Enforcing Fundamental Rights in Nigerian Courts – Processes and Challenges

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Abstract

Fundamental rights provisions have continued to feature very prominently in the successive constitutions of the Federal Republic of Nigeria. The enforcement procedure, however, remains identical to the one provided in 1979, in the Fundamental Rights (Enforcement Procedure) Rules. The parliament has remained aloof to these obvious realities of the procedural complications. Social, political and economic factors have continued to constitute the greatest hindrances to the citizens’ desire to seek redress for the infringement of their rights. This article evaluates the provisions on fundamental rights in the Nigerian constitution, and considers the extent of enforceability under the rules and jurisdiction of courts as provided in the constitution. Alternative dispute resolution may be the panacea for the legal and economic hindrances on rights enforcement. Recommendations are accordingly made for the government to facilitate and encourage the citizens to have recourse to mediatory process in less difficult cases.
I. Introduction

The foundation of genuine democracy is embedded in the rule of law, a principle that demands devotion to the spiritual and moral values, the common heritage of the peoples and the true source of individual freedom and political liberty.¹ These democratic ideals are presently being assimilated into the people’s consciousness in Nigeria as the nascent democratic experiment gradually solidifies. There is increasing awareness by the citizenry of the existence of constitutionally guaranteed rights. The utility of these rights can only be attained through the process of law enforcement; it is futile to talk of a right which lies only in the realms of human imagination. Thus, this paper examines the tenure of those constitutionally guaranteed individual rights and the legal process of enforcement with a view to discovering inherent deficiencies and projecting the way forward.

II. Human Rights As Distinguished From Constitutional Rights

Human rights are in some circles discussed, albeit erroneously, as synonymous with constitutional rights. This perhaps stems from the general conception that every right is enforceable in law. The word ‘right’ means that to which a person has a just and valid claim, whether it be land, a thing, or the privilege of doing or saying something. ‘Human’ pertains to having characteristics of, or the nature of mankind. Human rights are thus rights which all persons (mankind), everywhere, and at all times, have by virtue of being mortal and rational creatures. They are inherent in every human by virtue of his humanity. These rights embrace a wide spectrum of civil, political, economic, social, cultural, group solidarity and developmental claims which are considered indispensable to a meaningful human existence.² They are demands or claims that individuals or groups make on society, some protected by law and part of ex lata, while others remain aspirations to be attained in future.³

The constitution on the other hand is the body of laws on the basis of which a state is governed. In the Nigerian context, the constitution is the supreme law of the land on the basis of which the validity of other laws is determined. It is the grundnorm of the country’s corpus juris. Rights in the constitution are enforceable in accordance with the provisions of the constitution, unlike general human rights, some of which are not justiciable and constitute mere aspirations of the citizens.

Another distinction between human rights and constitutional rights relates to their divergent jurisprudential evolution. Human rights were propounded by natural law jurisprudence while constitutional rights have their origins in concepts of positive law, which accords preeminence to the laws made by the

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state. I do not intend to delve further into these theories because they are not within the scope of this paper. Suffice it to say, however, that constitutional rights are also referred to as fundamental rights. These are rights that are so essential to human existence that they are statutorily protected. In Ransome Kuti & ors. v AG Federation\(^4\) Oputa, JSC emphasized that:

> Not every civil or legal right is a fundamental right. The idea and concept of fundamental rights both derive from the premise of the inalienable rights of man – life, liberty and the pursuit of happiness. Emergent nations with written constitutions have enshrined in such constitutions some of these basic human rights. Each right that is thus considered fundamental is clearly spelt out.

Certain international bills of rights such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights refer to these constitutional rights as fundamental human rights.\(^5\) These fundamental rights are the human rights recognized and incorporated into international instruments. They are those rights that member states, by becoming signatories to the instruments, have promised to implement in their respective countries. This paper concentrates on those aspects of human rights embodied in the constitution and other international instruments ratified by Nigeria, such as the African Charter on Human and Peoples Rights of 1981.\(^6\)

