UNIVERSITY OF IBADAN LAW JOURNAL

VOL. 11, 2021 ISSN - 2651-5571

Published by:
Faculty of Law, University of Ibadan. Email: universityofibadanlawjournal@gmail.com

UNIVERSITY OF IBADAN

LAW JOURNAL

Vol. 11, 2021

University of Ibadan Law Journal, Vol. 11

ISSN: 2651 – 5571

Published by:
Faculty of Law,
University of Ibadan.
Email: universityofibadanlawjournal@gmail.com

Printed by:
Princeton & Associate Publishing Co. Ltd.
9 Ezekiel Street, off Toyin,
Ikeja, Lagos
08028636615
Email: princetonedu2012@yahoo.com
bookpublishing2017@gmail.com

CONTENTS

Procedural Challenges in the Mode of Commencement of Fundamental Right Suit under the Fundamental Rights (Enforcement Procedure) Rules 2009

Samuel Adewale Adeniji[1]

Abstract

Under the Nigerian law, human rights are categorized into justiciable and non-justiciable rights and they are contained in Chapters 4 and 2 of the Constitution of the Federal Republic of Nigeria 1999 as amended. In enforcing the justiciable rights, Section 46(3) of the 1999 CFRN, empowers the Chief Justice of Nigeria (CJN) to make Rules for their enforcement. Hence, the CJN made the Fundamental Rights (Enforcement Procedure) Rules, 2009 (FREPR 2009). This paper examines the mode of commencement of an action under the FREPR 2009. It adopts a doctrinal methodology by engaging in textual analysis of FREPR 2009. It finds that under Order II Rule 2 of the FREPR 2009, an application for the enforcement of fundamental rights may be made by any originating process accepted by the court which are writ of summons, petition, originating motion and originating summons. Therefore, it is argued that this provision has created a situation of uncertainty in respect of the mode of commencement of an action. It is recommended that

1 LL. B (Hons) OOU, LL.M (Ibadan) B.L, Lecturer, Department of Jurisprudence & International Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria. Email: sa.adeniji@ui.edu.ng; samueladeniji@ymail.com; GSM Numbers 234-8050942266; 234-8181447993

FREPR 2009 be amended to make certain the mode of commencement and that originating motion is preferable.

Keywords: Human Rights, Originating Processes, Written Statement on Oath, Affidavit Evidence, FREPR 2009,

1. Introduction

Prior to the exit of the British colonial rule in Nigeria, minority groups in Nigeria were apprehensive of post-colonial dominance and marginalization by the three dominant ethnic groups (Igbo, Hausa and Yoruba). Hence, at the 1957 Constitutional Conference in London, this apprehension was expressed and creative solutions were proffered to the effect that Fundamental Rights provisions be introduced into the 1963 Constitution. However, under successive Nigerian Constitutions, particularly the 1979 and 1999 Constitutions of the Federal Republic of Nigeria as amended (hereinafter simply referred to as CFRN), aside the Fundamental Rights, Fundamental Objectives and Directive Principles of State Policy (FODPSP) have been introduced. Both are contained under Chapters II and IV[2] respectively with their dichotomy being that; the former are generally regarded as non-justiciable while the latter are justiciable. The implication of the latter is that, a violation of any provision thereof can be legally enforced in a court of competent jurisdiction by the aggrieved party.

As a result of the justiciable nature of the rights contained in Chapter IV of the CFRN 1999 as amended, Section 46(3) of the CFRN 1999 as amended, the Chief Justice of Nigeria (CJN) is empowered, to make Rules for the enforcement of the rights of anyone whose right(s) has been, is being or likely to be contravened. As a result, the CJN in 2009, made the Fundamental Rights (Enforcement Procedure) Rules, 2009 (hereinafter FREPR 2009) as the procedural guide for the enforcement of Chapter IV of the CFRN 1999. The Rules replaced the Fundamental Rights (Enforcement Procedure) Rules, 1979 which posed several challenges towards seamless enforcement of fundamental rights, particularly the requirement of obtaining leave of court before bringing an application, as well as the issues of *locus standi* and limitation of time. These inhibitors have been jettisoned under the FREPR, 2009.

