

INTERROGATING THE CONSTITUTIONALITY OF THE FUNDAMENTAL RIGHTS ENFORCEMENT (PROCEDURE) RULES, 2009

Written by Mackson Oruma & Andrew Abuza***

** Lecturer, Department of Public Law, Faculty of Law, Delta State University, Abraka,
Nigeria*

*** Associate Prof, Faculty of Law, Delta State University, Abraka, Nigeria*

ABSTRACT

Without a question, human rights have taken pride of place in the world. This is due to the fact that certain rights are ancillary to human existence; in other words, without those rights, life would be meaningless. International concern over the legal foundation for their enforcement has resulted from this. Nigeria, like other countries, made an effort to increase the enjoyment of those rights, and as a result, a legislative framework was created in that direction. This essay seeks to examine the legal structure established to make sure that certain rights are more than merely theoretical. The Fundamental Rights Enforcement (Procedure) Rule, 2009, which specifies the standards of conduct and the process for enforcing those rights, is taken into consideration in this essay. The origin of the rules and if the rules, as they currently stand, can also serve as a legal basis for the enforcement of rights identical to those protected by other instruments. In order to accomplish this, the study adopts the doctrinal research approach and conducts a critical analysis of the powers granted to the rule-maker by the Federal Republic of Nigeria Constitution of 1999 (as amended), which also guarantees the fundamental rights in Chapter IV.

INTRODUCTION

How important enforcement is the importance of fundamental rights cannot be overstated. The influence of the rights themselves is the cause of this. There are times when an individual's rights may be violated unintentionally or on purpose in the course of daily operations in

society. Issues of rights violations are frequent when law enforcement officials enforce the law for the sake of the general welfare of society. This illustrates why the current administration in a democracy shouldn't take concerns about the administration of justice lightly. Without overlooking the challenges that can arise in the governments' efforts to protect these rights, the study in this essay focuses on the effectiveness of the legal instruments for assuring their enforcement. This prompted an investigation into how far applicants might use the Fundamental Rights Enforcement (Procedure) Rule, 2009 to pursue the enforcement of their rights in situations where there were violations or threats to such rights. The article examines the appropriateness or legality of expanding the application of the Rules to the enforcement of additional human instruments, such as international, regional, or even continental human rights frameworks. The words of Section 46(3) of the 1999 Constitution, which granted the Chief Justice of Nigeria (CJN) the authority to create the Rules, were examined as part of this process. The paper came to the conclusion that the Fundamental Rights Enforcement (Procedure) Rules, 2009 are unconstitutional to the extent that their creators extended the applicability of the Rules to international, regional, or even continental human rights frameworks, undermining the constitutional provision for the enforcement or applicability of international legal instruments. ⁱ

WHAT ARE FUNDAMENTAL RIGHTS

Basic freedoms and rights that are intrinsic to humanity just by virtue of being human are known as fundamental rights or human rights. No of the person's place of origin, religious beliefs, or choice of lifestyle, these rights are attached to them from birth and last until death. They consist of the freedoms of expressionⁱⁱ, association, association from enslavement and torture, and the right to life. We have access to these rights because we are human. Regardless of race, gender, ethnicity, nationality, color, religion, language, or any other status, they are intrinsic to humanity and are not conferred by any state. Not all human rights are basic rights, despite the fact that fundamental rights are by definition human rights. The 1948 Universal Declaration of Human Rights, the first legislative document to outline and expand on the fundamental human rights that should be universally protected, acknowledged the significance of these rights (Human rights). ⁱⁱⁱ

A landmark text in the history of human rights, the Universal Declaration of Human Rights (UDHR) was prepared by representatives of nations from all over the world with varying legal traditions.^{iv} The preamble summarizes the justification for the declaration of rights as follows: "...The General Assembly declares the Universal Declaration of Human Rights to be the common benchmark for success for all countries, with the intention that each person and every organ of society work to uphold these rights and freedoms through teaching and education, as well as through national and international progress measures to ensure their widespread and effective recognition and observance, both among the people of Mem and around the world.