### III. Human Rights Provisions in Nigerian Constitutions

Successive constitutions of Nigeria since independence in 1960 have continued to include provisions on human rights protections. This commitment to human rights has been attributed to the historical emergence of the Nigerian nation. One of the British legacies in the Commonwealth is the libertarian tradition of the common law and its system of justice as embodied in the Magna Carta of 1215 and the Bill of Rights of 1689. Civil liberties were guaranteed by the British colonial government except to the extent necessary to prevent rebellion against colonial government. This was expressed in the various constitutional conferences held in the march towards Nigerian independence in order to allay the minority tribes’ fears of domination by the majority tribes. The Willink’s Commission, constituted in 1957 to harmonize the divergent views, rejected the idea of creating more regions in Nigeria. Instead, it recommended the inclusion of a long list of human rights provisions in the emergent Nigerian constitution, which it believed would be of great value in preventing deterioration in the

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\(^4\) [1985] 8 NWLR (pt. 6) 211.
\(^5\) Ogbu, O. N. above note 2 at 31.
standards of freedom and encroachment by government on individual rights. In other words, the existing freedom, handed down by the colonial government, would be sustained by the emerging nation state by embodying the basic human rights in the constitution. These recommendations were accepted at the 1958 constitution conference and subsequently enacted as chapter iii of the Independence Constitution of 1960 and the Republican Constitution of 1963. The 1963 provisions are entitled ‘Fundamental Rights’ and contain 15 sections.

The subsequent 1979 constitution introduced a new dimension to the constitutional recognition of human rights by providing fundamental objectives and directive principles of state policy (chapter ii) in addition to fundamental rights (chapter iv). The 1989 constitution followed this trend, and as did the 1999 constitution, which forms the focus of this paper.

The fundamental objectives and directive principles of state policy are provided in chapter ii of the 1999 constitution and contained in sections 13 to 23. Section 16 of that chapter reveals an interesting formulation. The provision is as follows:

1) The state shall, within the context of the ideals and objectives for which provisions are made in this constitution-
   (a) harness the resources of the nation and promote national prosperity and an efficient, dynamic and self reliant economy;
   (b) control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity.

2) The state shall direct its policy towards ensuring-
   (a) the provision of a planned and balanced economic development;
   (b) that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;
   (c) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and
   (c) that suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

The subject of this economic policy affects the generality of the Nigerian public. A closer look at these provisions, in comparison with practical experience, undoubtedly indicates that this policy is observed more in breach than in compliance. Government economic policy has continued to benefit the same group of persons who revolve from one office to another as though they enjoy monopoly of knowledge. Policies are embarked upon with little or no regard for the positions of the masses. The current deregulation of the downstream sector of

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8 Ogbu O. N above note 5 at 33.
the oil industry despite massive protests, leaves an open wound regarding the issue of resources. It is no longer news that the Niger Delta region of Nigeria which harbors a great chunk of the country’s oil resources has been agitated for some time now as people protest against the perceived injustice arising from unfair distribution of the country’s oil wealth. Never mind living wages; those workers’ take-home pay remains static while inflation continues to drain the value of the pittance they receive. Unemployment among the youth continues to grow at an astronomical rate. Reports are rife with stories of senior citizens collapsing and dying on queues while awaiting the payment of their pensions. On the face of all these maladies, the successive governments have highly misplaced priorities and persevered in pursuing projects with little or no impact on the people’s immediate needs under the guise of economic reformation with promises of future benefits.

The essence of relief that these provisions are thought to have provided is obliterated by the constitution itself, which unequivocally provides in section 6(6)(c) that the judicial powers vested in the courts:

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.

This provision has been interpreted as meaning that the provisions of chapter ii are non justiciable as they constitute mere ideals towards which the states are expected to aim. The regrettable import of this provision can be discerned from the lucid lamentation of a renowned Nigerian judge, Akinola Aguda:

I feel much concerned to think that the directive principles are to be regarded as a mere ideal, a utopia, the arrival of which the citizen can only pray and hope for, but in respect of which he can hope for no assistance whatsoever from the courts. If this were so then wherein lies the expectations and the hopes of a bright future for the teeming millions of our people who manage merely to survive at near starvation level.

This point shall not be unduly stretched beyond confines of this paper. It suffices to observe, however, that a democratic government, as an elected government, ought to function within the confines of the law given by the electorate, that is, the constitution. To ensure compliance, therefore, the

electorates should have the power and be in the position to question any acts which are not in compliance with the goals set out by the constitution.

