required to file and serve an address on points of law within five days with or without a further affidavit. Thus, the preliminary objection and the main application will be heard together on the same day. The hearing is conducted based on the parties' written addresses,[48] while parties shall be given a maximum of 20 minutes to make an oral argument 'on matters not contained in their written addresses'.[49] In order to ensure that the non-attendance of counsel does not delay proceedings, the court may, either on its own or upon the application of the other counsel, deem the written address of the party whose counsel is absent as having been adopted. A party shall be deemed to have notice of the date fixed for the adoption of written addresses if he or his counsel was present in court on the last adjourned date where the case was fixed for that day.[50]

4.4 Service of application on the respondent

Generally, after an action has been filed, it must be served on the defendant. Without such service, he may not know that the plaintiff had sued him and for what. The object of the service is, therefore, to give notice to the defendant, so that he may be aware of and be able to defend the

46 'Prospect and challenges of new Fundamental Rights Rules' *The Punch* 22 February 2010.

47 See Order IV Rule 3 FREP Rules.

48 Order XII Rule 1 FREP Rules.

49 Order XII Rule 2 FREP Rules.

50 Order XIII Rule 3 FREP Rules.

action.[51] Failure to serve an originating process is a fundamental vice which entitles the other party *ex debito justitiae* to have the process set aside as a nullity.[52] Order V Rule II of the FREP Rules departs from the general principle on service of originating through personal service by providing that '[t]he application must be served on all the parties directly, so long as a service duly effected on the respondent's agents will amount to personal service on the respondent'.

This provision will undoubtedly make the service of the originating process on the respondent easier where the respondent has an identifiable agent. In view of the overriding objective of giving the provisions of the rules expansive meaning, the court should have no difficulty in deeming the service of an application on the Commissioner of Police as effective service on the Inspector-General of Police. In the case of a government agency or corporate entity, service on the state office or branch may be deemed as effective, especially where the respondent is aware of the suit and is represented in court.

4.5 Limitation of action

Just as time does not run against the state in the prosecution of criminal cases, the application for the enforcement of fundamental rights can no longer be affected by any statute of limitation whatsoever.[53]

5 Critique of the new FREP Rules

The fundamental objectives of FREP Rules are contained in the Preamble. First, it is unusual for any rules of court to espouse any fundamental objectives as such. What is usual is for the Rules to succinctly state the relevant section of the enabling law pursuant to which the Rules were made.[54] The FREP Rules may therefore go down in Nigerian history as the first rules of court to have a preamble. This is not really an objection, except that the nature of a preamble does not give assurance that the contents have much legal weight.

Since the lofty overriding objectives of FREP Rules are listed in the Preamble, the pertinent question is what legal effect(s) a preamble has. A preamble is a mere introductory statement that carries little or no weight in law. A preamble is too abstract and is usually just a state-

51 *United States Press Ltd v Adebanjo* (1969) 1 All NLR 431 432.

52 See *Obimanure v Erinosho & Another* (1966) 1 All NLR 250; *Mbadinuju v Ezuka & Another* (1994) 10 SCNJ 109 128; *Skenconsult v Ukey* (1980) 1sc 6 26; *Adeigbe & Another v Kusimo & Another* (1965) NMLR 284.

53 See Order III Rule 2 FREP Rules, 2009.

54 Eg, the FREP Rules, 1979 began by stating: 'In exercise of the powers conferred by section 42 subsection 3 of the Constitution of the Federal Republic of Nigeria, the Chief Justice of Nigeria hereby makes the following Rules.'

ment of fact, unlike the wording of the actual law.[55] Thus, the so-called Preamble of the FREP Rules does not really conform to a preamble. In the case of *Jacobson v Massachusetts*[56] 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 important to take a closer look at the provisions of section 46 of the 1999 Constitution pursuant to which the FREP Rules were made in order to see whether some of the provisions of the FREP Rules are not *ultra vires* the Chief Justice. The section provides:

(1) Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.
(2) Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that state of any right to which the person who makes the application may be entitled under this chapter.
(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.
(4) The National Assembly –
    (a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and
    (b) shall make provisions –
        (i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim; and
        (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.