As stated in the preamble, it is intended by this declaration that Human Rights are Universal and not the exclusive property of any privileged class in society.

Human rights include civil and political rights, which ensure that people are free to participate in civic or political matters in their communities. Rights to privacy, freedom of speech, and freedom from torture are all examples of civil and political rights.

Fundamental rights are those that the state recognizes and upholds, whereas human rights are those that attach to a person from birth.^v While fundamental rights are a more recent phenomenon that are typically linked to written law, human rights go back to the dawn of civilization, from the Middle Ages to the Modern Era. Not every right is a basic one, as highlighted by Oputa JSC in *Ramsome Kuti and Ors v. A.G Federation*,^{vi} The idea of a fundamental human right originated from the idea that men have certain unalienable rights, including the right to life, liberty, and movement. The inclusion of those rights in the Nigerian Constitution since independence, which spelled them out and defined them, highlighted the significance of those rights.

It must be stressed that the constitution is not their originator despite their inclusion in it. The constitution just acknowledged and listed them. Three categories of rights can be made up under the word "human right" in its broadest sense: civic and political rights, economic and cultural rights, and security-related rights. Extensions of socioeconomic and cultural rights, often known as people's rights or rights pertaining to collective solidarity (third generation rights).

A person's ability to thrive, develop, and engage in social and cultural activities is guaranteed by economic, social, and cultural rights, which make up another category of human rights.

Included in this group are rights like the right to health, the right to education, and the right to employment. It must be noted that while the government is required by law to ensure that people are not denied their civil and political rights, it is not required to protect their economic, social, and cultural rights. This explains why the governments of Africa and other developing nations, especially Nigeria, have consigned such rights to their constitutions and declared them non-justiciable, labelling them merely as Fundamental Objective and Directive Principles of State Policy.^{vii}

The Economic, Social, and Cultural Rights were listed in the 1999 Constitution under the heading, Fundamental Objectives and Directive Principles of State Policy. Despite the fact that these rights are comparable to those outlined in the 1948 United Nations Declaration of Human Rights and the UN Convention on Economic, Social, and Cultural Rights, they are not subject to the judicial system.^{viii}

HISTORY OF HUMAN RIGHTS ENFORCEMENT IN NIGERIA

Prior to the Federal Republic of Nigeria's constitution, which took effect in 1979, there is no record of any statutory provision in Nigeria for the implementation of fundamental human rights. This describes using the Habeas Corpus provision of English law.^{ix} Anyone who wants to apply for the enforcement of a fundamental right at that time is free to follow any procedure. These processes include the fundamental rights enforcement process, which is protected by the 2009 Rules, as well as petition, Writ of Summons, Originating Summons, and Originating Motion.^x The rights covered by Chapter IV of the 1979 Constitution were the only ones that could be enforced under the Fundamental Rights Enforcements (Procedure) Rule, 1979, which was created by them. CJN, Fatayi Williams in accordance with S.42 of the 1979 Constitution and went into effect on January 1, 1980.^{xi} The African Charter on Human and Peoples Rights (Ratification and Enforcement) Provisions Act has however expanded this to cover other rights that are recognized. Examples of this include the rights of those who are subject to persecution^{xii} to apply for refuge in other nations, Rights to the best state of bodily and mental health^{xiii} that is reasonably possible, to education,^{xiv} right to education^{xv} and to the right of the people to self-determination.^{xvi}

The Fundamental Rights (Enforcement Procedure) Rules 1979, which served as the legal foundation for the enforcement of the rights from 1979 until 1999, set forth the process for enforcing these rights. However, after the 1999 Constitution of the Federal Republic of Nigeria (as amended) entered into force, the 1979 Fundamental Rights (Enforcement Procedure) Rules were rendered obsolete by the 2009 Fundamental Rights (Enforcement Procedure) Rules, which were made by the then-CJN in accordance with S.46(3) of the 1999 Constitution. A person seeking to have their fundamental rights allegedly violated or threatened with violation must first request for permission, according to the 1979 spent Rules. According to those rules, the only individual who has a legal claim is the one whose rights are being violated or are at risk of being violated. As a result, there was nowhere for such an application to be submitted on behalf of a victim of such a breach.^{xvii} In the case *S.A Asemota v. Colonel S.L Yesufu & Anor*,^{xviii} the wife of an army officer who was imprisoned brought a claim for the enforcement of her husband's fundamental right to personal liberty. The wife then brought the claim in her own name. For the suit to be competent, the court suo motu changed the processes by replacing her husband's name with her own.