IV. Protection and Enforcement Of Human Rights

Human rights that are enforceable in law are those which are recognized by law as fundamental rights, as distinguished from mere aspirations or individual’s ideas of rights. These fundamental rights are now embodied in chapter iv of the Nigerian Constitution of 1999 from section 33 to 46, and the African Charter on Human and People Rights, which was ratified and re-enacted as a municipal law by the National Assembly in 1983. The rights as provided in the constitution are as follows: right to life- section 33, right to dignity of human person- section 34, right to personal liberty- section 35, right to fair hearing- section 36, right to private and family life- section 37, right to freedom of thought, conscience and religion- section 38, right to freedom of expression and the press- section 39, right to peaceful assembly and association- section 40, right to freedom of movement- section 41, right to freedom from discrimination- section 42, right to acquire and own immovable property any where in Nigeria- section 43, compulsory acquisition of property- section 44, restrictions on and derogation from fundamental rights- section 45, special jurisdiction of High Court and legal aid- section 46.¹¹

These rights have been broadly classified into civil, political, social, economic and cultural rights. Civil and political rights include the right to self-determination, the right to life, freedom from torture and inhuman treatment, freedom from slavery and forced labour, the right to liberty and security, freedom of movement and choice of residence, right to fair trial, right to privacy, freedom of opinion and expression, the right of assembly, freedom of association, the right to marry and found a family, the right to participate in one’s government, either directly or through freely elected representatives, and the right to nationality and equality before the law.

Economic, social and cultural rights embrace the right to work, right to just conditions of work, right to fair remuneration, right to an adequate standard of living, right to organize, form and join trade unions, right to collective bargaining, right to equal pay for equal work, right to security, right to property, right to education, and right to participate in cultural life and to enjoy the benefit of scientific progress.¹² The degree of protection and enforcement of these rights


¹² See Jemibewon above note 9 at 111. This classification is not sacrosanct, other writers have adopted different classifications such as personal rights, political and moral rights, proprietary rights, procedural rights and equality rights, see Nweze C.C; “Human Rights and Sustainable Development in the African Charter” A paper presented at a workshop on human rights organized by Nigerian Bar Association, Enugu branch on 17/9/97. There is also generational rights classification as expounded by Professor O. C. Eze. Human Rights Law No.1 (Lagos: Helen – Roberts Limited, 1997) at 2 –3.
is subject to the vagaries of existing social, economic and political conditions in a given society.

In Nigeria, the process of protection and enforcement may be classified as conventional and unconventional, or orthodox and unorthodox means. The term ‘orthodox means’ refers to the procedures provided by law; these are regularly adopted in seeking relief against an alleged infringement of right. These include the invocation of judicial powers and the recourse to police enforcement. Mediation can be classified as an unorthodox procedure. The following section intends to shed light on the various methods of protection and enforcement of human rights.

V. Judicial Process

Section 46 (1) of the 1999 constitution confers jurisdiction to the High Court to entertain suits from persons who allege that any of the provisions of chapter iv of the constitution “has been, is being or likely to be contravened in any state in relation to him.” The procedural rule for the commencement of such action comes from the Fundamental Rights (Enforcement Procedure) Rules of 1979, made by the then Honorable Chief Justice of the Federation, Justice Fatayi Williams, in December 1979 pursuant to section 42(3) of the 1979 constitution. This procedural rule is regarded by the constitution as an existing law and will continue to have effect in accordance with section 315 of the 1999 constitution. Order I rule 1 (2) of the Enforcement Rules defines ‘court’ as meaning the Federal High Court or the High Court of a State. This provision generally implies that an action for the enforcement of fundamental rights can be maintained in the Federal High Court or State High Court. In Zakari v IGP, the Court of Appeal of Nigeria held that the 1979 constitution intends to confer concurrent jurisdiction to both the Federal High Court and the High Court of a State over individual claims in respect of the enforcement of chapter iv fundamental rights.

