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The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria?

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Summary

This article reviews the Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009 to determine whether it is a suitable response to the numerous problems arising in the course of two decades of the enforcement of fundamental human rights in Nigeria. Such problems include the highly technical and formally procedural nature of the Fundamental Human Rights (Enforcement Procedure) Rules 1979; the requirement of standing to sue; and the distinction between principal and accessory claims. Through a review of the procedural changes made by the 2009 Rules and the overriding objectives in the application of the 2009 Rules the article demonstrates that the 2009 Rules may be regarded as a suitable response if the Nigerian judiciary recognises that utmost flexibility must be the fundamental ordering principle of human rights enforcement.

1 Introduction

The article reviews the Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009 to determine whether they are a fitting response to the problems that have arisen in the course of two decades of the

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enforcement of fundamental human rights in Nigeria. It is demonstrated that the new rules can be a fitting response if the Nigerian judiciary recognises that they must exercise flexibility in the enforcement of human rights.

In the wake of the 1966 military *coup* in Nigeria, the 1963 Constitution of the Federal Republic of Nigeria was suspended, including chapter two on the protection of human rights. Until the return to civil democratic rule in 1979, the protection of human rights was largely ineffective. A contributory factor to this ineffectiveness is the absence of procedural rules as required by section 32 of the 1963 Constitution which empowered the federal legislature to make provision with respect to the practice and procedure of the High Courts to entertain complaints of an infraction of the human rights. Since no rules were made by the federal or regional parliaments, fundamental rights litigation proceeded in a number of ways. In *Aoko v Fagbemi*,[1] it was by way of the application under section 30(1) of the 1960 Constitution of the Federal Republic of Nigeria;[2] in *Whyte v Commissioner of Police*,[3] an action for the protection of the right to a fair hearing commenced by way of an originating motion; in *Akande v Araoye*,[4] it was by a writ of summons; and in *Akunnia v Attorney-General Anambra State*,[5] the action was commenced by notice of motion.

After the 1979 Constitution of the Federal Republic of Nigeria came into force on 1 October 1979, the then Chief Justice of Nigeria, A Fatai-Williams, operationalised section 42(3) which empowered the Chief Justice of Nigeria to make rules for the practice and procedure of a High Court towards the exercise of the original jurisdiction vested in the High Court to hear and determine any application for redress made to it by any person who alleges that any of the provisions of chapter three of the Constitution have been, are being or are likely to be contravened in any state. The Fundamental Human Rights (Enforcement Procedure) Rules 1979, made pursuant to section 42(3), came into effect on 1 January 1980. Almost two decades to the day, the Fundamental Rights (Enforcement) Procedure Rules 2009 were made and designated to commence on 1 December 2009.

2 The 1979 Rules

The 1979 Rules were intended to facilitate a speedier and less cumbersome resolution of complaints of human rights abuse because it was felt Nigerian courts were steeped in formalism and technicalities.

1 (1961) 1 All NLR 400.
2 Similar to sec 32 of the 1963 Constitution.
3 (1966) NMLR 215.
4 (1968) NMLR 283.
5 (1977) 5 SC 161.

Emerging from a military regime, it was also the case that Nigerian courts were not well versed in the enforcement of human rights. Two decades later, the evidence shows clearly that the judicial interpretation of the 1979 Rules has turned it into a highly technical and formal procedural instrument. In addition, new threshold principles, especially the requirement of standing to sue and the distinction between principal and accessory claims, emerged in Nigerian human rights jurisprudence and shut out a significant volume of human rights litigation.

