THE IMPERATIVE OF REVIEWING THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES

By Kabir Mohammed Danladi *

1. Introduction

The 1999 Nigerian Constitution, under Chapter IV, provides for Fundamental Human Rights. These rights are basic rights, basic in the sense that they are important to the existence and development of every human being. A whole Chapter enshrines these rights in the 1999 Constitution like all other previous Nigerian constitutions. These rights are not just ordinary rights. They are justiciable rights, and are rights that represent the collective visions, dreams and aspirations of the Nigerian people.

"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, starting with the independence constitution, the Nigeria (constitution) Order-in-Council 1960 up to the present Constitution, that is, the Constitution of Federal Republic of Nigeria. 1979... 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.[1] (per Eso JSC)

Furthermore, the provisions of the 1999 constitution[2] gives the Chief Justice of Nigeria the power to make rules and procedures with respect to the practice and procedure to be adopted by the High Courts with respect to enforcing these rights under chapter IV of the constitution. Not only this, the National Assembly could confer additional powers on the State High Court[3] when it appears to the National Assembly that it is necessary or desirable to do so. Hence the focal point of this paper is to examine these procedural rules and also to assess some areas where controversies do arise in the course of the application and enforcement of these Rules.

2. What is a Right?

A right, according to Mamman Nasir J.C.A. (as has then was) is to have a claim to something and against someone, the recognition of which is for

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1 Ramsome Kuti Vs Attorney General of Federation (1985) 8 NWLR (pt. 6) 211

2 Section 46 (3) 1999 constitution

3 Section 46

by legal rules, or in the case of moral rights, by principles of enlighten need conscience.[4]

A right in the legal sense, must however be distinguished from moral claims which are mere assertions of notions or right and wrong without any backing of the legal and judicial system.

A distinction is necessary between having a right and enjoying the right, for one can have a right without necessary enjoying that right if one is not aware in the first place of the existence of the right or if he is not in a position to ensure the enforcement of the right. A right therefore makes more meaning if the beneficiary is sufficiently enlightened about it existence and the procedures to adopt in enforcing it, also one must have the means of such enforcements bearing in mind the Nigerian poor economic status

3. Meaning of Fundamental Rights

Human rights or fundamental rights are defined differently. For example the United Nations defined human rights as those rights which are inherent in our nature and without which we cannot function as human – beings.[5]

According to Gaius[6], Fundamental Human Rights are moral rights which every human being, every where at all times ought to have simply because of the fact that in contradistinction will other beings, he is rational and moral.. But Kayode Eso J.S.C. (as then was) defined human right as " a right which stands above 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 immutability of the constitution itself.[7]

In general terms, therefore Human Rights could be defined as those rights which are inherent in human beings/society on account of their being human. Such rights may be taken to derive from reason, God, nature or any other source.

4 Ezoukwu V Ezeonu II (1991) 6 NWLR pt 200 pp. 270 - 621
5 Tijjani, M. B, Dimension of Human Rights. NHRC No. 4 1998. p:2
6 Ejejiofor, J, Protection of Human Rights under the Law, 1964 Sussex p.3
7 In Ransome Kuti V A.G. Federation (1985) 6SC 245

Various revolutions (American, English, French) popularized the idea of rights in western thought. In writings of the philosophies of the enlightenment and in the works of Locke, Rousseau and even Hobbes, "life, liberty and estate" were taken as rights inherent in humans. These Rights were to form the core of what later came to be called civil and political rights-life, liberty, property, freedoms of conscience, belief, assembly, association etc. Therefore it is those rights that formed the basis of various rights provided by many countries in their constitutions. Nigeria too is not left out. Chapter IV of the 1999 constitution provides these rights from sections 3 – 44.

One thing stands out clear from the above definitions is that Fundamental Rights are endowed unto man by nature as higher Rights which should be enforced and maintained by positive laws of the various nations.

4. Venue to Commence the Proceedings

The normal place to commence the proceedings of enforcing Fundamental Rights is the court in the state where the violation occurred or is likely to occur.[8] Court under the rules means High Court of state, High Court of Federal Capital territory, or Federal High Courts where the infringement occurred. In *Umaru Abba Tukur V Government of Gongola state,*[9] Oputa, JSC as observed.