[2] Constitution of the Federal Republic of Nigeria, 1999 as amended

Despite the laudable objectives and provisions of the FREPR 2009, it is trite that fundamental rights litigations are fought on affidavit evidence only, and there is the uncertainty, as far as the mode of commencement of proceedings for the enforcement of the provisions of Chapter IV of the CFRN 1999 is concerned. Order 2, Rules 2, 3, and 4 of the FREPR 2009, specifically deals with mode of commencement. However, the Order Particularly Rule 2, contains a quagmire. This Rule provides that "an application for the enforcement of the fundamental right may be made by any originating process accepted by the court, which shall, subject to the provisions of these rules lie without leave of court." Traditionally, there are four originating processes known and accepted for the commencement of actions in court. They are writ of summons, originating summon, originating motion and petition. The questions that arise from this provision are: is an applicant who seeks the enforcement of his/her fundamental right(s) to choose from any of these four originating processes, or does the court have the discretion to adopt any of the four that is acceptable by it? Is the Court bound by the choice of the originating process adopted by an applicant since proceedings under the FREPR, 2009 may be commenced by "any" originating process accepted by the court? What is the effect of commencement of an action through an originating process not accepted by the Court – is it a mere procedural or substantive irregularity? What is the effect of this uncertainty on the development of jurisprudence of fundamental right enforcement proceedings in Nigeria? These questions form the swivel of this paper. Divided into four parts, the first part of this article is an introduction. The second part discusses the nature of fundamental rights enforcement procedure. The third part examines the procedure for enforcing fundamental rights and argues for reform. The forth part concludes the paper.

2. The Nature and Purpose of Fundamental Rights Enforcement Procedure

Under the Constitution[3], fundamental rights were provided for, but there was no special rules for enforcement of those rights guaranteed under The Constitutions of Federal Republic of Nigeria 1960 & 1963. The need for special practice direction for the enforcement of fundamental rights in the 1979 constitution was deliberated upon by the 1979 Constitution review committee that led to Section 42(3) of the Constitution of the Federal

[3] The Constitutions of Federal Republic of Nigeria 1960 & 1963

Republic of Nigerian, 1979 which empowered the Chief Justice of Nigeria to make rules for practice and procedure for purpose of enforcing fundamental rights in Nigeria. The provision of Section 42 of the Constitution[4] for the enforcement of the fundamental rights enshrined in Chapter IV of the Constitution is only permissible and does not constitute a monopoly for the enforcement of those rights. The object of the section[5] is to provide a simple and effective judicial process for the enforcement of fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. The object has been achieved by the Fundamental Rights (Enforcement Procedure) Rules 1979. It must be emphasized that the section[6] does not exclude the application of the other means of their enforcement under the common law or statutes or rules of Courts. These are contained in the several Laws of our High Courts, for example Sections 18, 19 and 20 of the High Court of Lagos State relating to mandamus, prohibition, certiorari, injunction and action for damages. A person whose fundamental right is being, has been or likely to be contravened may resort to any of these remedies for redress.[7] In civil causes and matters, damages are awarded and tied to strict observation of substantive and procedural rules. However, fundamental right enforcement proceeding is different. It is noteworthy that the concept of fundamental rights and human rights are used interchangeably within the purview of FREPR 2009. Order 1 Rule 2 of FREPR 2009 defines human rights to "include fundamental rights". Without doubt, the FREPR, 2009 have been made as a special procedure for the speedy enforcement of the fundamental rights of citizens. In other words, an action under the FREPR, 2009 is a peculiar action. It is a kind of action which may be considered as sui generis i.e. it is a claim in a class of its own, though with a closer affinity to a civil action than a criminal action.[8] The remedy available by this procedure is to enforce the constitutional rights available to citizens which have been contravened by others. In some cases, the acts or facts giving rise to the contravention of fundamental rights may have some criminal connotation, but will not raise the allegations of breach of