The question of whether the 1979 Rules are mandatory or flexible for the enforcement of human rights is at the core of the technical and formal nature of the Rules. The requirement that the 1979 Rules should be followed strictly because they are mandatory results in a finding that non-compliance causes the proceedings to be void. If, on the other hand, the 1979 Rules are regarded as flexible because they are part of the numerous ways in which human rights protection is to be sought, non-compliance would lead to either a condonable irregularity or just an inconsequential fact. A review of the cases shows that, on the one hand, a number of decisions have held that the 1979 Rules are not the only procedure for the enforcement of human rights. For example, in *Ladejobi v Attorney-General of the Federation,*[6] the High Court of Lagos dealt extensively with the proper procedure to be adopted in the enforcement of fundamental rights of a Nigerian citizen and held that a citizen can proceed by any procedure, including an originating summons, a general originating summons, a declaration of right by originating summons, a writ of *habeas corpus*, an application for an order of *certiorari,* mandamus or prohibition for the purpose of enforcing his fundamental human right.[7] In *Obikwelu v Speaker, House of Assembly,*[8] Araka CJ confirmed the view above and stated the advantages of proceeding under the Rules as the attainment of a speedier relief against a breach of fundamental human rights. When the Supreme Court in *Ogugu v State* (*Ogugu* case)[9] held that 'the provision of section 42 of the Constitution for the enforcement of fundamental human rights enshrined in chapter IV of the Constitution is only permissive and does not constitute a monopoly for the enforcement of those rights',[10] it was possible to argue that the controversy as to whether the 1979 Rules are to be followed strictly was over. Relying on this decision, the Supreme Court of Nigeria in *Abacha v Fawehinmi*[11] held that an aggrieved person could enforce his rights under the African Charter on Human and Peoples' Rights (African Charter) by way of an action commenced by a writ or by any permissible procedure such as the Fundamental Rights

6 (1982) 3 NCLR 563. The applicant came by way of judicial review.

7 See also *Nwigwe v Onaguluchi* (1985) 6 NCLR 480.

8 (1984) 5 NCLR 757. See also *Adedoyin v Governor of Ondo State* (1983) 4 NCLR 786.

9 (1994) 9 NWLR (Pt 366) 1.

10 *Ogugu* case (n 9 above) 26.

11 (2000) 6 NWLR (Pt 660) 228.

(Enforcement Procedure) Rules 1979. Closely allied to the question of proper procedure for the enforcement of human rights was the issue of the deficiencies in the 1979 Rules. In *Ladejobi,* the High Court of Lagos State held that if the Rules are deficient because they are silent on some issues or they do not go far enough, the rules of the appropriate court would apply instead. Along this line of interpretation, in *Bonnie v Gold,*[12] the Court of Appeal identified the fact that the 1979 Rules were deficient in the procedure to be followed in committal proceedings for contempt and held that the proper thing to do was to resort to the High Court (Civil Procedure) Rules.

Even before the decision of the Supreme Court in 1994 in *Ogugu*, a number of decisions were handed down that the 1979 Rules must be followed strictly in the enforcement of human rights. For example, in *Din v Attorney-General of the Federation* (*Din* case),[13] Nnaemeka Agu JSC said: '[T]he Fundamental Right (Enforcement Procedure) Rules 1979 have prescribed the correct and only procedure for the enforcement of fundamental rights which arise under chapter IV of that Constitution.'[14]

After *Ogugu*, several cases – *Udene v Ugwu* (*Ugwu* case);[15] *Chukwuogor v Chukwuogor* (*Chukwuogor* case);[16] *NUT v COSST*;[17] and *Dongtoe v CSC Plateau State*[18] – have held that the 1979 Rules are the only procedure for the enforcement of fundamental human rights.

In the interpretation of the components of the 1979 Rules the requirement of strict compliance is also evident. The first example is the requirement of leave which is *ex parte*. The 1979 Rules require an applicant[19] who intends to enforce a fundamental human right to seek leave of the High Court to do this.[20] In *Ugwu*,[21] the Court of Appeal held that the requirement for leave is mandatory and cannot be regarded as a mere irregularity. The application is made *ex parte* and must be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by an affidavit verifying the facts relied on. Unfortunately, the grant of leave on the determination of a *prima facie*

12 (1996) 8 NWLR (Pt 465) 234.

13 (1986) 1 NWLR (Pt 17) 471.

14 *Din* case (n 13 above) 478.

15 (1997) 3 NWLR (Pt 491) 57.

16 (2006) 7 NWLR (Pt 979) 302.

17 (2006) 5 NWLR (Pt 974) 590.

