

An Examination of the Power of the Chief Justice of Nigeria to Make Rules for the Enforcement of Fundamental Rights in Nigeria

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Abstract

This article undertook an examination of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, the Fundamental Rights (Enforcement Procedure) Rules (FREPR) 2009, and the African Charter on Human and Peoples' Rights Act (ACHPRA) 1983, in an attempt to resolve the argument on whether the then Chief Justice of Nigeria, Idris Legbo Kutigi, acted ultra vires the powers donated to him under section 46(3) of the CFRN 1999 in making the FREPR 2009 to include rights contained in the ACHPRA 1983 as enforceable rights under the Rules. It explained and defined some key concepts that would aid the better understanding of the article. The author takes the position that the power donated to the Chief Justice of Nigeria to make rules for the enforcement of fundamental rights enshrined in the CFRN 1999, do not include making rules for rights provided for in the ACHPRA 1983. The article highlighted some observations/finding, and offered some recommendations which if implement could resolve the argument above which is the subject of this article.

Keywords: Chief Justice, Enforcement, Fundamental Rights, Power, Rules, Nigeria

1. Introduction

The constitution of every country including that of Nigeria make provisions for fundamental rights of its citizens, and how such rights may be enforced. In Nigeria, the Constitution of the Federal Republic of Nigeria (CFRN) 1999 provides for the fundamental rights of Nigerian citizens in its Chapter IV.¹ Specifically, in its section 46, the CFRN 1999 make provisions on how the fundamental rights in its Chapter IV can be enforced.² In clear and unambiguous terms, the CFRN 1999 empowers the Chief Justice of Nigeria to make rules for the enforcement of rights provided for in its Chapter IV.³ Acting in pursuance of this power, the then Chief Justice of Nigeria, Idris Legbo Kutigi, made the Fundamental Rights (Enforcement Procedure) Rules (FREPR) 2009.⁴ In the said Rule, fundamental rights where defined to include rights in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPRA) 1983.⁵ Also, the FREPR 2009 provides that the rights in Chapter IV of the CFRN 1999 and the rights contained in the ACHPRA 1983, are enforceable rights under the Rule. Here lies the argument on whether the then Chief Justice of Nigeria, Idris Legbo Kutigi, has acted in excess of the powers donated by the CFRN 1999 in making the FREPR 2009.

Premised on the above, this article undertakes an examination of the CFRN 1999, the FREPR 2009, and the ACHPRA 1983, in order to resolve the argument above. It explains and defines some key concepts that would aid the better understanding of this article. The author takes the stance that the powers donated to the Chief Justice of Nigeria to make rules for the enforcement of fundamental rights enshrined in the CFRN 1999, do not include making rules for rights provided for in the ACHPRA 1983. The article highlights some observations/findings, and offers recommendations which if implemented could resolve the controversy above. The author concludes with a firm remark that the then Chief Justice of Nigeria, Idris Legbo Kutigi, acted *ultra vires* the powers donated to him under section 46(3) of the CFRN 1999 when he made FREPR 2009 for the enforcement of rights which includes rights contained in ACHPRA 1983.

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¹The Constitution of the Federal Republic of Nigeria (CFRN) 1999, Chapter IV.

²Ibid, s 46.

³Ibid, s 46(3).

⁴The Fundamental Rights (Enforcement Procedure) Rules (FREPR) 2009.

⁵The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (ACHPRA) 1983.

2. Definition of Key Concepts

In this part of this article, the author would define some key concepts that would aid the better understanding of this article.

2.1 The Constitution

Constitution is the written law of every country or organisation that directs the conduct of its leaders and members. For the purpose of this article, the constitution of a country would be briefly explained. The constitution of a country is the *fons et origo*⁶ of all laws in the country. Every other law in a country, derives its powers from the constitution. According to Nwafor:

*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.*⁷

It therefore follows that any other law that is inconsistent with the provisions of the constitution, is null and void by reasons of its inconsistency. The constitution is the only source of the fundamental rights of the citizens of every country.