Additionally, it can be observed that the 1979 regulations' tight definition of the locus standi question began to loosen with time. In *Chief Gani Fawehinmi v. Halilu Akilu*,^{xix} the Supreme Court argued that it was appropriate to loosen the locus standi rules in light of the idea of community brotherhood. In the words of Eso JSC

"...The worldview that all people are brothers and assets to one another, according to my learned brother Obaseki, is one that I fully share with respect. He applies this to the ground locus standi. We are all brothers, and this country is one where the ideas of "family" and "extended family" cut across all distinctions. Is it not appropriate for the court to notice that the word "brother" is loosely used in this nation and has very different connotations in Nigeria than it does in English?

The aforementioned has been promoted as a norm for extending the definition of locus standi in order to encourage public interest lawsuits.^{xx}

With the implementation of the Fundamental (Enforcement Procedure) Rules, 2009, which superseded the Fundamental Rights (Enforcement Procedure) Rules, 1979, this status acquired

formal confirmation. The guidelines state that even if there is a chance that a right will be violated, a cause of action still exists. So, the applicant need not wait until they have been harmed to request the enforcement of those rights.^{xxi} Therefore, the 2009 Rules eliminated the exclusionary definition of who can apply to enforce those rights. As a result, the following individuals now qualify to apply for the enforcement of fundamental rights:

- i. everyone pursuing their own interests
- ii. somebody who represents another person
- iii. Any one acting as a member of, or in the interest of a group or class of persons.
- iv. Any one acting in the public interest or
- v. Association that works for its members or other people or groups.^{xxii}

As a result, the court expansively interpreted the phrase "any person" under S. 46 (1) of the 1999 constitution to include the real individual who experiences the violation or probability of experiencing the violation of rights.^{xxiii}

The importance of citizen rights must be prioritized over methods of obtaining the enforcement of those rights guaranteed by the Constitution or the African Charter on Human and Peoples Rights, it has been held, even though it is expedient for motions to be used to initiate applications for the enforcement of Fundamental Rights.^{xxiv} Therefore, a citizen is not need to confine themselves to one of the methods suggested for the enforcement of such rights. This legal position was made clear by the court's ruling in *Oladekoyi v. IGP*^{xxv}

"...The purpose of rules of procedure is to facilitate and orderly hear matters in court. They are designed to aid in the administration of justice, not to thwart it. When it is clear from the facts of the individual case that the rules are unnecessary, courts shouldn't blindly obey the rules.

There is therefore no restriction on the applicant's ability to choose the legal process for requesting the enforcement of those rights.^{xxvi}

Another measure implemented under the new rules to ensure prompt hearing and resolution of issues involving fundamental rights is the elimination of the requirement that an application for leave be made as a condition prior to obtaining enforcement of rights under the 1979 Rules. A request for the enforcement of fundamental rights may be brought in accordance with Or.

11 Rule 2 of the FREP Rules, 2009, and shall, subject to the provisions of these Rules, lie without leave, through any originating method accepted by the court.

STATUS OF FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE RULES IN HIERARCHY OF LAWS

In this paper, we highlighted that the Chief Justice of Nigeria (CJN) is empowered to make the Fundamental Rights (Enforcement Procedure) Rules under Section 46 (3) of the Constitution of the Federal Republic of Nigeria, 1999. (as amended). Due to this, the Fundamental Rights (Enforcement Procedure) Rules are considered subsidiary laws. Orders, rules, regulations, rules of court, and bylaws issued before or after the effective date of an Act in the course of the exercise of a power granted by that Act are referred to as subsidiary legislation.^{xxvii} It is equally as strong as a practice direction. The Fundamental Right (Procedure for Enforcing It) Laws such as Practice Direction, which in this case explains how to proceed with the enforcement of fundamental rights in a particular court,^{xxviii} is a legal procedural guide.

