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Articles

Fundamental Rights Enforcement in Nigeria: Wearing a New Garb?

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Background

The concept of natural law, a precursor to natural rights, for ease of convenience can be categorized into four periods in history—the classical, the medieval, renaissance and enlightenment, and the post-world war II revivalism.

The Greeks perhaps were the first set of people who bothered themselves with the evolutionary theory of rights' justice. The idea of natural law appeared as a demonstration of the search for some idea which is superior to or higher than man-made law (or positive law). According to Finch[1] "the history of the law of nature (natural law) begins as do many other fields of study, with the Greeks. Greeks Philosophy on this subject took the form of a search for the absolute, and, in particular, for absolute standards of right of justice, this search being initially based on a belief in the eternal and immutable, in an absolute supernatural validity for laws which men ought to obey".

Natural law concept during the classical period benefited greatly from the input of Cicero. The Stoic philosophy was largely responsible for the continuation of the tradition of freedom and equity in Roman political and legal philosophy. We find it in the writing of Cicero, who left upon ancient and medieval thought a deep and beneficent impress out of all proportion to his originality as a thinker. He followed the Stoics closely and in stressing the fundamental resemblance and equality of men given by the fact of their common possession of reason and of the capacity to develop and to attain virtue notwithstanding differences in learning and ability.

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[1] Finch, John D. '*Introduction to Legal Therry* (London, Sweet and Maxwell, 1970) p.18

Another Greek writer, Seneca contended that virtue can be attained both by the slave and by the free, and that slavery affects the body only while the mind is of necessity the slave's own and cannot be given into bondage. This line of thought is found in the work of many Roman jurists at the full height of absolutist imperial rule. Ulpian, another Greek writer, like Cicero, thought that no man is free unless he has a share in political authority. It was Ulpian who, in company with other Roman lawyers of the Empire, taught that whatever may be the position of the slave in civil law, this is not so by natural law, for by it all men are equal.

The Medieval Ages

There is a striking conformity of thought between the Stoics and the most representative political literature of the Middle Ages in the source of the rights of freedom and of government by consent. One cannot discuss the concept of natural law in the medieval era without reference to Saint Thomas Aquinas. It was he who defined natural law as "the participation in the eternal law of the mind of a rational creature'. He was reproducing the central idea of the Stoics, the idea of a law superior to the external authority of the state. The state, according to Saint Thomas Aquinas, is subject to that higher law which determines the relation of the individual to the state. The justification of the state is in its service to the individual; a king who is unfaithful to his duty forfeits his claim to obedience. It is not rebellion to depose him, for he is himself a rebel; all political authority is derived from the people, and law must be made by the people or their representatives.

Marsilius of Padua used the same language. In fact, the view that the ruler is under the supremacy of the law is the principal feature of the political theory of the Middle Ages. By the end of the Middle Ages the substance of what proved to be the doctrine of the natural rights of human was well established. They flowed from the conception of the law of nature realized as a higher law superior to the state. They included the right to government by consent, the right to freedom from taxation without representation, and the right to freedom from arbitrary physical constraint. The principle of the *Habeas Corpus Acts* latent in the 39th Clause of *Magna Carta* was acknowledged already in 1188 by Alfonso IX at

the Cortes of Leon. The Golden Bull issued in 1222 by King Andrew II of Hungary is couched in language strikingly reminiscent of that used in *Magna Carta*. So is the law of General Privileges granted in 1283 by Peter III of Aragon. The struggle of the parliament of Paris against arbitrary royal ordinances provided opportunities, fully used, for invoking the principles of the higher law. Custom, and not the fiat of the state, was regarded as the typical manifestation of the law binding upon the individual. This was a doctrine propounded not only by leading continental jurists like Beaumanoir and Gratian. This doctrine preached Bracton in his now famous phrase, 'the king has two superiors, God and law'. Bracton argued that the king ought not be subject to men, but subject to God and to the law, for the law makes the king. It follows, he contended, that the king must attribute to the law what the law attributes to him, namely, dominion and power, for there is no king where the will and not the law has dominion.

The Reformation and the Social Contract

After the temporary wave of retrogression which in the sixteenth century was the twin and not unnatural result of the vogue of the teaching of Machiavelli and of the absolutism of the nascent national state, two factors combined to revive and strengthen the idea of the natural rights of man. The first was the direct outcome of the Reformation and of the religious struggle which followed it. Religious intolerance and persecution brought forth the insistence, with a favour not inferior to the religions impulse itself, on the natural right of freedom of conscience and religious belief. Erasmus gave that movement an impetus which left an indelible impress on the European tradition of tolerance. The Puritans and the levelers in England inscribed it in the tenet of their political faith as the foremost inalienable right. Matters of religion were the first subject with regard to which the Revolutionary Army of 1648 set a definite limit to the sovereignty of parliament: 'We do not empower our Representatives to continue in force, or make, any laws, oaths, and covenants, whereby to compel by penalties or otherwise any person to anything in or about matters of faith, religion, or God's worship[2]. Twelve years prior to the Agreement

[2] From the Second Agreement of the People, 1648: Puritanism and liberty;

of the people, the Puritan colonists who, under the inspiration of Roger Williams, founded Rhodes Island, adopted in their compact, which excluded matters of religion from the purview of the legislature.

Another factor, in fact the second factor, that kept the fire of the natural right burning was the theory of the social contract. This concept, the social contract, took root in the Medieval Ages and extended up to the beginning of the eighteenth century. According to the notion of the social contract, individuals had no right prior to the formation of organized society. Most of the propounders of the doctrine of the social contract taught that power of the state not only on account of the terms of the contract, but also for the simple reason that some rights, because of the nature of man, are inalienable. This, indeed, was not the invariable teaching of the school of the social contract. The contract has been constructed and interpreted by various scholars; each choosing to give it the meaning that suits him. However, it was John Locke that gave to the social contract theory a bent most favoured by revolutionists. He, Locke, excluded the inalienable rights from the scope of rights relinquished in the social contract. An author puts it thus:

> It was Locke's conception of the social contract which struck the deepest note in contemporary thought and which exercised a powerful influence on the early American Declarations of 1789 and 1791 in which, more emphatically than anywhere else, the principle that society is set up for the defence of certain inalienable rights[3]

Beside the concept of religious toleration and the theory of the social contract, there were the sources that gave vigour to the notion of natural rights of man:

> Witness Milton's appeal to the natural freedom of man as the basis of his claim to be ruled by law and not by the arbitrary whim of man; or the insistence, in the course of the Puritan revolution, on natural

[3] Efforts have been made to ascertain the author but to no avail.

> rights in support of political freedom, social equality and universal suffrage; or the place which Blackstone in his exposition of the laws of England assigned to the natural rights of man- an exposition which, at least in its influence, was not impaired by the seemingly unqualified acknowledgement of the supremacy of parliament[4].