2.2 Human Rights and Fundamental Rights

Human rights may be fundamental or non-fundamental.⁸ Human rights are those conditions, activities, and freedoms that every person is entitled to enjoy, by virtue of his humanity and regardless of their status.⁹ They are rights that are 'inalienable, inherent, interdependent, and indivisible, which means that they cannot be granted or taken away or selectively ignored'.¹⁰ In other words, human rights are rights that 'cannot simply be waived when they are violated by another agent, such as a State or a business'.¹¹ In a nutshell, human rights are rights that inure in favour of a person by virtue of that person being human. Therefore, human rights are rights that cannot be given or taken away from any person.¹²

On the other hand, fundamental rights are rights that are protected and guaranteed by the State.¹³ These are rights provided for and guaranteed in the constitution of every country.¹⁴ As already noted, the fundamental rights guaranteed in Nigeria are provided for in Chapter IV of the CFRN 1999. The constitution of every country makes provisions for the enforcement of fundamental rights. In summary, fundamental rights are selected human rights that a country undertakes to guarantee, the breach of which is enforceable under the constitution. This is not to mean that non-fundamental human rights are not enforceable. However, the enforcement of non-fundamental human rights more often than not face difficulties. Nwafor, further notes that:

⁶ *Fonsetorigo* means the 'source and origin' of something <<https://www.merriam-webster.com/dictionary/fons%20et%20origo>> accessed 17 September 2024.

⁷ A O Nwafor, 'Enforcing Fundamental Rights in Nigerian Courts - Processes and Challenges' *African Journal of Legal Studies* [2009] 4(1) 2 <file:///C:/Users/DE%20BARR/Downloads/ajls-article-p1_1.pdf> accessed 18 September 2024.

⁸ A. E. Abuza, 'Derogation from Fundamental Rights in Nigeria: A Contemporary Discourse' *East African Journal of Science and Technology* [2017] 7(1) 109.

⁹ A. S. Gutterman, 'What are Human Rights' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4320947> accessed 17 September 2024.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² O Imoni-Ogbe, 'The Concept of Right: A Critique of Some International Instruments Guiding the Conduct of Law Enforcement Officials Against Human Right Violations' *University of Benin Journal of Private and Property Law* [2024] 8(6) 91.

¹³ Abuza (n 8).

¹⁴ *Ibid.*

*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.*¹⁵

In *Ransome Kuti & Others v Attorney General of the Federation*,¹⁶ Oputa, JSC emphasised 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.*¹⁷

From the forgoing, ‘human rights are thus rights which all persons (mankind), everywhere, and at all times, have by virtue of being mortal and rational creatures’.¹⁸ While fundamental rights which is also known as constitutional rights ‘are rights that are so essential to human existence that they are statutorily protected’.¹⁹

2.3 Enforcement of Rights

Enforcement of rights is the process whereby a person seeks remedy against another person, persons, or organization that has violated his rights, or is about to violate his rights. It means:

*any and all rights, benefits, title, interests, remedies, including rights of priority, right to file, defend, prosecute, bring causes of action, make claims, settle, receive damages, maintain, renew, assign, license and enforce, and rights to indemnities, warranties, royalties, profits, income and proceeds.*²⁰

From the above, it is clear that for a person to seek enforcement of his rights, such a person’s right must have been violated or there is the existence of threat of violation of such rights. It therefore follows that when a person is said to be enforcing his rights, such a person is demanding that the law should place him in his former position or in a position that is as near as possible prior to the violation of his right. In most cases, it is impossible to undo the violation of a person’s right. Hence, adequate compensation in form of damages is awarded by the court to victims of human rights’ violation against the violator.

3. The Constitution of the Federal Republic of Nigeria and the Enforcement of Fundamental Rights

Having provided for the fundamental rights of Nigerian citizens, the CFRN 1999 also made provisions for how the fundamental rights enshrined in the Constitution can be enforced. For the purpose of clarity, section 46 of the CFRN 1999 provides thus:

- (1) *Any person who alleges that any of the provisions of this Chapter 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.*
- (2) *Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this Chapter.*

¹⁵ Nwafor (n 7).

¹⁶ *Ransome Kuti & Others v Attorney General of the Federation* [1985] 8 NWLR (Pt. 6) 211.

¹⁷ Ibid.

¹⁸ Nwafor (n 7).

¹⁹ Ibid.

²⁰ ‘Enforcement of Rights’ <<https://www.lawinsider.com/dictionary/enforcement-rights>> accessed 18 September 2024.