4 1979 Constitution
5 Section 42 of the 1979 Constitution
6 Section 42 of the 1979 Constitution
7 *Peter Nemi & Ors v. The State* (1994) LPELR-24854(SC);
8 *Solomon Adekunle v. Attorney-General of Ogun State* (2014) LPELR-22569(CA)

fundamental rights to the pedestal of a criminal allegation.[9] Now a special procedure has been put in place by the Chief Justice of Nigeria pursuant to Section 46(3) of the CFRN 1999 as amended for the enforcement of fundamental rights. The application is heard on the affidavit evidence filed in support or against the application for the enforcement of fundamental rights of a citizen or any person with complaint against another for the infringement of this fundamental rights. Unless there are irreconcilable affidavits, oral evidence once called as an affidavit evidence constitutes the evidence in a suit or action.[10] This is designed to make proceedings for the enforcement of fundamental rights less cumbersome and devoid of technicalities often associated with other classes of actions. In enforcing a breach of fundamental rights, the Applicant has the burden of placing before the Court, all relevant and credible evidence regarding the infringement or breach of his fundamental rights. He has the burden to prove by cogent, convincing and credible evidence, the facts as alleged by him as constituting the breach or infringement of the fundamental right as guaranteed by the CFRN, 1999 or under the African Charter on Human and Peoples' Rights. General and wide allegations of such breach or infringement will not suffice.[11]

It is apposite to summarize the facts of case of *Solomon Adekunle v. Attorney-General of Ogun State.*[12] The Appellant herein, was charged, tried, convicted and consequently sentenced to death at the Ogun State High Court. His appeal to the Court of Appeal and the Supreme Court was dismissed and the conviction and sentence of death meted on him by the High Court was affirmed. The appeal at the Supreme Court was determined on the 10th day of June, 2006. The Supreme Court dismissed his appeal.

After six years, the Appellant applied to the High Court of Ogun State for the enforcement of his Fundamental Rights to Freedom from torture, inhuman and degrading treatment as guaranteed by Section 34 of the

---

9 *Solomon Adekunle v. Attorney-General of Ogun State* (supra)

10 *Jack v. University of Agriculture* (2004) 5 NWLR (PT 865) 208; *Ade Mike Musa Ogugu & Ors. v. The State* (1994) 9 NWLR (Pt 366) 1 at 26; *Falobi v. Falobi* (1976) 9 10 SC 1 at 13-14; *B. V. Magnusson v. K. Koiki & Ors (1991) 4 NWLR (PART 183) 199 at 129 Eboh v. Oki* (1974) 1 SC 179, *Uku v. Okumagba* (1974) 3 SC. 35.

11 Per Haruna Simon Tsammani, J.C.A. (Pp. 23-24, para. B-B) *Solomon Adekunle v. Attorney-General of Ogun State* (2014) LPELR-22569(CA)

12 ibid 10

Constitution of the Federal Republic of Nigeria, 1999 and Articles 3, 4, 5, 6 and 8 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap.10 Laws of the Federation of Nigeria, 1990. By the said Application, the Appellant sought the following reliefs: -

1. A DECLARATION that as a citizen of the Federal Republic of Nigeria, the Applicant is entitled to protection against any form of infringement of his fundamental rights guaranteed under Section 34(1) (a) of the Constitution of the Federal Republic of Nigeria, 1999.

2. A DECLARATION that the punishment for murder is death and does not include prolonged period in detention before the execution of the death sentence.

3. A DECLARATION that the prolonged detention of the Applicant under death row awaiting the execution of the death sentence with its associated trauma and anguish constitutes torture, cruel, inhuman and degrading treatment.

4. A DECLARATION that the prolonged detention of the applicant since he was convicted and sentenced to death on 13/10/2000 awaiting execution a period of more than 6 years constitutes another form of punishment i.e. long period of imprisonment under trauma and anguish of imminent death, for the same offence apart from the punishment of death and therefore deserving of judicial remedy for the earlier sentence of death.

5. A DECLARATION that to carry out the execution of the death sentence on the Applicant, a delay of more than 6 years constitutes inhuman and cruel punishment contrary to Section 34(1)(a) of the Constitution of the Federal Republic of Nigeria.

6. A DECLARATION that the period of more than 6 years in detention awaiting execution constitutes a period of despair, agony, uncertainty which impacts negatively on the mental, emotional and psychological health of the Applicant and is therefore unlawful and offends Section 34(1)(a) of the Constitution of the Federal Republic of Nigeria.