The Virginian Declaration of Rights of 1776; the similar constitutional enactments, in the same year, of Pennsylvania, Maryland, Delaware, New Jersey and North and South Carolina; the constitutions of New York and New Georgia of 1777; and that of Massachusetts of 1780; the Declaration of Independence of the first ten Amendments to the constitution of the United States of America; the Declarations of the Rights of man, and of the citizen adopted in 1789 by the French National Assembly and prefixed to the constitution of 1791; and the declaration prefixed to the French constitution of 1793 and 1795 - all these mark the express acknowledgement of the inherent rights of man in the constitutional law of modern states. Some opinions have argued that this was a shift from natural law to natural rights. This is not true:

> For that process, as has been pointed out, is coeval with political and philosophical thought dating back to antiquity and the Middle Ages. The notion of human nature as a source and standard of political right is older than the end of the eighteenth century. What was new was the formal incorporation of these rights as part of the constitutional law of states and the possibility of their consequent protection not only against the tyranny of kings but also against the intolerance of democratic majorities. What was new was the rejection by positive enactment- for the idea itself went back to the Middle Ages and to Bodin - of the idea of the uncontrolled sovereignty of the sovereign people itself. The sovereign was subjected to the higher law, henceforth enthroned as

[4] Ibid

> the guarantor of the inalienable right of man. That subjection did not always find expression in tangible restrictions; it subjected the people not to the higher law of justice but to the higher law of the constitution which, in the last resort, could be changed by the sovereign people. But these 'higher law' bases of the constitution were destined to acquire a degree of sanctity which made them impervious to the vicissitudes of arbitrary change[5]

Fundamental Rights in Modern Constitution

The nineteenth and twentieth centuries saw the entrenchment of fundamental rights into the constitutions of many states. It became part of the law of nearly all European states. Sweden adopted it in 1809; Spain in 1812; Norway in 1814; Belgium in 1831; the Kingdom of Sardinia in 1848; Denmark in 1849; Russia in 1850; Switzerland in 1874. The Constitution of Liberia of 1847 opened with a Bill of Rights the first Article of which contained the statement that 'all men are born equally free and independent, and have certain natural, inherent and inalienable rights' The French Constitution of 1848 recognized 'rights and duties anterior and superior to positive laws'. After the first World War it was adopted by Germany and most of the new European states.

The All-Russia Congress proclaimed in January, 1918, a 'declaration of the rights of the toiling and exploited peoples' which was incorporated as part I of the constitution of 5 July, 1918. That declaration was considerably extended in the Constitution of 1936. Other states which subsequently succumbed to the wave of totalitarianism did not dispense in their constitutions- like those of Poland of 1935 and Roumania of 1938 - with a list of fundamental rights. The Latin American states followed in the nineteenth and twentieth centuries the general trend practically without exception. They amplified the scope of fundamental rights by enlarging on the duties of the state in the social and economic spheres and by adding considerably to the guarantees of their enforcement. States on the Asiatic continent followed suit. Thus, for instance, within

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[5] Ibid.

a period of two years we see the adoption of chapters on the Rights and Duties of the people in the Provisional Constitution of China of 12 May, 1931, on the Rights and Duties of the Siamese in the Constitution of the kingdom of Siam of 10 December, 1932, and on the Rights of Afghan subjects in the Fundamental Principles of the Government of Afghanistan of 31 October, 1932. The Turkish Constitution of 1928 did not refrain from similar terminology vividly reminiscent of the Declaration of 1789: 'Every Turk is born and lives free... The limits, for every one, of freedom, which is a natural right, are the limits of the freedom of others."

France herself, in the preamble to the Constitution of 1946, solemnly reaffirmed 'the rights and freedoms of man and of the citizen consecrated by the Declaration of Rights of 1789 and the fundamental principles recognized by the law of the Republic', and proclaimed once more that 'every human being without distinction of race, religion or belief, possesses inalienable and sacred rights'. The Constitution of Japan of 3 November, 1946, laid down, in Article II, that the people shall not be prevented from enjoying any of the fundamental rights' and that 'these fundamental rights guaranteed to the people by the constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights'. In the fundamental principles of the Italian Constitution of 23 December, 1947, 'the Republic recognizes and guarantees the inviolable rights to man' (Article 2). It states, significantly, that while 'sovereignty belongs to the people', the latter must exercise it 'within the limits of the Constitution' (Article II). No doubt, natural law (and later natural right) has had profound influence on the phenomena of fundamental rights in the constitutions of states in modern time. The Nigerian 1999 Constitution, chapter four, bears this out[6]. Infact, the preamble of this Constitution[7] speaks of the principles of freedom, Equality and Justice as the basis upon which the welfare of the people (all persons) is to be. Sections 33-46 of chapter four of the Constitution provide for some fundamental rights - the right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private and

[6] Constitution of the Federal Republic of Nigeria, 1999, Chapter 4
[7] C.F.R.N; 1999

family life, 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, right to acquire and own immovable property anywhere in Nigeria, right to be paid compensation in the event of compulsory acquisition of property.

If there is anything today that agitates the mind of the global world, then, that thing is fundamental rights of human beings. The reason(s) for this may not be far-fetched. To start with, the world wars-particularly the Second World War (and its unprecedented carnage), have demonstrated, more than ever, the need for global peace; and eminently the need for the preservation of human life and human dignity. It is the observance and the decisive enforcement of fundamental rights that give human life its desired earthly content. The consequences of the negation of the existence of these rights seem to have been aptly captured by the English political philosopher, Thomas Hobbes (1588-1679) who saw the English civil war, and so penned his immortal famous words:

> During the time men live without a
> common power to keep them all in awe,
> they are in that condition which is called
> War; and such a war as is of every man,
> against every man.
> For as the nature of foul weather, lieth not
> in a shower or two of rain; but in an
> inclination thereto of many days together:
> so the nature of war consists not in actual
> fighting, but in the known disposition
> thereto during all the time there is no
> assurance to the contrary.
> No arts; no letters; no society;
> and which is worst of all,
> continual fear and danger of
> violent death; and the life of
> man, solitary, poor, nasty, brutish, and short.[8]

[8] Thomas Hobbes, *Leviathan* (1651) pt.1,ch.13

Given the above, perhaps, no doubt, Hobbes, or anybody, may in no other words capture the holocaust that befalls the human race in the event of want of fundamental rights.

This article intends to revolve chiefly around the enforcement of fundamental rights in Nigeria, given the new rule on fundamental rights enforcement. Be that as it may, the author shall begin by examining the notion of fundamental rights, its evolution, metamorphosis.