It would seem from the provision of Rule 11 of the Rules that the process for enforcing the rights guaranteed under Chapter 4 of the 1999 Constitution (as amended) can be extended to enforcing the rights guaranteed under the African Charter on Human and Peoples Rights (Ratification and Enforcement) Provision Act. Legal debate has centered on whether the Rules' provision, which extends the enforcement process to the African Charter on Human and Peoples' Rights provision that was not specifically mentioned in S. 46 (1) of the 1999 Constitution, can amend that provision's language. According to Section 46(1) of the said Constitution,

Any person may petition to a High Court in any state for redress if he asserts that any provision of this chapter (underlining supplied) has been, is being, or is likely to be violated in respect to him.

In a similar manner, but with a riddle, Or. II Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 states as follows;

Anyone who claims that one or more of the Fundamental Rights guaranteed by the African Charter on Human and Peoples Rights (Ratification and Enforcement Act) and to which they are entitled have been violated, are being violated, or are likely to be violated may apply for redress in the state where the violation occurs or is likely to occur.

It is argued that even if the provisions in the latter were entirely similar in content, the CJN cannot rely on s.46(3) of the Constitution to make provisions for the enforcement of the provisions of the African Charter on Human and Peoples Rights because there is no clear constitutional provision allowing the CJN to extend the application of the Rules so made to the provisions of the African Charter on Human and Peoples Rights.

It is evident that section 46(1) of the 1999 Constitution included no mention of the African Charter on Human and Peoples Rights or any other regional or continental human rights instruments. Therefore, it is puzzling why the CJN would advise courts to abide by regional and international human rights agreements in the FREP Rules. ^{xxix}

It cannot be overstated how important it is to uphold the rights guaranteed by the African Charter on Human and Peoples Rights to a generally acceptable environment that is conducive to their development, but this cannot be justified by upholding those rights in accordance with the provisions of the Fundamental Rights (Enforcement) Procedure Rules given the clear limitations placed on the affected rights by section 46(1) of the 1999 Constitution. The African Charter would have been covered by the Rules if the Constitution had intended for it to happen. The principle in law is, *expressio unius best exclusion alterius* ^{xxx}

It is argued that because there is no constitutional provision allowing the Chief Justice of Nigeria (CJN) under section 46 (3) to extend the application of the rules thus made to the enforcement of the African Charter on Human and Peoples Rights provision, the CJN cannot rely on that provision to make rules of practice and procedure affecting enforcement of the provision of the Act, even if the provision were strictly similar in content. According to the law, when a primary Act specifies a specific way to exercise a statutory power, such method must be followed exactly as specified. ^{xxxi} Furthermore, it is claimed that a recipient of legislative authority granted by a subsidiary law is not permitted to use that authority in excess of what the main law permits. ^{xxxii}

In this connection, it is necessary to review the clause of Section 46(3) of the 1999 Constitution (as amended), which gives the Chief Justice of the Nation the authority to establish the norms for the enforcement of rights. For the purposes of this section, it states that "The Chief Justice of Nigeria may promulgate regulations with respect to the practice and procedure of a High Court."

The African Charter on Human and People's Rights (Ratification and Enforcement) provision's protections for human rights are not mentioned in this section. Therefore, it is argued that, while desirable, the CJN's ability to extend the law to include enforcement of the rights guaranteed by the African Charter on Human and Peoples Rights (Ratification and Enforcement) provisions falls outside the scope of the authority granted to the CJN by S.46(3) of the constitution. Regarding this, the provision of the Fundamental Rights (Enforcement Procedure) Rules, to the extent that they are made to cover enforcement of the rights guaranteed in the African Charter and other International or Continental Rights, is unconstitutional as it is in conflict with the provision of s.46(3) of the Constitution and is, as a result, void.^{xxxiii} This is true even though the rights have characteristics in common with those outlined in the charter but differ from those found in Chapter 4 of the Constitution. *In Abacha v. Fawehinmi*^{xxxiv} According to the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, which was passed after the Constitution was established, the African charter on Human and Peoples Rights does not conflict with the Constitution and so cannot be enforced.