> *"In this case, Alhaji Umaru is complaining that there has been a breach of one or the other of his fundamental rights to his liberty or his freedom of movement. This contravention allegedly took place in Gongola state. From section 42(1) above, he has to apply to a high court in that state that is the high court where the contravention or breach occurred. The Federal high court Kano can not be a high court in that state which was envisaged by Section 42(1) above.*
>
> *Even if jurisdiction of the Kano judicial division of the Federal High Court extends to and includes Gongola state, the Kano Federal High Court cannot without undue violence to the plain meaning of the words, be described 'as a High Court in the state' namely a High Court in Gongola state where his fundamental rights were breached. The appellant in this case did not apply to a High Court in that state*

8 See Section 46(1) 1999 Constitution
9 (1989) 4 NWLR (Pt 117) 517

as required by Section 42(1) of the 1979 Constitution".

Furthermore, Section 251 of the 1999 Constitution gave the Federal High Court "exclusive" jurisdiction in matters involving the Federal Government or any of its agencies. The general practice therefore, is matters involving the Federal Government or any of its agencies the proceedings on Fundamental Human Rights are instituted by the Federal High Court in the State of violation.

It should be noted, however, that the provision of Section 251 of the 1999 Constitution has categorically solved the earlier controversy obtained under Section 230 of the 1979 Nigeria constitution on issue of whether it is only the Federal High Court that has jurisdiction to entertain matters relating to Federal Government agencies to the exclusion of State High Court. Unlike Section 251 of the 1999 Constitution, Section 230 of 1979 Constitution did not mention 'exclusive.' The former section provides *"...the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters..."*

It is probable that, if this provision of Section 251 of 1999 constitution was available in the 1979 Constitution, Court of Appeal would not have reached the decision it made in *Lafiaji, Shaaba Mohammed Vs Military Administration or Kwara State.*[10] The court held that there is no where in the constitution where it was stipulated that any suit in which a Federal Government Ministry, agency, functionary or parastatal is sued must be justiciable only in the Federal High Court. That is, there is no blanket provision in these enactments which confers exclusive jurisdiction on the Federal High Court in suits against Federal Government or any of its agencies. The Court went further to hold that where a Commissioner of Police in a state is sued, it is High Court of a state and not the Federal High Court that has jurisdiction. The court remarked

> *"A police Officer in Nigeria is capable of enjoying a dual status. When he complying with the directives of the Governor of the State with respect to maintaining and securing of pubic safety and public order within the state he is an agent of the state and not an agent of the Federal Government even though he is a servant of the Federal Government. On the other hand where he is also complying with the directives of the president in maintaining and securing public safety and public order issued to the*

10 (1995) FHCLR 321-28

Inspector General of Police, then he is acting as an agent of the Federal Government".

5. The Procedural Rules

Section 46 (2) of the Constitution gives the High Court the power to hear and determine any application made to it pursuant to the provisions of section 46 (1) of the 1999 Constitution. The latter section provides that any person who alleges that any of the provisions of Chapter four of the Constitution has been, is being or is likely to be contravened in any state in relation to him, may apply to the High Court in that state for redress.

The procedure and rules to be adopted by the High Court in entertaining the application made to it is as provided by the Chief Justice of Nigeria in exercise of the powers conferred on him by the provisions of Section 42 (3) of the 1979 Constitution (which Section is in pari material with Section 46 (3) of the 1999 Constitution), has made the Fundamental Rights Enforcement Procedures Rules which came into force on the 1st day of January, 1980. These Rules, by the provisions of Section 315 of 1999 Constitution, are still extant.

Generally, the rights under Chapter IV of the 1999 constitution include among others, right to life; right to Dignity of human person; right to personal liberty; right to fair hearing; right to freedom of thought; conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination and right to acquire and own immovable property any where in Nigeria.[11]

These rights to be enforceable under section 46 (3) are generally classified into three. The first class of right to an individual is those rights that have already been violated; the second class is when the rights are also in the process of being violated; here too an individual can quickly seek redress in the High Court; and thirdly, an individual can also enforce his right where a violation is anticipated. That is to say an individual need not wait until these rights are violated, he can seek redress in court to prevent the violation of these rights.