18 (2001) 9 NWLR (Pt 717) 132.

19 In *Onyekwulujue v Benue State Government* (2005) 8 NWLR (Pt 928) 614, the Court of Appeal held that the fundamental rights in ch IV of the 1999 Constitution may apply to artificial persons such as companies because companies must act through the instrumentality of human persons.

20 See Order 1 Rule 2(1) of the 1979 Rules.

21 *Ugwu* case (n 15 above).

case was at the discretion of the trial court and often this discretion was exercised wrongly, thereby shutting out credible complaints. For example, in *Ushae v COP*,[22] a High Court refused applicants detained by the Nigerian police without being charged on allegations of armed robbery for over four months leave to apply for the enforcement of a fundamental human right.[23] Secondly, sections of the 1979 Rules that stipulate time limits for carrying out specific steps in the procedure were strictly enforced. A good example is the requirement that the motion on notice or summons for an order of the court to protect fundamental human rights must be entered for hearing within 14 days after such leave has been granted. In *Ogwuche v Mba,*[24] *Ezeadukwa v Maduaka,*[25] *Umoh v Nkan*,[26] *Chukwuogor*[27] and *EFCC v Ekeocha*,[28] this requirement was held to be mandatory and non-compliance rendered the subsequent proceedings void. It is of course regrettable that these decisions ignored *Ogugu.* It can be said that the fault is largely that of the Supreme Court because after *Ogugu*, the Court created a threshold principle distinguishing between principal and accessory claims. This distinction was first articulated in *Tukur v Government of Taraba State*[29] and followed in a long line of cases – *Borno Radio Television Corporation v Egbonu,*[30] *Sea Trucks Ltd v Anigboro,*[31] *Dongtoe v CSC Plateau State,*[32] *Abdulhamid v Akar*[33] and *Agwuocha v Zubeiru*[34] – that Nigerian courts will not entertain an action for the enforcement of a fundamental human right contained in the 1979 Rules unless it is the principal claim. In other words, if the action for the enforcement of a fundamental human right is an accessory or subsidiary claim, the action must be started by a writ of summons.[35] For example, claims that there was a breach of the right to a fair hearing in the withholding and cancellation of examination results were regarded as a subsidiary claim[36] and they could not be commenced under the 1979 Rules. Conversely, the Court

22 (2005) 11 NWLR (Pt 937) 499.

23 The Court did not apply its mind to the provisions of sec 35(4) of the 1999 Constitution which set time limits for an arrested person suspected of committing a crime.

24 (1994) 4 NWLR (Pt 336) 75.

25 (1997) 8 NWLR (Pt 518) 635.

26 (2001) 3 NWLR (Pt 710) 512.

27 n 16 above.

28 (2008) 14 NWLR (Pt 1106) 161.

29 (1997) 6 NWLR (Pt 510) 549.

30 (1991) 2 NWLR (Pt 171) 81.

31 (2001) 2 NWLR (Pt 696) 159.

32 (2001) 9 NWLR (Pt 717) 13.

33 (2006) All FWLR (Pt 321) 1191.

34 (2002) FWLR (Pt 99) 1129.

35 See ES Nwauche 'The dubious distinction between principal and accessory claims in Nigerian human rights jurisprudence' (2008) 52 *Journal of African Law* 66-88.

36 See *West African Examinations Council v Adeyanju* (2008) 9 NWLR (Pt 1092) 270; *West African Examinations Council v Akinkumi* (2008) 9 NWLR (Pt 1091) 151.

maintained that a principal claim must be commenced under the 1979 Rules. The nature of this principle, like the principle of standing to sue, is fundamental and can be raised at any time including at the level of the Supreme Court. It was therefore difficult for the Supreme Court to continue to maintain that the 1979 Rules were flexible and a way of enforcing human rights. Rather than evaluate claims of abuse of human rights, Nigerian courts became obsessed with distinguishing between principal and accessory claims.