(3) *The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.*

(4) *The National Assembly -*

(a) may confer upon a High Court such powers in addition to those conferred by this section as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by this section; and

(b) shall make provisions-

(i) for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and

(ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real.²¹

Section 46(1) and (2) of the CFRN 1999 above is clear on the court having jurisdiction to hear applications for the enforcement of the fundamental rights of Nigerian citizen, which is the High Court of a State or Federal High Court within jurisdiction where the violation of rights or intended violation of rights have occurred. However, though it also evidently clear that there is no ambiguity with respect to 46(3) of the CFRN 1999 which empowered the Chief Justice of Nigeria to make rules for the enforcement of fundamental rights contained in Chapter IV of the CFRN 1999, the then Chief Justice of Nigeria, Idris Legbo Kutigi, made the FREPR 2009 and includes rights contained in the ACHPRA 1983 as enforceable rights under the FREPR 2009.

Obviously, in the said FREPR 2009, fundamental rights were defined in its interpretation Order to include rights contained in the ACHPRA 1983. Order I Rule (2) para 5 provides thus:

Fundamental Right” means any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act.²²

In addition to the above, the FREPR 2009 also provides that enforceable rights under the Rules include right contained in the ACHPRA 1983. Order II Rule 1 provides thus:

Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.²³

From the foregoing provisions of the FREPR 2009 above, it is not in doubt that the FREPR 2009 made provisions for the enforcement of the rights contained in the ACHPRA 1983 as enforceable rights. The question this article now seeks to resolve is whether the then Chief Justice of Nigeria, Idris Legbo Kutigi, made the FREPR 2009 *ultra vires* of the powers donated to him in section 46(3) of the CFRN 1999? In resolving this question, this article would first confirm if the FREPR 2009 was made pursuant to the powers donated under section 46(3) of the CFRN 1999. This can be deduced from the statement made by the then Chief Justice of Nigeria, Idris Legbo Kutigi, before the Preamble to the FREPR 2009. It states thus:

²¹ The CFRN 1999, s 46.

²² The FREPR 2009, Order I Rule 2 para 5.

²³ Ibid, Order II, Rule 1.

In exercise of the powers conferred on me by section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 and all other powers enabling me in that behalf, I, IDRIS LEGBO KUTIGI, GCON, Chief Justice of Nigeria, hereby make the following Rules²⁴

From the statement above, it is evident that the FREPR 2009 was made pursuant to the section 46(3) of the CFRN 1999. However, the addendum, ‘and all other powers enabling me in that behalf’ is additional power which the then Chief Justice of Nigeria, Idris Legbo Kutigi, donated to himself outside the provisions of section 46(3) of the CFRN 1999. It would have been better understood if the then Chief Justice of Nigeria, Idris Legbo Kutigi, stated the exact provision or law empowering him to make rules for the enforcement of the rights contained in the ACHPRA 1983. The absence of this, leads the author to the conclusion that such power to make rules for the enforcement of the rights contained in the ACHPRA 1983 do not exist. Clearly, it do not exist.

Not to forget the fact that by virtue of Nigeria having adopted and ratified the African Charter on Human and Peoples’ Right 1981 (the 1981 Charter), the rights contained therein becomes enforceable rights in Nigeria. This position was also affirmed by the Supreme Court of Nigeria in case of *Abacha v Fawehinmi*,²⁵ in the following words:

Where, however, the treaty is enacted into law by the National Assembly as was the case with the African Charter which is incorporated into our municipal (i.e. domestic) law by the African Charter on Human and People’s Right (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1999... it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts.²⁶

It should be noted at this stage that this article acknowledges the position of the Supreme Court of Nigeria above on the enforcement status of the rights contained in the ACHPRA 1983, and as such, do not raise any argument as to the enforcement status of the said rights. However, what the article seek to resolve as earlier stated is whether section 46(3) has empowered the Chief Justice of Nigeria to make rules for the enforcement of the rights in the said ACHPRA 1983? Without missing words, the author is of the position that section 46(3) of the CFRN 1999 has not empowered the Chief Justice of Nigeria to make rules for the enforcement of the rights contained in the ACHPRA 1983. Hence, the author maintains the stance that the then Chief Justice of Nigeria, Idris Legbo Kutigi, acted *ultra vires* its powers conferred on him by section 46(3) of the CFRN 1999 when he made the FREPR 2009 to include rights contained in the ACHPRA 1983 as enforceable rights under it.