7. AN ORDER for stay of the execution of the death sentence passed on the Applicant.

8. AN ORDER for unconditional release of the Applicant from prison or alternatively AN ORDER that the death sentence be commuted to a term of imprisonment not exceeding 6 years including the period he was detained awaiting execution of his sentence. The Respondent filed a Counter Affidavit challenging the Application of the Appellant. Counsel thereafter addressed the Court, and in a considered judgment delivered on the 15th June, 2007, the learned trial judge granted the declaration sought by the Appellant that, he is entitled to protection against any form of infringement of his Fundamental Rights Guaranteed under Section 34(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999. However, the other reliefs sought on the paper, to wit; prayers (b), (c), (d), (e), (f) and (g) were refused and accordingly dismissed.

Dissatisfied with the decision of the trial Court, the Appellant appealed to the Court of Appeal. The Court adopted the issues as formulated by the Appellant for the determination of the appeal viz:

1. Whether the prolonged confinement of the Appellant on death row cell under conditions that are clearly dehumanizing, cruel and degrading does not infringe his right guaranteed under section 34(1) (a) of the constitution of the Federal Republic of Nigerian, 1999?

2. Whether the non-joinder of the Comptroller-General of Prison is fatal to Appellant's case?

3. Whether the Appellant discharged the burden of proof placed on him by the law?

4. Whether the trial court had the jurisdiction and powers to grant the relief sought by the Appellant?

On the whole, the Court held that the appeal lacked merit and same was accordingly dismissed. The judgment of the trial Court was affirmed.
It is imperative to note that to succeed in enforcement of fundamental rights, one applying for the enforcement of fundamental rights has the onus to show that the relief he seeks is within the purview of fundamental

rights as entrenched in Chapter IV of the 1999 Constitution. This is clearly brought out by the provision of Section 46 of the 1999 Constitution which stipulates that any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state in relation to him may apply to a High Court for redress. Anything short of this will not suffice. It is when such requirement is satisfied that the trial Court may give such directives as it may consider appropriate for the purpose of securing the enforcement within the state, of any right to which the person who makes the application may be entitled under this Chapter.[13] Thus, for an applicant to succeed, he must show that the main or principal claim and the consequent relief therein is for the enforcement of his/her fundamental right. In other words, the violation of his/her fundamental right should not be incidental, ancillary or peripheral to the principal claim or relief sought.[14]

What is more, it is pertinent to state here that, the overriding objective of the Rules is the protection, advancement and realization of the fundamental rights and freedom of applicants as enshrined in Chapter IV of the Constitution. The purport of the FREPR 2009 in making the proceedings for the enforcement of fundamental right by affidavit evidence is that of speedy consideration and determination of allegations of the infractions of the enshrined and guaranteed rights of citizens. Hence, being a very important constitutional right, its exercise ought not to be unduly fettered. The right must not be frustrated.[15]

The special procedure of the FREPR 2009 is not to be equated with the normal procedure in actions tried on pleadings and to which normal rules of pleadings apply.[16] If the only evidence before the Court or Judge is that of the complainant, that is the material the court should consider in order to determine the entitlement of the complainant. The other party is not compelled to file any affidavit. Notwithstanding that the other party has not filed any affidavit, he can still be heard on the application to contend

---

13 See Section 46(2) of the 1999 Constitution (supra) and the cases of *Nwangwu v. Duru* (2002) 2 NWLR (Pt. 751) 265

14 *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt. 510) 549; *Dongtoe v. C.S.C. Plateau State* (2001) 19 WRN 125 at 127; *Basil Egbuonu v. Borno Radio Television Corp.* (1993) 4 NWLR (Pt.283) 13; *Chukwuogor v. Chukwuogor* (2006) 49 WRN 183.

15 *Federal Polytechnic Bauchi & Anor v. Abdulfattah Aboaba & Anor* (2013) LPELR-21916(CA) Per Oyebisi Folayemi Omoleye, JCA (P. 42, paras. A-E)

16 *Grace Jack v. University of Agriculture* (2004) 17 NSCQR 90, 101-103.

that the facts disclosed by the complainant's affidavit do not point to the existence of a right, or an infringement of any right.[17]

3. Procedures for the enforcement of Fundamental Rights

An application for the enforcement of fundamental rights may[18] be made by any originating process accepted by the court,[19] which shall, subject to the provisions of these rules lie without leave of court.[20] An application shall be supported by a statement setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought, and supported by an affidavit setting out the facts upon which the application is made.[21] The affidavit shall be made by the applicant, but where the applicant is in custody or if for any reason is unable to swear to an affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the applicant, stating that the applicant is unable to depose personally to the affidavit.[22] Every application shall be accompanied by a written address which shall be succinct argument in support of the grounds of the application.[23] Where the respondent intends to oppose the application, he shall file his written address within five (5) days of the service on him of such application and may accompany it with a counter affidavit.[24] The