Introduction

The Concept of Natural Law

Let us peep into the source of fundamental human rights. A fundamental right (or fundamental human rights, as it is fondly called) has its root in natural law and natural rights, for according to a learned author:

> The notion of human rights originated from two inter-related conceptual trends: natural law and natural rights.[9]

Natural law is really of pristine existence:

> Natural law thinking has occupied a pervasive role in the realms of ethics, politics, and law from the time of Greek civilization. At some periods its appeal may have been essentially religious or supernatural: in modern times it has formed an important weapon in political and legal ideology.[10]

Fundamental Rights Enforcement

The source of substantive law on fundamental human rights is derived from the Constitutions. Upon Nigeria's attainment of independence, and following minorities' agitation, the Willink's Commission on minority agitation, suggested the inclusion of fundamental right in the Constitution. This, the commission

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[9] Nwazuoke, A.N. ed. *Essays in Human Rights Law*, 2004, published by the Dept of Commercial and Industrial Law, Faculty of Law, Ebonyi State University, Abakaliki, Ebonyi State, Nigeria.

[10] Lloyd's *Introduction to Jurisprudence*, Freeman, M.D.A., Sweet and Maxwell, 8th edition, 2008, p.83

thought, would assuage the agitation of the minority tribes that make the Nigeria Federation. So, right form the Independence Constitution through the Republican Constitution 1963 to the Second Republic constitution, 1979, to the 1999 Constitution (as amended), the concept of fundamental rights has always been entrenched.

The 1979 Constitution, for example, provided for fundamental rights in its Chapter four.[11] These rights are

(i) Right to life.[12]
(ii) Right to dignity of human person.[13]
(iii) Right to personal liberty.[14]
(iv) Right to fair hearing.[15]
(v) Right to private and family life.[16]
(vi) Right to freedom of thought, conscience and religion.[17]
(vii) Right to freedom of expression and the press.[18]
(viii) Right to peaceful assembly and association.[19]
(ix) Right to freedom of movement.[20]
(x) Right to freedom of discrimination.[21]
(xi) Compulsory acquisition of property.[22]

Any person who alleges that any of the provisions of the Constitution as regards the rights above 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.[23] Procedurally, the said Constitution empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for the

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[11] Chapter four, Constitution of the Federal Republic of Nigeria, 1979.
[12] Ibid, Section 30
[13] Ibid, Section 31
[14] Ibid, Section 32
[15] Ibid, Section 33
[16] Ibid, Section 34
[17] Ibid, Section 35
[18] Ibid, Section 36
[19] Ibid, Section 37
[20] Ibid, Section 38
[21] Ibid, Section 39
[22] Ibid, Section 40
[23] Ibid, Section 42 (1)

purpose of the enforcement of the above fundamental rights.[24] The Constitution confers original jurisdiction on a High Court of a state to hear and determine any application made to it in respect of breach of fundamental rights.[25] In the exercise of the power of the Chief Justice of Nigeria pursuant to the Constitution, on the first day of January, 1980, the Fundamental Rights (Enforcement Procedure) Rules came into force. According to these Rules, Fundamental Right means any of the fundamental rights provided for in Chapter four of the Constitution.[26] It is not worthy that the provision of order 1, rule 2(1) is *impari materia* to section 42(1).[27] In all, this Rule contained six orders and appendix (form No.1 to form N0.6)

Old Things Have Passed Away

On the 29th of May, 1999, Nigeria gave herself another Constitution. In respect of fundamental rights, the 1999 Constitution retains, in its Chapter four, all the rights that were in the 1979 Constitution.[28] However, the Fundamental Rights (Enforcement Procedure) Rule, 1979 was still the adjectival law upon which the Constitution revolves. The Chief Justice of Nigeria, under the Constitution of Nigeria, 1999, is clothed with the power to fashion out rules in respect of enforcement of fundamental rights.[29] On the strength of this, the Chief Justice of Nigeria, Idris Legbo Kutigi, C.J.N., made the Fundamental Rights (Enforcement Procedure) Rules, 2009. The commencement date of this Rules being 1st December, 2009. This Rules abrogated the Fundamental Rights (Enforcement Procedure) Rules, 1979.[30] Why a new Rule? The new Rules have, arguably, altered the jurisprudence of fundamental human right enforcement in Nigeria.

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[24] Ibid, Section 42 (3)
[25] Ibid, Section 42 (2)
[26] Fundamental Rights (Enforcement Procedure) Rules, Order 1(2)
[27] Constitution of the Federal Republic of Nigeria, 1979
[28] See Chapter 4 of the 1999 Constitution.
[29] See Section 46(3) C.F.R.N., 1999
[30] See, Order XV, Rule 1, Fundamental Rights (Enforcement Procedure) Rules, 2009

Requiem for *Locus Standi?*

One of the most remarkable features of the 2009 Rules is its provision on *locus standi*.[31] A learned writer puts the import of *locus standi* thus:

> The concept of *locus standi* is important in Nigerian jurisprudence- very much like it is in other common law jurisdiction; *Locus standi* (or standing as it is alternatively called) is a party's right to make a legal claim or seek judicial enforcement of a duty or right.[32]

In a recent case, the Nigerian Supreme court stated that:

> *Locus standi* or standing is the legal right of a party to an action to be heard in litigation before a court of law or tribunal. The term entails the legal capacity of instituting or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever.[33]

Another learned law Lord puts it aptly as 'denoting legal capacity to institute proceedings in a court of law'[34]. The right of citizens and non-citizens alike to move or invoke the jurisdiction of the court depends, among others, on whether the said citizen or non-citizen or litigant has the requisite *locus* in law. The term *'locus standi'* therefore, denotes the legal capacity to institute proceedings in court of law; it is used interchangeably with the term "standing" or "title to sue". It is an aspect of *justiciability* [35] and also an issue of *jurisdiction*[36]. From the fore going, it is discernible that *locus standi* does not stand alone- it leans on jurisdiction:

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[31] For a detailed work on the concept of *locus standi* in Nigeria, see, Iloh, F. O. 'Locus Standi' Through the cases in Nigeria: Whether the courts still tread softly, Kogi State University *Bi-annual Journal of Public Law*, Vol. 2 (2009) pages 142-155

[32] Ibid, p. 142

[33] Per Niki Tobi, *Inakoju v Adewolu, Rashidi Ladoja* ors 29 N.S.C.Q.R. p.1068

[34] Ibid, per Akintan, J.S.C.

[35] Italics by the writer for emphasis.

[36] Italics by the writer for emphasis.

> If a plaintiff is incompetent because he has no *locus standi* to bring an action, the court would in turn be incompetent and without jurisdiction to entertain the plaintiff's action. In the instant case, the respondent lacked *locus standi* to institute the suit. In the circumstance, the suit was a nullity and the trial court also lacked jurisdiction to hear the suit.[37]

Commenting on the relationship between *locus standi* and justiciability, Obaseki. J.S.C. (as he then was), made an illuminating distinction:

> That when a party's standing to sue (i.e. *locus standi*) is in issue, the question is whether the person whose standing is in issue is the proper person to request an adjudication of a particular issue and not whether the issue itself is justiciable.[38]

The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the court and not on the issue he wishes to have adjudicated. In other words, *locus standi* to sue does not depend on the success or merit of a case but on the showing of the plaintiff's case in his statement of claim; that is, it is a condition precedent to a determination on the merit. Consequently, if a plaintiff has no *locus standi* or standing to sue, it is not necessary to consider whether or not there is a genuine case on the merit. His case ought to be struck out as being incompetent.