55 See http://www.eng.hi138.com/Legal Papers/State/Constitution Law Papers (accessed 17 June 2011).

56 197 US 11 (1905).

It is clear from the provisions of section 46(3) that the power of the Chief Justice of Nigeria can only be exercised with respect to 'practice and procedure'. Rules of court, by nature, set out standards that govern the initiation and conduct of a civil or criminal law suit in the court. They cover the methods of commencing an action, prescribe what kind of processes are required of the parties, the timing and manner in which these must be done, the conduct of trials, the process for judgment, and how the courts and its key official(s) must function.[57] Section 46(4)(a) of the 1999 Constitution makes it clear that it is the responsibility of the National Assembly to confer additional powers on the High Court for the purpose of enabling the court to exercise its jurisdiction more effectively. Sections 46(4)(b)(i) and (ii) even go as far as authorising the National Assembly to make laws that will render financial assistance to indigent citizens. As we can see, these are some of the laudable objectives of the new FREP Rules. It follows that the National Assembly as an important government institution must intervene by making the requisite law in order to achieve its desired objectives. Fortunately, the Supreme Court had held in *Attorney-General of Ondo State v Attorney-General of the Federation and Others*[58] that the Supreme Court sustained the constitutionality of the Independent Corrupt Practices (and Other Related Offences) Commission Act, 2000,[59] enacted pursuant to section 15(5) of chapter two and item 60(a) on the exclusive legislative list of the 1999 Constitution. The import of this decision is that the provisions of chapter II of the Constitution can be made enforceable to the extent that they have been enacted into law. Thus, in the absence of any such law by the National Assembly aimed at invigorating the enforcement of fundamental rights, there is a limit to which the Chief Justice of the Federation can intervene. In this regard, it is arguable that any provision of the FREP Rules that is beyond practice and procedure is *ultra vires*, null and void.

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 of superior records contained in section 6(6)(c) of the 1999 Constitution as follows:

> 6 (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
>
> ....
>
> (6) The judicial powers vested in accordance with the foregoing provisions of this section –
>
> ....

57 See 'Civil procedure' en.wikipedia.org/wiki/Civil_procedure (accessed 13 March 2010).

58 [2002] 9NWLR (Pt 772) 222 (2002) 27 WRN 1 (2002) 6 SC (Pt 1) 1 (2002) FWLR (Pt 11) 1972.

59 Cap C31 LFN, 2004.

(c) shall not. except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of 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.

The above provision is a constitutional limitation on the extent of judicial powers vested in all the courts of record in Nigeria, including the Supreme Court. In furtherance of these provisions, while the infringement of any of the rights contained in chapter IV can be challenged in an appropriate High Court, the economic, social and cultural rights which are contained in chapter II of the Constitution are not justiciable. In *Archbishop Olubunmi Okogie v Lagos State*,[60] the Court of Appeal had this to say:[61]

> The fundamental objectives identify the ultimate objectives of the nation and the Directive Principles lay down the policies which are expected to be pursued in the efforts of the nation to realise the national ideals. While section 13 of the Constitution makes it a duty and responsibility of the judiciary, among other organs of government, to conform to and apply the provisions of chapter II, section 6(6)(c) of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. It is clear therefore that section 13 has not made chapter II of the Constitution justiciable.

In other words, the provisions of chapter II of the Constitution, which contain some socio-economic rights, are unenforceable in court and it is only the civil and political rights contained in chapter IV of the Constitution that can be enforced in a court of law.[62] Thus, the FREP Rules made by the Chief Justice of Nigeria in the exercise of his judicial functions cannot under any guise enlarge the scope of the judicial powers vested in the courts.

Also, the FREP Rules seek to expressly override the provisions of section 12(1) on the conditions for the application of international treaties and conventions in Nigeria. Section 12(1) provides:

(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty.

The above provisions entrench the principle of dualism. The essential purport of this is that when Nigeria signs any international treaty or convention, it does not become binding law in Nigeria unless and until

60 (1981) 2 NCLR 337 350.

61 *Attorney-General of Ondo State v Attorney-General of the Federation & Others* (n 58 above).