---

17 *Agbakoba v. Director S.S.S.* (1994) 6 NWLR (Pt.351) 475 at 500

18 The word "may" gives the applicant discretion, power or right to determine the originating process to use in an application for the enforcement of the fundamental human right. The meaning of the word "may" ordinarily means permissive, that is, the person who has a duty to carry out may choose among the available options. See *Niblett v. Akpan* (2007) 38 WRN 185; *Peoples Democratic Party v. Senator Ali Modu Sherrif & Ors* (2017) LPELR-42736(SC); *Alhaji Chief A. B Bakare v. The Attorney-General of the Federation & Ors* (1990) LPELR-707(SC); *Chief P.I. Mokelu v. Federal Commissioner for Works and Housing* (1976) LPELR-1904(SC); MacDougall v. Patterson (1851) 138 E.R.672). *Chief Sunday Eyo Okon Obong & Ors v. Government of Akwa Ibom State & Anor* (2014) LPELR-24259(CA); *Chief Mokelu v Federal Comm. for Works & Housing* (1976) 3 SC 35; *Okumagba v. Egbe* (1965) 1 NWLR 62.

19 *Alfa v. Attai* (2017) LPELR 42579 (SC), *Attorney General, Federation v. Abule* (2005) 11 NWLR (Pt 936) 369, *Abdullahi v. Sabuwa* (2015) LPELR 25954 (CA), *Okehi v. Inspector General of Police* (2018) LPELR 45062(CA), *Climax Hotel (Nig) Ltd v. Venitee Global (Nig) Ltd* (2019) LPELR 47103(CA), *Taraba State Government v. Shaku* (2019) LPELR 48130(CA); *Federal Republic of Nigeria v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113 *Alhaji Ali Ahmad Maitagaran & Anor v. Hajiya Rakiya Saidu Dankoli & Anor* (2020) LPELR-52025(CA) Per Habeeb Adewale Olumuyiwa Abiru, JCA (pp. 13-19, paras. F-C)

20 Order II Rule 2 FREP Rules, 2009

21 Order II Rule 3 FREP Rules, 2009

22 Order II Rule 4 FREP Rules, 2009

23 Order II Rule 5 FREP Rules, 2009.

24 Order II Rule 6 FREP Rules, 2009.

applicant may on being served with the respondent's written address, file and serve an address on points of law within five days of being served and may accompany it with a further affidavit.[25]

What is an originating processes?

An Originating process is a means by which actions are commenced or lawsuits are instituted.[26] The competence of such process is a pre-requisite for valid and subsisting claim(s) in fundamental rights claims. Where the process fails to comply with the requirements of the law regarding its procedure, the Court cannot assume jurisdiction. Jurisdiction of a Court in any fundamental right matter is constitutional. No Court can therefore confer jurisdiction upon itself, nor can parties by their mutual agreement also confer any jurisdiction on the court.[27] A defective originating process cannot activate the Court's jurisdiction.[28]

What are the originating processes accepted by the court in an application for the enforcement of fundamental rights? The mode of commencement of civil suits in law courts are: Writ of Summons, Originating Summons, Originating Motion and Petition. Invariably, the validity of an originating process is most fundamental, as the competence of the proceedings of the Court is a condition *sine qua non* to the validity nay competence of any suit by the jurisdiction of the Court. Thus, failure to commence proceedings upon a valid and competent originating process deeply goes to the root of the action.[29] Any decision or order resulting from such proceedings is liable to be set aside on appeal for being rendered incompetent and a nullity.[30]

Thus, an issue of jurisdiction may be raised at any time by the parties and even *suo motu* by the Court.[31] The validity of originating processes in a proceeding like the originating summons, writ of summons, motion on notice or petition, is a *sine qua non* for the competence of the proceeding

---

25 Order II Rule 7 FREP Rules, 2009.

26 *Braithwaite v. Skye Bank Plc.* (2012) LPELR - 15532 (SC) per Ogunbiyi, JSC @ 23-24.