The Supreme Court in *Egbe V Belgore*[12] disclosed that the first limb is where the fundamental rights in chapter IV has been physically contravened or infringed. In other words, the act of contravention or

11 See generally section 46 - 45 1999 Constitution for details provision of rights
12 (2002) 8 NWLR (pt. 285) 336

infringement has been completed and the plaintiff goes to court to seek for redress.

The second limb is where the fundamental right is being contravened or infringed. Here the act of contravention or infringement may or may not have been completed. But in the case of the latter, there is sufficient overt act on the part of the respondent. The process of contravention or infringement must be physically in the hands of the Respondent. Also, that the act of contravention or infringement must be in existence substantially.

The third limb, there is likelihood that the respondent will contravene or infringe the fundamental right or rights of the Applicant. While the first and the second limb may ripen together in certain situation, the third limb of the subsection is entirely different. By the third limb, an Applicant need not wait for the completion or last act of contravention or infringement.

These rules and procedures made by the Chief Justice of Nigeria contain six orders. The rules are clear and unambiguous in reading but some times very ambiguous in terms of applicability because of the salient procedures to be followed when applying for the enforcement in High Court.

The fundamental issues here are:

1. Application for leave by the applicant or plaintiff must be made and granted by the Court before any enforcement of fundamental rights can be made.
2. The said Application for Leave must be supported by statement indicating the name, description, reliefs sought and grounds, supported by a verifying affidavit.
3. The application for leave must be filed not later than the date preceding the hearing date.
4. The duration period for the application for the enforcement of fundamental rights shall be twelve months from date of the happening of the infringement of the individual's rights.
5. There must be at least 8 clear days between service of the motion and the day fixed for hearing.
6. Motion or Summons must be fixed for hearing 14 days after such leave was granted and it must be served on all persons affected.
7. The Names and addresses of places and dates of service of all persons served must be disclosed in an affidavit before the motion or summons is listed for hearing. The affidavit must disclose also

any person who ought to be served and has not been served and the reasons behind that.

8. The motion or summons must be served with copies of the statement in support of the application for leave. Only grounds and reliefs set out in the statement shall be relied upon.
9. An amendment to the statement and affidavit to include new grounds can be made only through application to the court.
10. Notice of motion or summons must be served (in cases of application for release of person restrained) against whom the order for the release of the applicant is sought and on such other persons as the court may deem fit. And there must be at least 5 clear days between service and hearing date.
11. Personal service must be effected in case of person restrained on person to whom it is directed. And in case of police officer, or prison superintendent, Immigration officer or other public officers, it can be served by leaving it with any other official person working in the above office.
12. Application for an order for questioning any proceedings can be made, except that the applicant can not question the validity of any order, unless he has served a certified true copy with the copy of the application on the Attorney-General of the Federation or the State.

Be that as it may, the processes of enforcing human rights under the 1999 constitution need urgent and speedy attention. These procedures are not very easy to accomplish or adhere to particularly in urgent situations. One sad development is that any mistake or non-compliance with the Rules is fatal.

6. Controversies and Confusion in the Application of the Rules and Procedures by the Court

Despite the Fundamental Rights Enforcement Procedure Rules as made by the Chief Justice of Nigeria, our courts have not adopted a uniform procedure. This, therefore, negates the spirit behind making the procedures and rules separate from other rules like civil procedure rules and criminal procedure rules. This development led to a great controversy in the application of the rules by both lawyers and judges. For example Hon. Nnaemeka-Agu JSC, propounded the single way doctrine of fundamental rights enforcement. In *Din V Attorney General of the Federation*[13] started that the

13 (1988) 4 NWLR (pt. 87) 147 SC

> *"The Fundamental Rights (Enforcement Procedure) Rules 1979 have prescribed the correct and only procedure for the enforcement of fundamental rights which arise under chapter IV of the constitution. This by implication therefore means it is only these procedures that can be followed and nothing more in order to enforce these rights".*