Another threshold principle that severely affected the enforcement of human rights was the requirement of standing to sue. Soon after the 1979 Rules were made, the Nigerian Supreme Court in *Adesanya v President of the Federal Republic of Nigeria*[37] recognised the requirement of personal standing as fundamental for any action, including complaints against human rights abuse, on the strength of section 6(6)(b) of the 1979 Constitution.[38] The Supreme Court held that standing would be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of. With respect to human rights litigation, the Court stated that the relevant person for determining standing was set out by section 42(1) of the 1979 Constitution to be the person whose fundamental human rights are in issue. Following this interpretation, section 46(1) of the 1999 Constitution, which is similar to section 42(1), would accord standing only to the person whose fundamental human rights are at issue. This interpretation was to the detriment of public interest litigation. Numerous attempts were made to ameliorate the harshness of the principle of standing to sue[39] and it was not until the case of *Owodunni v Registered Trustees of Celestial Church*[40] that change became inevitable. In that case, the Supreme Court adopted the opinion of Ayoola JSC in *NNPC v Fawehinmi*,[41] that the majority of the Supreme Court in *Adesanya* did not decide that section 6(6)(b) laid down a requirement of standing.[42] Recently, in *Fawehinmi v Federal Republic of Nigeria* (*Fawehinmi* case),[43] the Court of

37 (1981) 1 All NLR 1.

38 Sec 6(6)b of the 1979 Constitution provides that the judicial powers vested by the Constitution on different courts '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 question as to the civil rights and obligations of that person'. An identical provision is also present in the 1999 Constitution.

39 In *Fawehinmi v Akilu* (1987) 4 NWLR (Pt 67) 797, the Supreme Court recognised the right of all Nigerians to engage in the private prosecution of criminal cases.

40 (2000) 6 SC 60.

41 (1998) 7 NWLR (Pt 559) 598.

42 See T Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of the law of standing to sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 527; T Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39 *Journal of African Law* 1.

43 (2008) 23 WRN 65.

Appeal decided that the requirement of *locus standi* was 'unnecessary in constitutional issues as it will merely impede judicial functions'[44] and that every Nigerian should have access to seek an interpretation of the Constitution. The Court of Appeal recognised the limited impact of its judgment because it suggested future constitutional amendments to 'provide access to court by any Nigerian in order to preserve protect and defend the Constitution'.[45] It is true that the standing requirement was not part of the 1979 Rules and developed outside, but its effect was draconian as Nigerian courts regarded the principle as fundamental as the requirement of jurisdiction. Accordingly, it could be raised at any time, including at the Supreme Court. Thus, in some cases the question of standing was successfully raised at the Supreme Court many years after the matter had started, often to the disadvantage of the party complaining of a breach of human rights. A natural consequence of a restrictive meaning of standing was that public interest litigation was almost non-existent.

These two threshold principles have laid ambush for many a human rights case, effectively denying access to genuine complaints of human rights abuse. The crucial point is that they were developed outside the framework of the 1979 Constitution. While the principle of standing is based on an interpretation of section 6(6)(b) of the 1979 Constitution, the distinction between principal and accessory claims is a creation of the Nigerian judiciary. It would be wrong to blame the problems with the enforcement of human rights on the two threshold principles because a number of other challenges remain. For example, challenges such as the widespread poverty and illiteracy of Nigerians; the high cost of litigation; the relationship between the African Charter and the Bill of Rights in the Nigerian Constitutions; the relationship between the Economic Community of West African States (ECOWAS) Court of Justice and the Nigerian judiciary as well as the scope and nature of human rights, especially the status of socio economic rights and the enforcement of human rights against private individuals, continue to hamper the enforcement of human rights in Nigeria. To address the issues discussed above, constitutional or legislative reform was necessary. To deal with these issues by means of the 2009 Rules is nothing less than a leap of faith. Perhaps the Chief Justice of Nigeria (who made the 2009 Rules) was encouraged by the decision of the Court of Appeal in *Abia State University v Anyaibe*[46] to the effect that, since the 1979 Rules were made pursuant to section 42(3) of the 1979 Constitution, they form part of the Constitution and have the same force of law as

44 *Fawehinmi* case (n 43 above) 114.
45 *Fawehinmi* case (n 43 above) 124.
46 (1996) 3 NWLR (Pt 439) 646.

the Constitution.[47] Whether the intent of the 2009 Rules will materialise will be shown in time.