Locus standi is an obstacle in the course of actualization of the enforcement of fundamental human rights. Under the 1979 Rules, many an application bothering on encroachment on fundamental rights were challenged on the basis of lack of *locus standi*, and in some cases the applications were thrown out. The Rule did not make any provision on *locus standi* – either directly or impliedly. Under the circumstance, litigants have always anchored their argument (whether there was *locus standi* or not) on the premise of section 6 (6) (b) of 1979 constitution.[39]

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[37] *Inakoju V. Adeleke*, supra
[38] *Fawehinmi V. Akilu, N.S.C.C.* (1987)2 p.1267
[39] Section 6(6)(b), 1999 Constitution of Nigeria.

> 6 – (1) The judicial power 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 provision of this section –
> (b) Shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any person as to the civil rights and obligations of that person.

A learned writer, commenting on this section (which was considered by the courts in Adesanya v. President[40]), averred.

> This writer considers it pertinent to give a close scrutiny to the application and reference made of this section of the constitution in this case. Much heavy weather was made of this section, particularly by the respondent, as a basis why the appellant should be denied standing. His reasoning was based on precedent. The Supreme Court in Adesanya V. President held that the appellant lacked locus given this section. This section was well considered by the court. Having looked at the law, the court asked the question, can it be said that there is no question relating to the civil rights and obligations of the appellant?[41]

The new Rule, Fundamental Rights (Enforcement Procedure) Rule, 2009, seems to have heralded a new dawn, the Rule in its preamble avows as part of its over-riding objectives:

> The court shall encourage and welcome public interest litigations in the human rights field and no human rights case *may* be dismissed or struck out for want of *locus standi*.[42]

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[40] (1981) N.S.C.C.
[41] Iloh, F.O. '*Locus Standi* Through the cases in Nigeria: Whether the Courts still Tread softly', supra pages 147-148
[42] Fundamental Rights (Enforcement Procedure) Rule, 2009, Preambie, 3(e). All italicized wards by the writer for emphasis.

This is quite proactive. But is this provision having the ace? Though, in the interpretation of a statute, the preamble is to be looked up when ambiguity comes up; but can it not be argued that Adesanya V. President [43] overrides this, given the fact that section 6 (6) (b) is based on the Constitution? In the hierarchy of norms, the constitution is in the apex of the pyramid of laws[44]. Though it may be contended, in favour of the 2009 Rules, that the power of the Chief Justice to make it was derived from the Constitution, i.e. section 46 (3). However, even at this, this argument can be assailed by the argument that the power granted the Chief Justice to so make rule, at best, is a delegated power. And so, it cannot purport to be in conflict with the very statute that loans it such power, in this case the grundnorm, the constitution.

Furthermore, the word used in the preamble is ***'may'*** and this has been construed by the courts, in a plethora of cases, to be permissive and not obligatory. Consequently, one is tempted, though regrettably, to contend that the Rule may not after all have brought *uhuru* [45] to the jurisprudence of human rights litigation in Nigeria. And really, it is desirable that there should be a change. The use of *locus standi* may well be to prevent floodgate of litigations by shutting out meddlesome interlopers[46], its use sometimes, if not often, results in delay and eventually injustice. The case of Badejo v. Minister of Education and Others demonstrates this.[47]

In this case, before the Court of Appeal an eleven year-old primary school pupil, suing through her next friend, her father, instituted an action against the Federal Government for discrimination against her in the Common Entrance Examination to unity schools due to different cut-off marks for the various states in the country; she claimed that she was denied admission while some students who scored lower marks but were in some so-called educationally disadvantaged states were given admission. The trial learned judge, Akinboboye, J., in a ruling delivered on 4th

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[43] Supra

[44] Section 1(3), 1999 Constitution of Nigeria (as amended).

[45] Uhuru in Uganda means Halleluya

[46] See the judgement of Uwais, J.S.C in *Adesanya v. President*; see the Judgement of Pats-Acholonu, J.C.A. in *Shell Petroleum v. E. N. Nwawka* (2001) 10 NWLR (pt. 720) p.82-83

[47] CA/L405/88

November, 1988, on the basis that the applicant is not the only person aggrieved by the mode of admission of students by quota system, held:

> As earlier stated, the applicant in this case does not have an interest in the subject matter greater than those of the other candidates that were also affected by the policy of cut-off marks. ...
> Applicant had not deposed to the fact that she is prosecuting this application in a representative capacity that is, that she has the mandate of the other candidates so affected to prosecute this matter in court. It is my considered opinion that the applicant had not been able to establish that she had suffered by the acts of respondents, injuries greater than those suffered by all the other successful candidates who were not called for interview in the common Entrance Examination.[48]

On this faulty finding of fact, with due respect, the learned Judge dismissed the application for lack of *locus standi.* On appeal, the Court of Appeal unanimously overturned the decision of the trial Court; but it was regrettably a pyrrhic victory for the appellant:

> I am satisfied that the applicant has established that she has *locus standi* to institute the action and I so hold The appeal is allowed. The Ruling of Akinboboye, J. delivered on 4th November, 1988 is hereby set aside. I award #250.00k cost against the respondents. *However as the matters complained of in this appeal had already been completed, the subject-matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out.*[49]

From the above, where it not for the time spent on the argument on *locus standi* in the High Court and Court of Appeal, the Substantive application would have been taken timeously and the

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[48] *Badejo v. Minister of Education*, supra.
[49] Ibid, supra

action would have been saved. And it is not unlikely that the appellant could have won the substantive suit (discrimination). So far, it is the opinion of this writer, that, the notion of *locus standi* may not have been laid to rest. It will, according to Obaseki, J.S.C,[50] be debated in legal circles for a long time.

Widening the Scope of Applicants

The Fundamental Rights (Enforcement Procedure) Rules of 2009 in its preamble makes provisions that enlarge the class of prospective applicants. It provides:

> In human rights litigation, the applicant may include any of the followings:
>
> (i) Anyone acting in his own interest;
> (ii) Anyone acting on behalf of another;
> (iii) Anyone acting as a member of or in the interest of a group or class of persons;
> (iv) Anyone acting in the public interest, and
> (v) Anyone acting in the interest of its members or other individuals or group.[51]

The above is a laudable provision.

In conjunction with its liberal provision on *locus standi*, it is only reasonable that the scope of prospective applicants should be widened as enumerated above. Unlike in former dispensation as obtained under the 1979 Rules, many a person who would have been prevented by the hurdle of *locus standi* can now bring up application on behalf of other persons. Perhaps if this provision had been provided under the 1979 Rules, the issue of *locus standi* might not have arisen in Fawehinmi v. Akilu[52]. Here, again, as in the legal argument under the issue of *locus standi* under the new Rules, can it not be argued that the provision of the Constitution (Section 6 (6) (b), Adesanya v. President) over-rides the provision of the Rules?