While Nnaemeka-Agu adheres to only one way approach to the application of the enforcement of fundamental rights procedure, Late Hon. Mohammed Bello CJN did not agree with him. He propounded the second approach in the case of *Ogugu V State.*[14] He started, that:

> *"I am inclined to agree with Mr. Agbakoba that the provision of section 42 of the constitution for the enforcement of the fundamental rights enshrined in chapter IV of the constitution is only permissible and does not constitute a monopoly for the enforcement of those rights. The object of the section is to provide simple and effective judicial process for the enforcement of rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. The object has been achieved by the Fundamental Rights (Enforcement Procedure) Rules, 1979. It must be emphasized that the section does not exclude the application of the other forms of their enforcement under the common law or statutes or rules of court. These are contained in the several laws of our High Courts, for example section 18, 19 and 20 of the High Court of Lagos relating to mandamus, prohibition, certiorari, injunction and action for damages. A person whose fundamental right is being or likely to be contravened may resort to any of these remedies for redress".*

This view of Late Mohammed Bello CJN is similar to that of Enaemeka Agu JSC, that is to say, the object is to provide a simple and effective judicial process for enforcement of rights in order to avoid the cumbersome procedure and its technicalities. It can be argued that this has not been achieved in view of the poor financial position of Nigerians, and the level of literacy in the country, in a country like Nigeria where only 35-40% of the populace is educated, and even among the educated ones, only few are aware of these rights and the procedure to follow.

14 (1998) 1 HRLRA 167; (1986) NWLR (pt. 366)

Finally, due to its technical and cumbersome nature, Hon. Justice Uwaifo propounded the "Rainbow Doctrine" of fundamental rights enforcement. He did not agree with either Nnaemeka Agu or Mohammed Bello. He thus stated in *F.R.N. V Ifegwu,*[15]

> *"The manner in which the court is approached for the enforcement of a fundamental right does not matter once it is clear that the originating court process seeks redress for the infringement of the right so guaranteed under the constitution. The court process could be by the fundamental rights (enforcement procedure) rules or by originating summons or indeed by writ of summons. The concern in regard to redressing a contravention of a fundamental right have been underlined by liberalizing the type of originating process without the person affected being inhibited by the form of action he adopts".*

The above approach adopted by the Learned Justices clearly indicates the controversies surrounding the procedure to be adopted.

Therefore a liberal and simple procedure should be adopted just like the one propounded by Justice Uwaifo, since the underlying reason is a violation of the Constitution. The overall objective is to allow the applicant or the plaintiff a quick, simple and easier means to seek redress. It does not matter whatever method he chooses to follow, once his complaint is understood it ought to be entertained.[16]

7. Other Applicable Controversies

A. Jurisdictional controversy

Section 46 of 1999 constitution gives the High Court the original jurisdiction to hear and determine an application made to it pursuant to the provisions of section 46 (1). The High Court can make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement within the state. (High Court here include the Federal High Court.) Section 252 of 1999 constitution enumerated all cases and matters that the Federal High Court can entertain. Therefore, all cases of violation of human rights relating to such matters listed under S.251 go to Federal High Court, and all other cases not listed under section 251 goes to state High Court. The major controversy here is that, not all states in Nigeria have Federal High Court, and in a situation where an individual's Right has been, is being or

15 (2003) 15 NWLR (pt. 842), P.I 13 at 179; (2003) 5 SC 252

16 See *Saude V Abdullahi* (1989) 4 NWLR Pt.1 16, P.387

is likely to be infringed in such area where there is no Division of the Federal High Court and such infringement is by an agency of the Federal Government, what happens to such an individual? Will he stay like that or can he go to state High Court; which has no power to try such case by reason of the provisions of S.251 of the Constitution?

Practical experience has demonstrated that even if such victims go to the State High Court, the Respondent's Counsel do object to the jurisdiction of the State High Court where the objection succeeds, the Applicant is left without a remedy.

It is my humble opinion that if the essence of the provisions of Chapter IV and the procedural Rules is to safeguard and protect the individual with a quicker and simpler justice, then the State High Court should be allowed constitutionally to try these cases involving an agency of the Federal Government particularly in states where there is no Division of the Federal High Court. The High Court in such a situation should give an interim order ex parte to prevent or restrain the respondent from further abuse of the individual's rights infringed so that later the individual or applicant can go to the proper Federal High Court to file his case. This at least will protect and safeguard the victim.