27 *Dr Tunji Braithwaite v. Skye Bank Plc* (2012) LPELR-15532(SC) where Per Clara Bata Ogunbiyi, J.S.C. (p 22, paras. C-D).

28 *Dr Tunji Braithwaite v. Skye Bank Plc* (2012) LPELR-15532(SC).

29 *Ibid.*

30 *Ibid.*

31 See, *Mohammed Marikida v. A.D. Ogunmola* (2006) LPELR 169 (SC) 15 paragraphs E - G per Musdapher, JSC, (as he then was).

that follows it, or that is initiated by such process.[32] It cannot be over-emphasized that unless the action was initiated in accordance with due process of law, which includes its commencement with a valid originating process, it is incompetent.[33] The proceedings in such an action remain a nullity *ab initio*, no matter how well the proceedings were conducted.[34] Courts do not exercise their given jurisdiction in futility.[35] The question remains; can fundamental rights suit be commenced and enforced in a High Court by filing any originating processes accepted to the court? That is, is filing any originating processes accepted to the court in consonance with the dictates of FREPR 2009? In answering this question, a brief examination of the procedures involved in commencement of civil suits in High Courts would be carried out.

3.1 Commencement of fundamental rights proceedings by Writ of Summons

First, when an action is commenced by Writ of Summons[36], it must be accompanied by a Statement of Claim, List of Witnesses to be called at the trial, Written Statement on Oath of the Witnesses, and copies of every document to be relied on at the trial.[37] Where a Plaintiff/Claimant[38] fails to comply with the above, the court processes shall not be accepted for filing by the registry.[39] The Defendant after entering an appearance (conditional or unconditional) shall file a Statement of Defence, List of Witnesses to be called at the trial, Written Statement on Oath of the

---

32 *Wilson Obioha & Sons Ltd & Anor v. Inamsco Multi Concepts Ltd & Anor* (2017) LPELR-42332(CA); *David Sabo Kente v. Darius Dickson Ishaku & 2 Ors.* (2017) 15 NWLR (Pt. 1587) 94, 118.

33 See, *Madukolu v. Nkemdilim* (supra).

34 See, *Timitimi v. Amabebe* (1953) 14 WACA 374.

35 *Registered Trustees of Divine Commission Intl Church v. Ikolodo* (2018) LPELR-44199(CA) Per Moore Aseimo Abraham Adumein, J.C.A (pp. 12-13, paras. A-E).

36 *Andee Iheme v. Chief of Defence Staff & Ors* (2018) LPELR-45354(CA)

37 Order 3 Rule 2 (1) of the Oyo State High Court (Civil Procedure) Rules 2010; Order 3 Rule 2 (1) of the High Court of Lagos State (Civil Procedure) Rules 2012; Order 3 Rule 2 (1) of the Osun State High Court Amended (Civil Procedure) Rules 2008; Order 3 Rule 3 (1) of Ondo State High Court (Civil Procedure) Rules 2011, Order 3 Rule 3 (1) of High Court of Edo State (Civil Procedure) Rules 2012

38 Plaintiff/Claimant means the same thing. It means someone who initiates a process(es) or apply for a certain claim(s)

39 Order 3 rule 2 (2) of the Oyo State High Court (Civil Procedure) Rules 2010; Order 3 rule 2 (2) of the High Court of Lagos State (Civil Procedure) Rules 2012; Order 3 rule 2 (2) of the Osun State High Court Amended (Civil Procedure) Rules 2008, Order 3 Rule 3 (1) of Ondo State High Court (Civil Procedure) Rules 2011, Order 3 Rule 3 (1) of High Court of Edo State (Civil Procedure) Rules 2012

Witnesses and copies of every document to be relied on at the trial. Where the defendant has a Counter-claim, the claimant shall file a defence to counter-claim and reply to Statement of Defence where the need be.[40] When a matter is commenced via Writ of Summons and same is fixed for hearing, witnesses who had earlier filed their depositions before the court shall be required to enter the witness box and be led in evidence including adoption of their written statements on oath. If witnesses are not called, the issue of commencement by Writ of Summons do not arise.