This was the position of the law before the promulgation of Decree No.107 of 1993 by the military government, a substantial part of which is now re-enacted as section 251 of the 1999 constitution. This provision confers exclusive jurisdiction to the Federal High Court for matters affecting the federal government or any of its agencies. As a result, the hitherto unlimited jurisdiction of the State High Court to entertain matters involving an infringement on fundamental rights of citizens was circumscribed. An action for the enforcement of fundamental rights cannot be maintained against the federal government or any of its agencies in the State High Court. Identifying the party to

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13 In Dangtoe v. C.S.C. Plateau State [2000] 2 NWLR (pt. 717) 132, the Supreme Court of Nigeria held that by virtue of section 42 of the constitution of 1979, the relief which may be claimed by means of the Fundamental Rights (Enforcement Procedure) Rules of 1979 is limited and confined to any of the provision of chapter iv of the constitution. Any exercise of jurisdiction in respect of subject matters outside chapter iv is without jurisdiction, unconstitutional and void.

14 [2000] 8 NWLR (pt.670) 666. Nigeria has thirty six states at present with each having its own High Court governed by the State High Court Rules.

15 See NEPA v Edegbero [2002] 18 NWLR (pt.798) 79 where the Supreme Court made a definite pronouncement on the exclusive jurisdiction of the Federal High Court on matters contained in Decree No. 107 of 1993.
be sued is now a very important consideration, which may determine the court
where the action is to be instituted.

The inherent problem with this requirement is that Federal High Courts
are very sparsely spread across the states of the federation. Various states do not
even have Federal High Courts; litigants will have to travel far distances at
enormous expenses to institute actions in the nearest Federal High Court
covering their locality. Even where the action can be filed in the State High Court,
most States High Courts are rooted in the cities. Very few of the 774 local
government headquarters in the country can boast of a High Court, and again,
most are within the cities, so that litigants must bear the financial burden, not
only of the transportation and legal fees of their solicitors, but of themselves to
the nearest court to enforce their rights. The result is that various cases of
infringement of rights do not get to the courts at all. Yet, one of the primary aims
of the Fundamental Rights Procedure Rules is to expedite disposal of
fundamental rights cases. What is the essence of speedy disposal of a suit if
adverse economic factors prevent prospective litigants from seeking redress for
infringement of their rights? Although there is a constitutional provision for legal
aid as an obligation of the government, this is rarely provided and only in
criminal cases. Redress for breaches of fundamental rights in most cases, if not
all, take the form of civil wrongs.

As a corollary to the inaccessibility of the courts is the need to extend the
jurisdiction of courts on fundamental rights cases to Magistrate Courts, which are
nearer to the grass roots. It is well known that Magistrate Courts, though lower
than the High Courts in the judicial hierarchy, exist in virtually every local
government in Nigeria and are presided over by lawyers. Legal practitioners also
appear in these courts for the prosecution of other cases. It is difficult to find
justification for denying these courts jurisdiction to hear fundamental rights
cases.

The procedure for the enforcement of fundamental rights in the High
Courts requires the obtaining of leave of court by filing a motion ex parte
supported by an affidavit, the statement of material facts and verifying affidavit
within twelve months of the occurrence of the event complained against.\footnote{16}

When leave is granted, a motion on notice is filed in the same manner as
the motion ex parte and served on the party complained against (respondent).
The party served must have at least eight days to respond, before the hearing,
which must be within fourteen days of the granting of leave.\footnote{17}

These demanding procedures will certainly task the ingenuity of a lawyer.
Many a lawyer has commenced proceedings only to have them struck down for
non-compliance with these procedural requirements. The same procedure is
adopted for the enforcement of the provisions of African Charter.\footnote{18}

\footnote{16 See Order 1 Rule 2 of the Fundamental Rights Rules.}
\footnote{17 See Order 2 Rules 1 & 2.}
\footnote{18 See Abacha v Fawehinmi [2000] 6 NWLR (pt. 660) 228 the Supreme Court overruled the
earlier decision by the Court of Appeal in Fawehinmi v Abacha [1996] 9 NWLR (pt. 472) 710 but
pointed out that action for the enforcement of fundamental rights could also be commenced by a
writ of summons.}
The meaning of these rules is certainly beyond the comprehension of laymen. The implication is that the litigant must employ the services of a lawyer in order to seek redress for an infringement of his fundamental rights. In a vastly poor society such as ours, only a few can afford such luxury. The unpleasant consequence of these hiccups is that various acts of infringement of constitutional rights do not get to the courts. This calls for an alternative dispute resolution measure that, though unconventional or unorthodox, is easily available, less expensive and acceptable.