B. Application For Leave:

Order 1 rule 2 (2) of the Fundamental Rights (Enforcement Procedure) Rules is also controversial. The order or rule requires a plaintiff or applicant to apply for leave before the court. It is my humble submission that this rule is even contrary to section 46 of the 1999 constitution which 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. The purpose of section 46 therefore is to allow free, direct and quick access to court from the outset. Experience has shown that the system of Justice as obtains in our court is slow and painfully. Because of the cumbersome procedure, a lot of harm could be done to the applicant particularly in cases where the applicant is alleging that his fundamental right is being or is likely to be infringed.

It is submitted, therefore, that this order should be removed so that an applicant can go direct to file his complaint under chapter IV as intended by the section.[17]

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17 Section 46 1999 constitution

C. **Service of Enforcement of Fundamental Rights Processes**
Order 2 rule 1 (4) provides that

> *"An affidavit giving the names and addresses of and the place and date of service on all persons who have been served with the motion or summons must be filed before the motion or summons is listed for hearing"*

This order is also controversial, it is controversial in the sense that it is trite that all court processes are to be served by the Bailiffs of the Court under Sheriffs and Civil Process Act. But unfortunately many learned judges do not allow the process under the enforcement procedure rules to be served by the court Bailiff, but rather they insist that the processes must be served by the applicant or the plaintiff himself even though the order does not mention that such processes should be served by the applicant. For example Hon. Justice S.J Adah of Benin Federal High Court Lamented that

> *"Affidavits of service deposed to by Bailiffs of this court in the instant case are deficient in form and substance. The affidavits do not contain for instance, the addresses of those purportedly served as required by the rules. Further more, the papers purportedly served were not inclusive of all other process filed in this matter in addition to the motion on notice as ordered by the court at the time leave was granted. The responsibility of ensuring that these were done to my mind does not devolve on court officials but on the applicant".*[18]

It is therefore humbly submitted that this controversy should be cleared by allowing the court Bailiffs to serve the processes since order 2, rule 1 (4) is silent on the issue, regard should be given to the existing laws governing service of court processes.

D. Statements and Affidavits /Verifying Affidavit.

The procedure rules also require an applicant to file his statement and affidavit for service on any other party or parties as the court may direct.[19] Well, there's not much controversy here, but the problem is with

18 Odofin V Inspector General of Police and Ors. (2001) ICHR, 440 at 447 See also = Re Apollo's UDO (1987) 4 NWLR (Pt. 63) P. 120. See also Oyawole Vs Shehu (1995) 8 NWLR (Pt. 414) 484 in this case the counsel inadvertently stated the facts of the case in an affidavit instead of the statement.

19 Order 1 Rule 2 (4)

Order 1 rule 2 (3) which requires also that apart from the statement and affidavit, a verifying affidavit must also be filed verifying the facts relied on in the statement, deposing the name and description of the applicant, the relief sought, and the grounds on which the relief is sought. Some legal practitioners have argued that the affidavit must be headed as verifying affidavit, otherwise it should be struck out by court.

It is humbly submitted that, the mere heading of the affidavit does not matter, in as far as the major substance of the relief sought is the same thing with statement and affidavit filed this controversy should not have arise, because the provision of Section 84 of the evidence Act allows such document to be relied on by the court. The said section provides:

> *"The Court may permit an affidavit to be used, not withstanding it is detective in form according to this Act, if the court is satisfied that it has been sworn before a person duly authorised".*

8. Conclusion

This paper conveniently traced out some of the controversial issues related to the Fundamental Right (Enforcement Procedure) Rules. These issues have made it very difficult for the applicant to seek redress as easily as intended by the Legislature. It is, therefore, finally submitted that having tested and practicalised the Fundamental Rights (Enforcement Procedure) Rules for over twenty years, it is high time these Rules were reviewed. Once reviewed, Fundamental Rights (Enforcement Procedure) Rules would be greatly facilitated.