Other rights recognized by the African Charter on Human and Peoples Rights but not included in Chapter 4 of the 1999 Constitution include the right to seek asylum in another country when facing persecution,^{xxxv} the right to live in a generally satisfactory environment that is favorable to their development,^{xxxvi} the right to work in an equitable and satisfactory environment,^{xxxvii} the right to the best possible state of physical and mental health,^{xxxviii} the right to education, right to education^{xxxix} and the right of the people to self-determination.^{xl} The clauses in paragraphs 3(a) and (b) of the Rules' preamble are noteworthy. In accordance with paragraph 3(a), the Constitution, particularly chapter 4, and the African Charter must be carefully and purposefully interpreted and used in order to advance and realize the rights and freedoms they include and give the protection that they were designed to provide.

Since neither the Constitution nor any other statutory instrument has given the CJN the authority to create regulations for the enforcement of the African charter's provisions, it is questionable whether the CJN can make the prescription found in paragraph 3(a) of the FREP Rules, 2009 in relation to that provision. A second school of thought has questioned the FREP Rules' intended internationalization when it stated in paragraph 3(b) of the preamble that the court shall respect local, regional, and international bills of rights entered or brought to its attention or known to the court, whether these bills constitute instruments in and of themselves or are components of larger documents like the CRC.^{xli} It appears that the 2009 FREP Rules have brought Nigeria's enforcement of fundamental rights into line with international standards.^{xlii} Or that regardless of whether or not such instruments have been domesticated, the court will automatically be able to enforce them once it is made aware of them or when it is made aware of their existence. It is argued that the CJN acting under S. 46(3) of the constitution violated international law by extending the Fundamental Rights (Enforcement Procedure) Rules to additional international instruments not mentioned in chapter 4 of the 1999 Constitution.

This essay also questions whether the court must uphold the Universal Declaration of Human Rights and other documents, such as the protocols in the United Nations Human Rights System, according to a valid interpretation of paragraph 3 of the preamble to the rules. Does the regulation intend to disregard the constitutional clause determining how international treaties and conventions are enforced? Can the court uphold international human rights treaties without domestication in accordance with section 12 of the 1999 constitution? The Constitution's S.12 clause stipulates:

No treaty signed by the Federation and another nation shall be legally binding unless and until it has been passed into law by the National Assembly.

When stating that the court must observe the U.D.H.R. and other instruments, including protocol in the United Nations Human Rights system, paragraph 3 of the preamble to the regulations did not appear to take the above provision into consideration. The court ruled in *Barrister Bay Nnayi v. Nigeria Football Association & Anor*,^{xliii} that until domestication, international treaties, conventions, and protocols do not have legal force in Nigeria. This is how the court outlined the law:

I must mention that the CAF status was one of a foreign status under international treaties from 2000 to 2004. It is important to remember that our legislation takes the position that foreign treaties are not binding on inhabitants of this country until they are adopted into law by the National Assembly and do not have the legal authority to have any of its provisions enforced in our courts.

It appears that the CJN did not consider the pertinent state of the law when he wrote paragraph 3 of the preamble of the PREP Rules, 2009. Because the FREP Rules expanded their powers for enforcement to include elements of the African Charter, it is argued that the PREP Rules, 2009 are incompatible with the Constitution.^{xliv} The Constitution's S.1(3) stipulates;

If any other law conflicts with a provision of the constitution, the constitution shall control, and the conflicting portion of the other legislation shall be void.

CONCLUSION

This paper concludes by noting that while it is desirable to include detailed provisions for the enforcement of all Human Rights instruments in our law books, the Foundation Rights (Enforcement Procedure) Rules 2009 cannot serve as the legal framework for those requirements. This is evidently because, aside from the provisions of Chapter Four of the 1999 Constitution, the person who created the Rules lacks the constitutional authority to create regulations for the enforcement of rights guaranteed by Human Rights Instruments (as amended).