VI. Mediatory Process

Mediation is a process by which an impartial person, the mediator, facilitates communication between the parties to a dispute to promote reconciliation, settlement and understanding. It is a private, voluntary and informal process of dispute resolution where a neutral party assists the disputing parties to reach a mutually acceptable agreement. The mediator is not concerned with the issue of right and wrong. His primary interest is to assist the parties in reaching an amicable, acceptable and satisfactory resolution of their dispute. In mediation, parties listen actively to each other and try to understand each other’s point of view. They recognize as legitimate the needs and interests of others. They improve and build on their relationship if possible, discuss issues purposefully, systematically and rationally. They look for joint solutions, new options, ideas and ways to make decisions easy for each other. They keep difficult problems in perspective, not permitting the problems to prevent agreement on other issues and breaking them into smaller component parts so that they may be addressed separately. Where all else fails, they seek specific and amicable agreement to disagree, thus safeguarding areas of agreement, providing for some sort of relationship in the future and allowing for review of the situation.\(^\text{19}\)

The key feature of mediation is that it allows parties to decide the outcome of their dispute. This is why the outcome is called an agreement, and not an award as in arbitration, or a judgment as in litigation.\(^\text{20}\)

Mediation accommodates enormous flexibility in its process, as there are no procedural rules or laws, except those agreed upon by the parties. Disputes are often resolved without undue delay, and enormous resources, which would have been spent in protracted legal battles, are saved. Since mediation does not broker the idea of a victor or a vanquished, the parties in dispute often end up as closer friends rather than the sworn enemies that often result from protracted litigation. Privacy of the parties is also preserved as the mediator consults each disputing party privately before bringing them together at an agreed private venue with a view to reaching an amicable settlement.

These characteristics of mediation invariably commend it to the settlement of certain fundamental rights disputes. It should be noted that fundamental rights are personal rights. The person entitled to benefit from such rights may decide to litigate it, compromise it, or abandon it. Mediation stands as a better

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\(^{20}\) Ibid. at 14.
option when dealing with the alleged infringement of the rights of an individual. It can be utilized in settling family disputes, marriage controversies, and communal and private land disputes. The only snag might be the willingness of the parties to agree. In the final analysis, the outcome of mediation is nearly always preferred to litigation.

Nigeria could accord statutory flavor to mediation by following the example of Sex Discrimination Act, 1975 of South Australia. That Act established a Commission for Equal Opportunity and a Sex Discrimination Board. The Commission’s main role is one of conciliation. If this is unsuccessful, the matter is referred to the Board which has the power to grant an injunction, award damages including damages for injury to feelings, and order specific redress for previous discriminatory acts. The Act preserves the individual’s right of appeal against the decision of the Board.  

VII. Conclusion

The above discussions reveal that human rights are not exactly same as constitutional or fundamental rights. Fundamental rights are those aspects of human rights which are statutorily protected. Such protections have practical relevance when an individual can conveniently seek relief in a court for an infringement. But there are many obstacles to be surmounted in seeking such relief, which range from procedural rules to economic factors.

The procedure for the enforcement of fundamental rights as embodied in the Fundamental Rights (Enforcement Procedure) Rules is by no means one of smooth sailing. Many a practitioner of law still lacks the understanding of these rules. The rules are certainly beyond the comprehension of the laymen who are often victims of fundamental rights encroachment. Cases are often struck down by the courts for non-compliance with the rules of procedure. The law could do without the requirements for a statement of material facts and verifying affidavit. The law could be restricted to require the motion on notice with the supporting affidavit and achieve the same purpose, since the supporting affidavit sets out virtually the same set of facts as the statement of material facts.

Experience has also shown that the litigants almost always file the same set of papers more than once, when seeking leave to enforce the rights and again after leave is granted. Is this not a sheer waste of time and resources of litigants?

Jurisdiction over the enforcement of fundamental rights should be extended to the Magistrate Courts, which are nearer and more accessible to the litigants, especially in rural areas. After all, duly qualified lawyers preside over these courts just as in the High Court. The discrepancy in years of experience of the judicial officers is assuaged by the right to appeal decisions from the Magistrate Court to the High Court. The State should also encourage the citizens to have recourse to mediation in less difficult cases by providing the legal

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22 Save that the motion ex parte is now amended by the lawyer to read motion on notice.
framework and necessary logistics for the operation of such reconciliatory mechanism.