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[50] *Fawehinmi v. Akilu* (1987)2 N.S.C.C. p. 1272
[51] Preamble 3(e), Fundamental Rights (Enforcement Procedure) Rules, 2009
[52] Supra

Encouraging Public Interest litigations

The 2009 Rules enjoin the court to encourage and welcome public interest litigation in the human rights field and no human rights may be dismissed or struck out for want of *locus standi*. It is noteworthy to observe here that the provision of preamble 3(e) of the 2009 Rules on Fundamental rights enforcement is reminiscent of the *dictum* of Obaseki, J.S.C in Fawehinmi v. Akilu, wherein the learned erudite Justice of the Supreme Court averred that when it comes to the law of crime, we are all our brothers keepers:

> It is a universal concept that all human beings are brothers and are assets to one another. All human beings living in the same country and being citizens of the same country are more closely related to one another and are in truth and in fact each other's keeper than those living in countries separated by great distances. The death of one is a loss to the other whether by natural or felonious means.[53]

The Chief Justice of Nigeria, in making the 2009 Rules, may have been influenced by *dicta* such as the above.

Traditionally, based on *locus standi*, an applicant need to demonstrate the existence of personal and private interest. The new Rule has moved away from this customary dogma. Law is really dynamic. Like Obaseki, J.S.C, whose *dictum* was cited above, Eso, J.S.C., another legal colossus, giving the concept of *locus standi* a liberal interpretation, said:

> It is the view of my learned brother Obaseki, which I fully share with respect, that "it is the universal concept that all human beings are brother and assets to one another ". *He applies this to ground locus standi*[54]. That we are all brother is more so in this country where the socio-cultural concept of family and extended family transcend all barriers. Is it not right then for the court to take note of the concept of the loose use of the word "brother" in this country? "Brother in the

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[53] *Fawehinmi v. Akilu*, supra, p. 1281. See, Iloh, F.O. 'Locus Standi Through The Cases in Nigeria: Whether courts still Tread softly', supra p. 147

[54] Italics is of the writer for emphasis.

> Nigerian context is completely different from the blood brother of the English language. Though Cain challenged the *locus standi* of his being questioned as to the whereabout of his brother, Abel, it was his reason that he was not his brothers keeper. That might have been in the outskirts of the Garden of Eden. In Nigeria, it would be an unacceptable phenomenon. And when it comes to the law of *crime, everyone is certainly his brother's keeper.*[55]

Indeed, human rights abuses should be the concern of all. Closely connected to this, is the right of *any other person* to be heard in human right application, as provided by the Rule[56]. This provision is not absent in the 1979 Rule. As in the 1979 Rule, the new Rule permits any person or body who desires to be heard in respect of any Human Rights Application and who appears to the court to be a proper party to be heard, may be heard. However, unlike the 1979 Rule, the said interested party or body may be heard *not withstanding that the party has no interest in the matter* [57]. In the 1979 Rule, the word ***"shall"*** (shall be heard) was used; while under the 2009 Rule, the word ***"may"*** (may be heard) is used. It appears to this writer that this difference *in the use of shall or may* may not make any difference, after all. This opinion is predicated on the premise that in both orders (Order 5, 1979 Rules; Order XIII, Rule I, 2009 Rules) the court or judge is given the exercise of discretion with regard to the right of any other person to be heard. Therefore, the court will have to exercise this discretion judicially and judiciously.

Another innovation brought about by the 2009 Rules is the presence of *Amici Curiae* (friends of the court).

> *Amici curiae* may be encouraged in human rights applications and may be heard at anytime if the court's business allows it.[58]

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[55] *Fawehinmi v. Akilu*, supra, italicized words by the writer for emphasis.
[56] Order XIII, Rule I, Fundamental Right (Enforcement) Procedure Rule, 2009 see order 5, 1979 Rules.
[57] Italics by the writer for emphasis.
[58] Order XIII, Rule 2, 2009 Rules on Fundamental Rights Enforcement.

Encouraging Human Right Activism, Advocacy and Non-Governmental Organizations

It is part of the over-riding objective of the Rule (2009) that the court in encouraging public interest litigation, should also entertain applications instituted by human rights activists, advocates and NGOs. The role of NGOs in the enforcement of human rights is enormous, particularly in Nigeria.[59] Some of us are living witnesses to the role they (NGOs) played during the rule of Nigeria's military-particularly during the regime of the self-styled evil genius, Babangida,[60] and the dark-goggled general-Abacha.[61] His regime was the darkest in Nigeria's history----human rights advocates and activists were thrown into the gulag without trial for months, even for years. Legal representation is one of the functions of NGOs, however, the ability of NGOs to initiate actions on behalf of victims of human rights abuses is constrained by the doctrine of *locus standi* or standing to sue. In Nigeria, to be entitled to invoke the judicial powers of the courts, the plaintiff "must show either his personal interest will immediately be or has been adversely affected by the action complained against or that he has sustained or is in immediate danger of sustaining an injury to himself, and which interest or injury is over and above that of the general public".[62] Writing on this legal constraint *(locus standi)* in respect of NGOS, a learned author observed:

> ...the expeditious mechanism for the enforcement of fundamental rights under the Fundamental Rights (Enforcement Procedure) Rules, 1979, does not countenance representative action. It therefore behaves NGOS to obtain the consent or instructions of victims of human rights violation to institute actions in the victim's name. *This may sometimes be practically impossible where the victim is held incommunicado,*

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[59] For a fuller discussion on NGO and Human Rights in Nigeria, see Nwazuoke, A. Introduction to Human Rights Law, 2006, Copycraft International Ltd., chapter 19.

[60] Babangida ruled Nigeria between August 1985 – August, 1993.

[61] Sanni Abacha's inglorious regime was between 1994-1998

[62] *Thomas v. Olufosoye* (1986) I N.S.C.C. p. 226-7. See also Oputa, J.S.C at p.340, *Adesanya v. The President*, supra.

> *and where there is nobody who can give the requisite instructions on his or her behalf.*[63]

The specific mention of N.G.O. in the Fundamental Rights (Enforcement Procedure) Rules 2009 may have changed the law as against what was obtained under the 1979 Rule as observe by the learned author quoted above.

The African Charter on Human and Peoples' Rights

The Fundamental Rights (Enforcement Procedure) Rules, 2009 in its Preamble, states as its overriding objectives, among others,:

> *For the purpose of advancing but never for the purpose of restricting* the applicants rights and freedoms, the court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, whether these bills constitute instruments in themselves or form part of larger documents like constitutions. Such bills include:
>
> (i) The African Charter on Human and Peoples' Rights and other instruments (including protocols) in the African regional human rights system.
> (ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system.[64]

The above objective is a salutary development in the enforcement of human rights jurisprudence in Nigeria. From the excerpt above, it is obvious that the court is enjoined, in handling human rights application, to respect municipal, regional and international bills of rights. The African Charter on Human and Peoples' Rights, a regional human rights instrument, is specifically mentioned, the universal declaration of Human Rights is not left out.