The position of the author above is premised on the literal rule of interpretation of statutes which states that:

The literal rule prescribes that words should be given their ordinary meaning when statutes are being interpreted. It is believed that the ordinary meanings of words contain the true intention of the legislature. This view was supported by Tridall, C.J. in the Sussex Peerage Case. It is believed that the mere inconvenience of words when applied in their ordinary sense is not enough to depart from the ordinary meanings of the words. This view was shown in the cases of Adegbenro v Akintola and Okumagba v Egbe.²⁷

The author’s position above is also premised on the fact that Nigeria has also adopted and ratified other human rights treaties such as: International Convention on the Protection of the Rights of All Migrant

²⁴ This is the statement made by the then Chief Justice of Nigeria, Idris Legbo Kutigi. The statement comes before the preamble to the FREPR 2009.

²⁵ *Abacha v Fawehinmi* [2000] 6 NWLR (Pt. 600) 288.

²⁶ *Ibid*, p 295.

²⁷ See ‘Statutory Interpretation’ <<https://www.learnnigerianlaw.com/learn/legal-system/interpretation>> accessed 17 September 2024.

Workers and Members of their families 2003, International Convention for the Protection of the All Persons from Enforced Disappearance 2010, Optional Protocol to the Convention on the Rights of Persons with Disabilities 2008, International Convention on the Elimination of All Forms of Racial Discrimination 1969, and many more which the FREPR 2009 did not include as enforceable rights.

Also, it should be noted that the ACHPRA 1983 has not also provided explicitly that the Chief Justice of Nigeria shall make rules for the enforcement of rights contained therein. The enforcement provision of the ACHPRA 1983 provides that:

*As from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.*²⁸

Again, the supremacy of the CFRN 1999 cannot be undermined. This position of the law is provided for in Section 1 of the CFRN 1999 thus:

- (1) *This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.*
- (2) *The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.*
- (3) *If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*²⁹

From the foregoing, the Chief Justice of Nigeria lack the power to make rules for the enforcement of rights contained in the ACHPRA 1983.

4. Observations/Findings

- i. It is observed that the then Chief Justice of Nigeria, Idris Legbo Kutigi, made the FREPR 2009 pursuant to section 46(3) of the CFRN 1999.
- ii. Also, it is observed that the CFRN 1999 in its section 46(3) or any other provision did not empower the Chief Justice of Nigeria to make rules for the enforcement of the rights contained in the ACHPRA 1983.
- iii. Evidently, it is observed that the provisions of ACHPRA 1983 did not empower the Chief Justice of Nigeria to make rules for the enforcement of the rights contained in the ACHPRA 1983.
- iv. Finally, it is observed that the FREPR 2009 made provisions for the enforcement of the rights enshrined in both the CFRN 1999 and the ACHPRA 1983.

5. Conclusion

This article undertook an examination of the CFRN 1999, the FREPR 2009, and the ACHPRA 1983, in an attempt to resolve the argument on whether the then Chief Justice of Nigeria, Idris Legbo Kutigi, acted *ultra vires* the powers donated to him under section 46(3) of the CFRN 1999 in making the FREPR 2009 to include rights contained in the ACHPRA 1983 as enforceable rights. It explained and defined some key concepts that would aid the better understanding of this article. The author takes the stance that the power donated to the Chief Justice of Nigeria to make rules for the enforcement of fundamental rights enshrined

²⁸ The ACHPRA 1983, s 2.

²⁹ The CFRN 1999, s 1.

in Chapter IV of the CFRN 1999, do not include making rules for rights provided for in the ACHPRA 1983. The article highlighted some observations/finding, and offered some recommendations which if implemented could resolve the controversy of the subject of this article.

From the totality of the above, it is clear that the then Chief Justice of Nigeria, Idris Legbo Kutigi, acted *ultra vires* the powers donated to him under section 46(3) of the CFRN 1999, when he made the FREPR 2009 for the enforcement of rights which includes rights contained in ACHPRA 1983.

6. Recommendations

- a. It is recommended that section 46(3) of the CFRN 1999 should be amended to empower the Chief Justice of Nigeria to make rule for the enforcement of the rights contained in the CFRN 1999, as well as the ACHPRA 1983. This is necessary to give effect to the Supreme Court Judgment in the case of *Abacha v Fawehinmi*.³⁰ This will no doubt bridge the gap between section 46(3) of the CFRN 1999 and the provisions of the FREPR 2009 on the subject-matter of this article.
- b. In the alternative, the ACHPRA 1983 should be amended in its section 2 to empower the Chief Justice of Nigeria to make rule for the enforcement of the rights contained in the ACHPRA 1983.

³⁰ *Abacha v Fawehinmi* (n 25).