ENDNOTES

ⁱ S. 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

ⁱⁱ <https://www.un.org> accessed 4th March,2023

ⁱⁱⁱ <https://www.ohchr.org> accessed 4th march, 2023

^{iv} United Nations General Assembly Resolution 217A. *humanrights.gov.au*

^v Part II, 1999 constitution of the Federal Republic of Nigeria (as amended

^{vi} (1985)2NWLR (pt.6) 211.

^{vii} Chapter 2 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

^{viii} *Ibid.*

- ^{ix} A.1 Ogbuabia, Alimi, Obioma, Ngumoha, practice Manual on Fundamental Rights (Enforcement Procedure in Nigeria (2020) City Books Ventures Ikeja, Lagos P.13.
- ^x *Ibid.*
- ^{xi} *Uzuokwu v. Ezeonu II (1991) 6 NWLR (Pt. 200) 708*
- ^{xii} Art 12 (3) of the African charter on Human and people Rights (Ratification and Enforcement) provision Act, Cap. 10 L.F.N, 2004
- ^{xiii} *Art. 15 Ibid.*
- ^{xiv} *Art. 16 ibid.*
- ^{xv} *Art. 17 Ibid.*
- ^{xvi} Art. 20 *Ibid.*
- ^{xvii} Or. 1 Rule 2(1) of the Fundamental Rights (Enforcement procedure) Rules, 1979
- ^{xviii} *(1981)1 NCLR 420.*
- ^{xix} *(1987)4NWLR (pt.67)797 at 847*
- ^{xx} *F. Falana, fundamental Rights Enforcement (2004) Legal Text Publishing Company Ltd. Lagos P.40*
- ^{xxi} s.46 (1) of the 1999 Constitution (as amended)
- ^{xxii} Para. 3(a) of the preamble to the Fundamental Rights (Enforcement procedure) Rules, 2009
- ^{xxiii} *Olusola Oyegbemi v A. G Federation (1982) 3NCLR 895.*
- ^{xxiv} *Alhaji Mohammed Sha'aba Lafiaji v. Military Administrator of Kwara State (1995) FHCLR 321*
- ^{xxv} *(2002)16 NWLR (Pt.1127) 410*
- ^{xxvi} *National Union of Teachers v Conference of Secondary Schools Tutors of Nigeria (2007) WNR 63 at 90*
- ^{xxvii} O Babalola, *Babalola's law dictionary of Judicially defined words and phrases (2019) 2nd ed. Noetic Repertum Inc. Lagos, Nigeria p 369.*
- ^{xxviii} *Vincent Ugo & Ors v. Diokpa Ummuna (2018) ALL FWLR (Pt. 926) 35 at 39 R.3.*
- ^{xxix} Para.3 (b) (i) (ii) of the preamble to the Fundamental Rights (Enforcement Procedure) Rule, 2009
- ^{xxx} The Express mention of one thing excludes the other
- ^{xxxi} *Nigeria national Petroleum Corporation(NNPC) & anor v. Famfa Oil Ltd (2012) ALL FWLR (Pty. 635) 204 at 215 R.13*
- ^{xxxii} *Ibid.*
- ^{xxxiii} *Mobil producing Nigeria Unlimited v. Okem Johnson & Ors (2019) ALL FWLR (Pt. 975) 811 at 820 R.5*
- ^{xxxiv} (2000) 4 SCNJ 400
- ^{xxxv} *Art. 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Provision Act*
- ^{xxxvi} *Art. 15 ibid.*
- ^{xxxvii} *Art 16 ibid.*
- ^{xxxviii} *Art 17 ibid.*
- ^{xxxix} *Art 20 ibid.*
- ^{xl} Paragraph 3(a) and (b), Fundamental Rights (Enforcement Procedure) Rules, 2009
- ^{xli} *Ibid.*
43. D.I Efevwerhan, Principles of Civil Procedure in Nigeria (2013) 2nd ed. Snaap Press Ltd. Enugu Nigeria P.469
- ^{xliii} (2011) ALL FWLR (Pt.) 559) 1995 at 1197-1198 Ratio 4
- ^{xliv} See section 1 (3).