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[63] Nwazuoke, A. Introduction to Human Rights Law, op. cit., p. 186; italics by the writer for emphasis.

[64] See the preamble to the Fundamental Rights (Enforcement Procedure) Rules, 2009.

It is the opinion of this writer that this overriding objective (as quoted above) of the 2009 Rules may have come about due to the influence of Nigerian case law. The case that readily comes to mind is *Abacha v. Fawehinmi*[65]. Here, the respondent, Chief Gani Fawehinmi, a legal practitioner, was arrested without warrant at his residence on Tuesday, January 30, 1996 at about 6 a.m. by six men who identified themselves as operatives of the State Security Service (SSS) and policemen and taken away to the office of the S.S.S. at Shangisha where he was detained. At the time of his arrest the respondent was not informed of, nor charged with, any offence. He was later detained at the Bauchi prisons. In consequence, he applied *ex-parte* through his counsel, to the Federal High Court, Lagos pursuant to the Fundamental Rights (Enforcement Procedure) Rules 1979 for a declaration that his arrest, detention and continued detention constitutes a violation of his fundamental rights guaranteed under section 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and People Rights (Ratification and Enforcement) Act[66] and is therefore illegal and unconstitutional. The trial Federal High Court, Lagos, per Nwaogwugwu, J., ruling on a preliminary objection (on jurisdiction) dismissed the application on the ground that state security (Detention of Persons) Decree No. 2 of 1984 (as amended) and further by section 4 of the aforementioned Decree No. 2 of 1984 (as amended), the Federal military Government was immune to any legal liability in respect of any action done pursuant to the Decree. Importantly, the learned trial judge found that any of the provision of the African Charter on Human and Peoples' Rights which is inconsistent with Decree No. 107 of 1993 (the grundnorm) is void to the extent of its inconsistency. And that the African Charter on Human and Peoples' Rights has no legs to stand on its own under the Nigerian law. It cannot be enforced as a distinct law as such, it is subject to our domestic law and ouster decrees. Upon appeal, the Court of Appeal[67], Lagos, unanimously allowing the appeal in part, on the

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[65] (2000)6 N.W.L.R (pt 660) pages 228-359.

[66] Chapter 10, Laws of Federation of Nigeria, 1990.

[67] The Court of Appeal panel that heard the case comprised Dahiru Musdapher, J.C.A. (Presided who read the lead judgement) with him were Rabiu Danlami Muhammed and Ignatius Chukwudi Pats-Acholonu, J.J.C.A, who both concurred.

status of the African Charter on Human and Peoples' Rights, held that the provision of the African Charter on Human and Peoples' Rights are in a class of their own and do not fall within the classification of the hierarchy of local legislations in Nigeria in order of superiority.

> The member countries-parties to the protocol--- recognised that the fundamental human rights stem from the attributes of human beings which justify their international protection and accordingly, by promulgation of cap, 10 the Nigerian State attempted to fulfill its international obligation. It is an international obligation to which the nation voluntarily entered and agreed to be bound. The arrest and detention of the appellant on the facts addressed clearly breached the provisions of the Charter and can be enforced under the provision of the Charter. The contracting states are bound to establish some machinery for the effective protection of the terms of the Charter and when local procedure is exhausted or when delay will be occasioned, the matter will be taken to the international commission. All these indicate that the provisions of the Charter are in a class of their own and do not fall within the classification of the hierarchy of laws in Nigeria in order of superiority as enunciated in *Labiyi v. Anretiola*. It seems to me that the learned trial judge acted erroneously when he held that the African Charter contained in Cap. 10 of the Laws of the Federation of Nigeria 1990 is inferior to the Decrees of the Federal Military Government. It is commonplace that no Government will be allowed to contract out by local legislation, its international obligations. It is my view that notwithstanding the fact that cap 10 was promulgated by the National Assembly in 1983, it is legislation with international flavour and the ouster clauses contained in Decree No. 107 of 1993 or No. 12 of 1994 cannot affect its operation in Nigeria. I agree with the submissions of the learned counsel for the appellant. In England where there is no written constitution and the parliament is supreme, it could legislate on any issue. But the sovereignty is

> now somewhat limited through the impact of European community Act of 1972. Although the British Parliament passed the E.C Law, and can in theory, repeal it, but there are constraints and limitations and thus the Parliament in Britain is no longer supreme. The Parliamentary supremacy has been surrendered, by implication, by signing of the unions Laws. It is for the above that I hold that the provisions of cap.10 of the laws of the Federation 1990 are provision in a class of their own. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the Charter. ***They are protected by the international laws and the Federal Military Government is not legally permitted to legislate out of its obligations.***[68]

This writer holds the opinion that the above judicial activism of the Court of Appeal in *Fawehinmi v. Abacha*[69] is in consonance with the preamble to the 2009 Rule. The Court of Appeal seems to have done this (not allowing the decree to **"kill"** the right provided under the Charter) for the purpose of advancing but never for the purpose of restricting the appellant's rights and freedoms[70]. The Court of Appeal has been quoted in *extensor* above – this is to show the extent of the disposition of the Court as regards the status of the African Charter; and the effect of the detention decree on it. It should be remarked, here, that, on this point (whether the decree ousted the Charter) the Supreme Court, sitting on the case on appeal, had a split decision – 4 to 3 – it was greatly contentious.

The matter went to the Supreme Court on appeal. The panel of justice was composed of seven justices as it was a constitutional matter[71]. The entire panel unanimously dismissed the appeal

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[68] Per Musdapher, J.C.A, delivered the lead judgment in *Abacha v. Fawehinmi* (1996)9 NWLR p. 718-719.

[69] Supra

[70] See the preamble to the 2009 Rules

[71] Name of justices that sat on the appeal: Salihu Modibbo Alfa Belgore J.S.C (Presided and dissented on the cross-appeal); Michael Ekundayo Ogundare J.S.C (Read the lead judgment); Uthman Mohammed, J.S.C (dissented on the

against the appellants. **But not so for the cross-appeal.** The respondent, Chief Fawehinmi, cross-appealed against those parts of the decision of the court of Appeal relating, among others, to:

1. The mode of enforcing the fundamental rights guaranteed under the African Charter; and
2. Procedure for tendering detention order.

On the cross-appeal, as said earlier, four of the justices allowed it, while three dissented

> Before ending this judgment, I need to add that the cross-appeal was very contentious. The judgment of my learned brother Achike, J.S.C. which I had the privilege of reading in advance expresses the consensus view on the appeal. But the dismissal arrived at by him of the cross-appeal, the reasons for which I respectfully acknowledge he has painstakingly stated in the clearest possible manner, was initially a majority position while on the other hand I held a minority view to allow the cross-appeal. After I made a draft of this judgment available, it appeared the merit of the cross-appeal became crystal clear and so the majority view emerged in favour of allowing the cross appeal.[72]

It is to be noted that the Supreme Court held that the African Charter, Cap. 10 though a statute with international flavour, is not superior to the Constitution nor decrees under a military regime. Thus the National Assembly or the Federal Military Government could remove it from the body of our municipal laws by simply repealing it[73]. Furthermore, it should be noted that, it appears, in line with the 2009 Rules (that the African Charter shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them

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cross-appeal), Anthony Ikechukwu Iguh, J.S.C; Okey Achike, J.S.C (Dissented on the cross-appeal) Samson Odemwingie Uwaifo, J.S.C; Akintola Olufemi Ejiwunmi, J.S.C.