62 See *Okogie v Attorney-General of Lagos State* (1981) 2 NCLR 350; *Oronto Douglas v Shell Petroleum Development Company Limited* (1999) 2 NWLR (Pt 591) 466.

it is enacted into law in Nigeria as an Act of the National Assembly.[63] Thus, any treaty signed into law by the executive cannot supersede the provisions of the Federal Republic of Nigeria. However, paragraph 3(b) of the Preamble to the FREP Rules mandates courts to 'respect' municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware.

The meaning of the word 'respect' is not clear. It certainly does not seek to impose an obligation, otherwise mandatory terms such as 'shall' would have been used. It is reasonable therefore to construe the word as persuasive rather than directory. The provisions would be open to attack if the intention is to make international human rights instruments directly enforceable in Nigerian courts. It is worth noting that the provision does not even require Nigeria to be a signatory to such international instruments. It remains to be seen how an international instrument may be validly enforced by the Nigerian courts when the Constitution clearly stipulates that any such instrument must first be domesticated for it to have the force of law.

The FREP Rules, having been made by the Chief Justice of Nigeria, are akin to subsidiary legislation. It has been argued, especially by human rights activists, 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. This view finds support in the Court of Appeal case of *Abia State University v Anyaibe*,[64] where it was stated that the Rules form part of the Constitution and therefore enjoy the same force of law as the Constitution.

With due respect, this cannot be a correct statement of the law. Assuming (without conceding) that the FREP Rules are an integral part of the Constitution, this will not make the provisions of the Rules override the express provisions of the Constitution. Sections 1(1) and 1(3) of the 1999 Constitution entrench the principle of supremacy of the Constitution thus:

> (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> ....
>
> (3) 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.

Based on this provision, it is submitted that all the provisions of the FREP Rules which are inconsistent with the Constitution stand the risk of being declared as null and void to the extent of their inconsistency.

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63 See generally the provisions of sec 14(1)(2) of the 1999 Constitution of the Federal Republic of Nigeria.

64 (1996) 3 NWLR (Pt 439) 646.

The decision of the Court of Appeal that the FREP Rules have a constitutional flavour should be re-examined because of its possible negative implications for the future development of the Rules. If the argument is followed to its logical conclusion, it would mean that, once made, the rules can only be amended through the rigorous process of constitutional amendment contained in section 9 of the 1999 Constitution. This has been the fate of the four statutes[65] which are deemed by the provisions of section 315(5) of the 1999 Constitution as forming part of the Constitution. If the argument that the Rules have a constitutional flavour is sustained, it follows that the entire body of FREP Rules stand the risk of being declared unconstitutional having been 'amended' in a manner that is inconsistent with the provisions of section 9 of the 1999 Constitution.

The FREP Rules are still open to attack on the ground that the objective of simplicity is not sufficiently manifest from its provisions. Considering the commencement of action, besides the abolition of the requirement of leave and verifying affidavit, the applicant is still required to produce almost the same set of court processes in addition to a written address. An appreciable degree of duplication is still involved in the process. For instance, while the reliefs would have been stated in the originating process, the applicant is still required to file a statement setting out the name and description of the applicant, the reliefs sought, and it must also be supported by an affidavit setting out the facts upon which the application is made.[66] What should form the contents of the statement has given rise to controversy in the past, leading to some meritorious cases being struck down on technical grounds. This has not been specifically addressed by the Rules. Order 9(1), however, provides that failure to comply with the requirement as to time, place, manner or form shall be treated as an irregularity and may not nullify proceedings except as it relates to the mode of commencement of the application. This connotes that the provisions as to the commencement must still be strictly complied with. It will further the objective of simplicity and access if these technical documents are dispensed with altogether since their contents can be taken care of, especially in the affidavit and address. One would also have expected a procedure whereby a victim will only have to fill out some forms to activate the court process on an urgent basis while the filing of a written address should be made optional. Also, a more careful examination of the new requirements for commencement of action under the FREP Rules would reveal that they may be disempowering and counter-productive for a victim of a human rights violation. Application for leave is now abolished while the application must be accompanied by a written address. The requirements for leave under the FREP Rules proved to be a window for victims

65 The National Youth Service Corps Decree 1993, the Public Complaints Commission Act, the National Security Agencies Act and the Land Use Act.