3 2009 Rules

The 2009 Rules bring a number of procedural and substantive changes to the procedure for the enforcement of human rights in Nigeria. The 2009 Rules abrogate the 1979 Rules but retain the forms in its appendices which may be adopted, adapted and modified as the circumstances indicate.

3.1 The procedural changes made by the 2009 Rules

In general, it may be said that the fundamental procedural change brought about by the 2009 Rules is the move away from the emphasis on procedural requirements in the enforcement of human rights. The general rule is based on Order 9(1) of the 2009 Rules which provides that where at any stage in the course of or in connection with any proceedings there has, by any reason of anything done or left undone, been a failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify such proceedings except as they relate to the mode of commencement of the application, whether the subject matter is within chapter four of the 1999 Constitution or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. While this appears to deal with the significant interpretation of strict compliance with the 1979 Rules, it may have been equally important to expressly declare the 2009 Rules as only one of the means by which a human rights action may be commenced in the Nigerian courts.

The objective of achieving a speedier disposal of complaints of human rights infractions is based on a number of procedures. First, Order II Rule 2 provides that there is no longer a requirement for leave from the court to institute an action. However, the jurisdiction of the court may be challenged by way of a preliminary objection as provided for by Order VIII which will require the court to determine the question of jurisdiction which was the aim of the requirement of leave of the court under the 1979 Rules. The respondent's notice of preliminary objection must be filed with the counter-affidavit to the main application and must be heard on the same day as the main application.

[47] See also *Zakari v Inspector-General of Police* (2000) 8 NWLR (Pt 670) 666. One of the effects of the constitutional nature of the 1979 Rules was tested by the promulgation of the 1999 Constitution which came into effect on 1 October 1999. It was open to interpretation that the 1979 Rules were repealed by the new Constitution. In *Ugwumadu v UNN* (2001) 3 WRN 181 and *Ibrahim v Industrial Training Fund* (2001) 10 LHCR 80, it was held that the 1979 Rules are existing law saved by sec 315 of the 1999 Constitution.

The manner in which the preliminary objection is to be heard is intended to ensure that it does not become a source of delay in the proceedings.

Secondly, human rights actions may be initiated in a specific way. Thus, Order II Rule 2 provides that an application for the enforcement of a fundamental right may be commenced by any originating process accepted by the court. Every application must be accompanied by a written address which must be a succinct argument in support of the grounds of the application.[48] It is hoped, as argued above, that the cast of Order II is interpreted to mean that a human rights action may be commenced by any procedure. In this regard, Order XV Rule 4 of the 2009 Rules provides that, where in the course of any human rights proceedings a situation arises for which there is or appears to be no adequate provision in the Rules, the civil procedure rules of the court shall apply. It is therefore interesting to note that a failure to comply with the rules regarding the initiation of an action is not regarded by Order IX of the 2009 Rules as an irregularity. This would suggest that a failure to comply with the requirements of Order II is fatal to the action.

Thirdly, Order IV regulates the general conduct of proceedings after the action is filed in a manner intended to facilitate a quick resolution of the application. Rule 1 of Order IV requires that the application must be fixed for hearing within seven days from the day the application was filed. Where the court is satisfied that exceptional hardship may be caused to an applicant before the service of the application, especially when the life or liberty of the applicant is involved, it may hear the applicant *ex parte* upon such interim relief as the application may demand.[49]

Fourthly, in order to facilitate a speedier hearing of the application, Order XII Rule 1 of the 2009 Rules requires that the hearing must be conducted on parties' written addresses. Rule 2 of the same order provides that oral argument of not more than 20 minutes must 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. In order to ensure that the non-attendance of counsel does not delay proceedings, Rule 3 of Order XII provides that when all the parties' written addresses have been filed and come up for adoption and either of the parties is absent, the court must, 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. A party shall be deemed to have notice of the date for adoption if, on the previous date last given, the party or his counsel was present in court.