[72] Per Uwaifo, J.S.C, *Abacha v. Fawehinmi*, supra, p. 352

[73] See *Abacha v. Fawehinmi*; Per Ogundare, J.S.C; p. 289; Ejiwunmi, J.S.C., p. 357; Uwaifo, J.S.C., p. 343; Muhammed, J.S.C, p. 302

and affording the protection intended by them)[74] that the majority decision of the Supreme Court (in respect of the cross-appeal) in *Abacha v. Fawehinmi* took the restrictive stance in respect of the decree purporting to oust the jurisdiction of the trial by Federal High Court. While the three justices[75] that dissented on the cross-appeal seem to hold that decree N0.12 of 1984, upon which the Inspector-General of Police issued the detention order upon which the respondent was arrested and detained, *impliedly ousted the jurisdiction of the trial Federal High Court in view of the application brought pursuant to African Charter on Human And Peoples' Rights (Domestication and Enforcement)Act; the majority decision held that the jurisdiction of the Court was intact to hear the matter. They held in their judgment, that, the decree rather preserved the Charter, and that it can only oust the Court's jurisdiction by saying so expressly, not by implication:*

> Therefore I proceed on the basis and upon the understanding that at the time the cross-appellant was arrested, the appellants recognized and acknowledged that the African Charter, adopted by Cap.10 of the Laws of Federation of Nigeria, and *affirmed by Decree No.107 of 1993, was in full force.* From the principle and the Laws already discussed above, the following basic concepts ought to be established, namely *(a) the African Charter is a special genus of law in the Nigeria legal and political system; (b) the charter has some international flavour and in that sense it cannot be amended or watered down or sidetracked by any Nigeria law; (c) the effect of the Charter in Nigeria may be completely obliterated by an express repeal of the African Charter on Human and Peoples' Rights (Ratification and Enforcement)Act.* I do no think to pay due regard to the African Charter, even though it is now part of our municipal law, will be in conflict with the decision of this court in *Labiyi V. Anretiola.*[76]

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[74] See the preamble to the 2009 Rules.
[75] Achike, Belgore and Muhammed, J.J.SC.
[76] Per Uwaifo, J.S.C, *Abacha v. Fawehinmi*, supra, p. 347. All the italics are the writer's for emphasis.

Uwaifo, J.S.C. was not the only one who saw through this judicial prism; another law Lord lent his voice:

> It is of course settled law that the jurisdiction of a court to hear a matter is invariably determined by the claim of the plaintiff. I have before now, set out the application made by the cross-appellant in the trial Court. A careful reading of the reliefs sought by the cross-appellant, clearly shows that the cross-appellant anchored his reliefs on both the provisions of fundamental rights guaranteed under sections 31,32 and 38 of the 1979 Constitution, and also Articles 4,5,6 and 12 of the African Charter on Human and Peoples' Right (cap.10) of the laws of the Federation).
> For the cross-respondent the argument urged on the Court with regard to whether the cross-appellant could pursue his remedies under the above provisions of the Constitution and Cap.10 of the Laws of the Federation, 1990 was anchored on the ground that there provisions have been suspended by Decree 107 of 1993. However, the contrary argument was put forward for the cross-appellant. In addition, it was urged on the Court to apply the principle, already recognized in this Court that the Court must in order to protect its jurisdiction, strictly such laws as tend to deny or whittle its jurisdiction.
> *As Decree 107 of 1993 by its section 17 has left in tact the provisions of Cap.10 The Human and Peoples' Rights, it is my view that in such circumstances, the cross-appellant could quite properly pursue his action in the Federal High Court and before another Judge of that Court.*[77]

His lordship, Iguh, J.S.C, who also heard the appeal, concurred with the majority when he averred in very strong terms:

> In the present case, section 4 of the State Security (Detention of Persons) Act unequivocally and in clear terms mentions Chapter iv of the Constitution of the

[77] Per Ejiwunmi, J.S.C., *Abacha v. Fawehinmi*, supra, p. 358-359. Italics by the writer for emphasis.

> Federal Republic of Nigeria, 1979 as the earlier enactment which it expressly suspends.[78]

Having conceded the obvious, that is, the decree only expressly suspended the Constitution of 1979, he went on:

> It (the decree) neither mentioned nor did it include the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983 as one of the enactments concerning fundamental human rights it was suspending. My attention was not drawn to any Decree or, indeed, to any other Act or law promulgated after 1983 which in clear terms repealed or suspended the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act, 1983 in relation to detention of persons.[79]

According to the learned Jurist, the consequence of not expressly suspending the Charter is that:

> In the circumstance (of no express suspension), I think the said African Charter on Human and People's Rights (Ratification and Enforcement)Act 1983 remained effective and in full force at all times material to the respondent's alleged detention.[80]

His lordship was not through yet, as he found jurisdiction for the trial Federal High Court:

> I entertain no doubt also that the court below, with profound respect, were in definite error when they held that there was no jurisdiction in the lower courts to entertain the respondent's claim for the entire period of his alleged detention. Think such jurisdiction exists.[81]

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[78] Per Iguh, J.S.C., *Abacha v. Fawehinmi*, supra, p. 304
[79] Ibid.
[80] Ibid.
[81] Ibid.

What is the basis of jurisdiction? His lordship was not in want of answer:

> This (jurisdiction[82]) is by virtue of the fact, firstly, that the African Charter on Human and peoples' Rights (Ratification and Enforcement)Act, 1993 *was at no time suspended or repealed*[83]. There is, secondly, section 1 of that Act *which stipulates that from the date of its commencement, the provisions of the African Charter on Human and Peoples' Right shall, subject as provided there under, have full force of law, in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria.*[84] Thirdly, and finally, is the fact that the respondent's action, was *expressly*[85] founded in his originating summons, not only under the 1979 Constitution, *but also under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria, 1990 which, as I observed, remains fully in force and enforceable in Nigeria*[86]. It is may view therefore, that there is ample jurisdiction in the law courts to entertain the respondent's claims under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, 1983.[87]

By way of critique of this case (in relation to the 2009 Rule—this writer holds the opinion that the Rules seem to be preaching the gospel of liberalism to the Courts when faced with human rights litigation. The attitude of the Court of Appeal in interpreting whether or not the decree in question ousted the jurisdiction of the Court is in accord with the disposition of the majority judgment of the Supreme Court. It is the Submission of this writer that the

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[82] The word in bracket is by the writer for clarification.
[83] Italics by the writer for emphasis.
[84] Italics not by the writer.
[85] Italics not by the writer.
[86] Italics by the writer for emphasis.
[87] Per Iguh, J.S.C, *Abacha v. Fawehinmi*, supra, p. 304

minority judgment[88] (that dismissed the cross-appeal of Chief Fawehinmi) was really based o strict interpretation of the law against the fundamental rights of the citizens.