66 Order II R 3 FREP Rules, 2009.

to obtain swift 'temporary' relief. This is because the application for leave is made *ex parte* and, once granted, operates as a stay until the return date when the motion on notice is fixed for hearing. In practice, the hearing of the case is usually delayed by a combination of factors, and meanwhile the victim continues to enjoy his or her freedom until the return date or such time that the case is finally disposed off. In the majority of cases, most respondents may not even bother to respond, in which case the victim continues to enjoy his freedom on account of the interim order.

Although the requirement of filing a written address in support of the application must have been made with the altruistic intention of speeding up the process, it may have unwittingly created some stumbling blocks along the path of enforcement of fundamental rights. In sum, the applicant under the 2009 Rules is required to front-load his case. The idea of front-loading is that the applicant must have obtained all his evidence, completed his research; and prepared all the processes and authorities before approaching the court. The natural implication is that the applicant's counsel will now require more time to prepare and file his application. This is also true even for extremely urgent cases. Therefore, a victim of a human rights violation who seeks the intervention of the court will now have to wait much longer to get even temporary reprieve.

6 Conclusion

It took the Chief Justice of Nigeria about two decades to respond to the challenges posed by the FREP Rules, 1979. While the FREP Rules, 1979, indeed started a dynamic process of the enforcement of fundamental human rights, a number of unintended stumbling blocks soon emerged along its path, thereby making the road towards the attainment of its objective bumpy and difficult for many victims of human rights violations. The problems of the FREP Rules of 1979 may be divided into four types, namely, (i) those that are rooted in the Constitution; (ii) those that are self-inflicted by the courts; (iii) those that are inherent in the Rules; and (iv) general problems of societal ordering and social justice.[67] Apparently in an attempt to cover lost ground and to establish more vibrant and efficient rules, the Chief Justice, the NBA and the tribe of human rights activists seem to have gone overboard in expressing their good intentions in the new FREP Rules. Thus, the FREP Rules contain a number of innovative provisions which are tantamount to an amendment of the provisions of sections 6(6)(c) and 12(2) of the 1999 Constitution. The Rules in its Preamble enjoin the courts to respect the provisions of chapter II of the 1999 Constitution, the African

67 This classification has been adopted for convenience and ease of understanding of the nature of the problems.

Charter and all international conventions and treaties notwithstanding the requirement of domestication in section 12(2) of the 1999 Constitution.

This article argues that the decision of the Court of Appeal that seeks to put the FREP Rules on the same juridical pedestal as constitutional provisions is misconceived and even counterproductive. Although the principle established in this case indeed meets the demands of justice, it is imperative to give the FREP Rules a proper and correct juridical classification in order to appreciate the extent of what is achievable via that route. Calling a spade a spade and not a garden egg, the FREP Rules are nothing but subsidiary legislation. It should be clear that some of the problems which the FREP Rules address are far beyond what is achievable through subsidiary legislation. For instance, no matter how far the FREP Rules are stretched, they are incapable of overriding the express provisions of the 1999 Constitution. If the FREP Rules can indeed be deployed to make the socio-economic rights provisions of chapter II of the Constitution enforceable and to give direct effect to the provisions of international treaties on human rights to which Nigeria is not even a signatory, this will render the provisions on amendment of the Constitution to a large extent redundant. There exists a groundswell of decisions by the Supreme Court which proclaim the supremacy of the Constitution above any law, whether local or international.

While the writer identifies with all the objectives of the FREP Rules espoused in the Preamble, their attainment in practical terms would require far-reaching constitutional reform, including the amendment of the provisions of sections 6(6)(c) and 12(1)(a) which may serve as obstacles to the enforcement of the provisions of chapter II of the Constitution and direct application of the provisions of international treaties in Nigeria without any need for local domestication. Nigerians must rather restructure their constitutional framework in such a way that it will not only espouse, but give real effect to the socio-economic rights and aspirations of the majority of the people in the struggle for survival with little or no awareness of the Constitution. Beyond making socio-economic rights justiciable, a functional social security system must be developed to take care of those who are poor and vulnerable and insure everyone against the risk and cost of illness. Until this is done, whatever judicial or executive interventions that are made towards the enforcement of fundamental rights would be like a flash in a pan. I hope it will not take another two decades for Nigeria to chart the right course in this regard.