48 Order II rule 5.

49 Order IV rule 3.

Fifthly, Appendix A to the 2009 Rules fixes the fees to be paid to institute an action, and it is gratifying to note that an application may be successfully prosecuted with the payment of court fees of less than US $10.[50] This is important when considering that the average filing fees are about US $300.

At the hearing of an application, Order XI empowers the court to make such orders, issue such writs, and give such directions as it may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provided for in the 1999 Constitution or the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act to which the applicant may be entitled. This is also the tenor of section 46(2) of the 1999 Constitution.

3.2 Overriding objectives in the application of the 2009 Rules – Substantive changes made by the 2009 Rules

The Preamble to the 2009 Rules sets out the overriding objectives of the Rules. It would appear that these are the standards to guide Nigerian courts in the enforcement of human rights. We shall now turn to a more detailed examination of the ramifications of the overriding objectives.

3.2.1 The scope of human rights: Expansive and purposeful interpretation of chapter IV of the 1999 Constitution and the African Charter

Preamble 3(a) of the 2009 Rules enjoins Nigerian courts to expansively and purposely interpret and apply the 1999 Constitution, especially chapter IV, as well as the African Charter, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them. It is to be remembered that because of section 6(6)(c) of the 1999 Constitution, only the civil and political rights contained in chapter IV of the same Constitution can be enforced in a court of law.[51] This is because section 6(6)(c) declares that the judicial power in Nigeria

> shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

The content of the said chapter II represents in some cases some socio-economic and cultural rights. The fundamental issue in this area has been how to reconcile the provisions of the African Charter, which

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50 An exchange rate of US $1 to 150 Nigerian Naira is the basis of calculation.

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

protects the socio-economic rights, and the fact that the 1999 Constitution only allows the protection of civil and political rights. Evidence from decided cases in Nigeria supports the following conclusions. First, the tenor of *Abacha v Fawehinmi*[52] and *Ogugu v State*[53] state that the 1999 Constitution is superior to the African Charter. Accordingly, only those rights in chapter IV of the 1999 Constitution which are also in the African Charter are justiciable in Nigeria. Secondly, a number of cases have held that the African Charter is superior to municipal legislation.[54] In this regard, it appears that the appropriate rights in this regard are limited to the concurrent rights in the African Charter and chapter IV of the 1999 Constitution. It can therefore be stated that Preamble 3(a) is an affirmation of the fact that the African Charter applies in Nigeria. However, the question as to whether socio-economic and cultural rights are justiciable in Nigeria is not clearly dealt with. An expansive and liberal interpretation, on the other hand, should recognise that these rights are enforceable in Nigeria. The latter interpretation is fundamental for the long term developmental interest of Nigeria and it is hoped that Nigerian courts will readily overcome the conceptual obstacle that only chapter IV of the 1999 Constitution is enforceable in Nigeria. Along this line, the recent ruling of the ECOWAS Community Court of Justice in *Socio-Economic Rights Project v Federal Republic of Nigeria*[55] that Nigerians have a right to education, as provided for by sections 17 and 18 of the 1999 Constitution and well as by article 17(1) of the African Charter, is welcome as part of the new jurisprudence that regards chapters II and IV of the 1999 Constitution as well as the African Charter as enforceable in Nigerian courts.

3.2.2 Respect for regional and international bills of rights

Preamble 3(b) provides that courts shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the court is aware, including human rights instruments in the African regional human rights system as well as the United Nations (UN) human rights system. It is well to remember that Nigeria is a dualist country and the 1999 Constitution requires treaties to be domesticated before they can have effect in Nigeria. Of all the international human rights treaties, only a few have been domesticated, which include first the African Charter[56] and secondly the domestication of the UN Convention on the Rights of the Child, 1989,[57] as well as the

52 (2000) 6 NWLR (Pt 660) 228.

53 *Ogugu* case (n 9 above).