Absence of Application for Leave

Under the 1979 Rules, no application for an order enforcing or securing the enforcement within that State of any such rights shall be made unless leave therefore has been granted in accordance with the rule.[89] Closely connected to this (application for leave) is the concept of limitation statute. Under the 1979 Rules, leave shall not be granted to apply for an order under the Rules *unless the application is made within twelve months form the date of the happening of the event, matter, or act complained of, or such other period as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the court or judge to whom the application for learned is made.*[90]

According to the Fundamental Rights (Enforcement Procedure) Rule 2009 the above is no longer the law. The new Rule provides that an application for the enforcement of the Fundamental Right may be made by originating process, accepted by the court which shall, subject to the provisions of the Rules lie without leave of court.[91] *The Rules emphatically abolished limitation in statute whatsoever in respect of application for the enforcement of fundamental Right.*[92] Again, under the old Rule, when leave has been granted to apply for the order being asked for, the application for such under must be made by notice of motion or by originating summons to the appropriate court, and unless the court or Judge granting leave has otherwise directed, there must be at least *eight dear days between the service of the motion or summon and the day named therein for the hearing.*[93] Now, in this era of the new Rule, *the application shall be fixed for hearing within seven days from the day the application was fixed. The simple implication of these, is that the new Rule has removed some procedural bottleneck.*

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[88] See particularly the judgment of Achike, J.S.C,, p. 306-332
[89] See, Order I, Rule 2(2); *Abacha v. Fawehinmi*, supra, p. 285.
[90] Order I, Rule 3(1)
[91] Order II, Rule 2
[92] Order III
[93] Italics for emphasis.

Hearing of the Application

In the old Rule, there was no set down rules for hearing application. Usually what happened was that applicants by their counsel move their originating summons, taking as much time as they desired. In respect of the new Rule, *every application shall be accompanied by a Written Address which shall be succinct argument in support of the grounds of the Application*[94].Where the respondent intends to oppose the application, he shall file his written address within five days of the service on him of such application and may accompany it with a counter-affidavit[95]. The applicant may on being served with the Respondent's Written address on points of law within five days of being served, and may accompany it with a further affidavit.[96]

The hearing of the application shall be on the parties' written address.[97] Oral argument of not more than twenty minutes shall be allowed from each party by the court on matters not contained in their written addresses provided such matters came to the knowledge of the party after he had filed his written address.[98] The Rules also provide what the written address should contain and its structure.[99]

The Rules anticipate absentism on the part of either parties when the written addresses have been filed and come up for adoption. Here, the Rules say that the court shall either on its own motion or upon oral application by the counsel for the party present, order that the addresses be deemed adopted if the court is satisfied that all the parties had notice of the date for adoption and a party shall be deemed to have notice of the date of adoption if on the precious date last given, the party or his counsel was present in court.

This writer observes that the format and procedure enumerated above, is in line with what is now practised under the civil procedure Rules of most states in Nigeria.

In all, the Fundament Rights (Enforcement Procedure) Rules, 2009 have brought about remarkable improvement in the sphere of

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[94] Order II, Rule 5, 2009 Rule.
[95] Order II, Rule 6, 2009 Rule.
[96] Order II, Rule 7, 2009 Rule.
[97] Order XII, Rule I, 2009 Rules.
[98] See, Order XII, Rule 2, 2009 Rules.
[99] Order XII, Rule 4.

human right enforcement in Nigeria. However, it is the contention of this writer that, except the country's courts adopt the right frame of mind, the Rule would be a paper tiger. And what is the right frame of mind? It is seeing human rights, whatever the form of government, whether democratic or totalitarian, as rights that are special; and it is the sacred duty of the courts to protect these species of rights.

Conclusion

This article has as its main theme, the analysis of the Fundamental Rights (Enforcement Procedure) Rules, 2009. In this discourse, the writer took a voyage into the womb of history of the evolution and revolution of fundamental rights. The enforcement of fundamental rights in Nigeria was examined against the background of the 1979 Rules, which gave way to the 2009 Rules.

Nigerian courts must strive, more than ever, to protect the fundamental rights of the people. The courts must see laws, whether in a democracy or in a militocracy, that whittle down human rights as aberrations. It is against this background that one is delighted by the attitude and judicial activism of Pats – Acholonu, J.C.A.[100], though he received some judicial knocks from the Supreme Court, particularly from the dissenting judgment (In the cross – appeal) of Achike, J.S.C[101]. The courts should not, at the slightest flicker of oust of jurisdiction, throw up its arm in despair. The advice of Pats – Acholonu comes in handy, here:

> The issue of ouster of jurisdiction must be understood and considered within the broad line of the prism and contextualism of a case in as much as the court owes it as a duty to ensure that since the liberty of an individual who is not charged with a specific criminal offence is at stake but is based on matters that burden on state security, a liberal construction ought to be adopted particularly in peace time.[102]

The reason why the courts should adopt the above posture as canvassed by the Law Lord is that:

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[100] See, *Fawehinmi v. Abacha* (1996)9 NWLR, p. 751-767

[101] See, *Abacha v. Fawehinmi*, supra, p. 316-317

[102] Per Pats-Acholonu, J.C.A; *Fawehinmi v. Abacha*, p. 764.

> Liberty which is the very essence of our being is the light and life of the free world. Take it away and there is darkness, misery, frustration, disillusionment, decay and societal death. The courts below should take another look.[103]

The courts should be weary of arguments that are based on strict legal positivism as a basis for the denial of fundamental rights of citizens:

> It is a pity human nature has not learnt anything from certain practices perpetrated in the Third Reich Germany. There is still ruling us, as it were, the school of empirical positivism which unwittingly seeks to enthrone despotism... ouster clauses are in essence a method to perpetrate legal positivism. But then for ouster clauses to be relevant, the conditions laid down for it to be resorted must be adhered to rigidly.[104]

Unwittingly adhering to legal positivism or judicial formalism did breed the ugly despotic regimes of Hitler's Third Reich in Germany and Fascism in Italy. Consequently, the United Nations enthroned the Universal Declaration of Human Rights. There is growing tendency in most jurisdictions to protect as much as possible the fundamental rights of people in times of peace in particular. There is no doubt that in times of war or emergency of some sort – like earthquake or internal insurrection, the public might shut their eyes to an enactment of laws that appear draconic on their face. Such laws if made are to secure and protect the state in times of emergency[105].

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[103] Ibid.
[104] Ibid, p. 763.
[105] Ibid, p.760