54 See eg *UAC (NIG) Ltd v Global Transport SA* (1996) 5 NWLR (Pt 448) 291.

55 ECW/CCJ/APP/08/08 (ruling delivered 27 October 2009).

56 See the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

57 Nigeria ratified this Convention in 1991.

African Union Charter on the Rights and Welfare of the Child, 1990,[58] at federal[59] and state[60] levels. Thus, to ask Nigerian courts to respect other international human rights instruments is to require them to consider them of persuasive and not binding authority. This is a practice that Nigerian courts, conversant with the principle of judicial precedent, are already aware of and often resort to. Preamble 3(b) can therefore be regarded as designed to encourage Nigerian courts to accord a greater role to international instruments in the enforcement of human rights.

3.2.3 Public interest litigation and standing to sue

Preamble 3(d) requires a Nigerian court to proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented. Related to this is the requirement in Preamble 3(e) that a court shall encourage and welcome public interest litigation in the human rights field and no human rights case may be dismissed or struck out for want of standing to sue. In particular, human rights activists, advocates or groups as well as any non-governmental organisation may institute a human rights application on behalf of any potential applicant. Because of the 2009 Rules, the applicant in human rights litigation may include any of the following: anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest, and associations acting in the interest of its members or other individuals or groups. The standing rules set out above represent a departure from the position under the 1979 Rules of which enough evidence exists to suggest that the standing principle set out in *Adesanya* was no longer good law. The 2009 Rules therefore capture the correct mode in the country and this may be one of its provisions that will be eagerly and happily embraced.

To sum up this part, attention is drawn to the question whether it is possible for procedural rules to overturn decisions of Nigerian courts, including the Nigerian Supreme Court. As noted above, the two threshold principles discussed above emanate from the Supreme Court and it can be argued that since the 2009 Rules are considered to be of 'constitutional flavour' and have been made by the Chief Justice

58 Nigeria ratified this Convention in 2000.

59 In 2003, the Child Rights Act was promulgated into law.

60 The Child Rights Act has been promulgated into a Child Rights Law in at least 24 of the 36 states of Nigeria: Abia, Anambra, Akwa Ibom, Bayelsa, Benue, Cross River, Delta, Ebonyi, Edo, Ekiti, Imo, Jigawa, Kwara, Kogi, Lagos, Nassarawa, Ogun, Ondo, Oshun, Oyo, Plateau, Rivers, Niger and Taraba states. The reason for this legislative procedure is that 'children' are under the Residual Legislative List of the Constitution of the Federal Republic of Nigeria 1999 and therefore within the competence of state governments. Many of the Child Rights Laws are similar or identical to the Child Rights Act.

of Nigeria, the threshold principles as well as other appropriate principles of law stultifying human rights litigation have been overruled. On the other hand, it is easy to see how ambitious the 2009 Rules are and that, while they may be commendable, it may need the Supreme Court to expressly affirm the overriding objectives so that the precedential weight of Supreme Court judgments would erase whatever doubts exist of the impact of the 2009 Rules. The Nigerian Supreme Court would do well to comprehensively overturn *Adesanya*[61] and the distinction between principal and accessory claims. Furthermore, it is sad to note that a change in the standing rules is not part of the ongoing amendment of the 1999 Constitution.

4 Concluding remarks

If the record of the Nigerian judiciary in the interpretation of the 1979 Rules is anything to go by, the success of the 2009 Rules lies in their realisation that utmost flexibility must be the fundamental ordering of human rights enforcement. Two decades of human rights enforcement has shown the resilience in Nigerian courts of form over substance characteristic of common law courts. It is fervently hoped that the 2009 Rules heralds a new beginning.

61 The Court could borrow a leaf from the Ghanaian Supreme Court in *New Patriotic Party v Attorney-General (Ciba* case) (1996-1997) SCGLR 729, where the Court in a majority judgment held that all persons – natural and artificial – have the standing to seek an enforcement of the Constitution in accordance with art 2(1) of the 1992 Ghana Constitution; the Malawian High Court in *PAC v Attorney-General* Civil Cause 1861 of 2003 and the Gambian Supreme Court in *Jammeh v Attorney-General* (1997-2001) GR 839.