The originating process shall be supported by a statement setting out the name and description of the applicant, the relief (s) sought, the grounds upon which the reliefs are sought and supported by an affidavit setting out the facts upon which the application is made.[41]

Order II Rule 4 of FREPR, 2009 allows any person who has personal knowledge of the facts or who has been informed of the facts by the applicant to swear to the affidavit. By Order II Rule 5, 6 & 7 of FREPR, 2009, the application shall be accompanied by a written address followed by a Respondent's written address and a counter affidavit (if necessary) within 5 days. The applicant also has an option of filing a written address on point of law and a counter affidavit within 5 days of service on him of the Respondent's address. This in my view will Fast Track Human Rights Litigation through Frontloading.[42]

It is worth noting that by the provisions of Order III, an application for the enforcement of Fundamental Rights is not affected by any limitation of Statute whatsoever. Thus, it can be brought any time, irrespective of the time the act constituting the breach was committed.

3.1.1 Distinction between Written Statement on Oath and Affidavit

By rules of High Courts, writ of summons must be accompanied with written statement on oath not affidavit. There are distinctions between

[40] Order 15 rule 1 (3) of the Oyo State High Court (Civil Procedure) Rules 2010; Order 15 rule 1 (3) of the High Court of Lagos State (Civil Procedure) Rules 2012; Order 15 rule 1 (3) of the Osun State High Court Amended (Civil Procedure) Rules 2008

[41] See Order II Rules 2 and 3. See *E.F.C.C v. Akingbola* (2015) 11 NWLR (PT..1470) PG. 249 at 289

[42] See; *E.F.C.C. v. Akingbola (supra).*

affidavit evidence and written statement on oath. A witness written statement on oath is different from affidavit evidence. An affidavit is a statement of fact which the maker or deponent swears to be true to the best of his knowledge. It is a Court process in writing, deposing to facts within the knowledge of the deponent. It is documentary evidence which the Court can admit in the absence of any controverting deposition. On the contrary, a witness statement on oath is not evidence. It only becomes evidence after the witness is sworn in Court and adopts his statement from the witness box. At this stage, at best, it becomes evidence in-chief. It is therefore subjected to cross-examination after which it becomes evidence to be used by the Court. If the opponent fails to cross-examine the witness, it is taken that the true situation of facts is contained therein. The effect is that, a written statement on oath becomes evidence upon which the Court can act, only if it has been adopted on Oath at the trial by the deponent. Therefore, it means that where the written statement on oath was adopted at the trial without any objection by the opponent, opponent cannot later challenge the competence of that statement.[43]

In law, statement on oath of witnesses and affidavit are neither synonymous nor used interchangeably. Simply put, an affidavit is not the same as a written statement on oath. Written statement on oath does not necessarily or strictly need to be in compliance with the provisions of the Evidence Act 2011 relating to Affidavit. The duty of a witness making a written statement on oath is to ensure that it is deposed to before a Commissioner for Oaths duly authorised by law to do so. It is a general statement of the law that an affidavit and a written statement of a witness are to be sworn before a Commissioner for Oaths or a Notary Public.

With a written statement on oath, the deponent tells his story of the evidence on the facts as pleaded by the party on whose behalf he is testifying. Once it is sworn to before the authorised Commissioner for Oaths, it is competent. Being the evidence in chief of a witness, it needs not be subject to the stringent requirements of an affidavit. A witness written statement on oath is a witness evidence in chief. After all, a statement on oath or evidence in chief of a witness in writing is in all cases, except where the opposing party elects not to, subject to cross

[43] *Agagu v. Mimiko* (2009) 7 NWLR (pt. 1140) p.342 at 424 paragraphs E – F; *Majekodunmi & Ors v. Ogunseye* (2017) LPELR-42547(CA) Per Haruna Simon Tsammani, J.C.A (Pp. 40-45, paras. D-C).

examination to test its veracity as oral evidence unlike an affidavit evidence which unless there is irreconcilable conflicts is not usually subjected to cross examination.[44]

On the other hand, an affidavit is a voluntary declaration of facts written down and sworn to by the declarant before an officer authorised to administer Oath. It is a deposition which is made under oath. Therefore, its contents are sacrosanct and can only be controverted by another deposed affidavit, not by cross-examination or analysis.[45] It should be noted that, unlike an affidavit *per se*, a Written Statement on Oath filed in Court for the enforcement of fundamental right is not evidence on its own, unless it has been duly adopted by the witness at the trial. In other words, a Written Statement on Oath will only become evidence to be used by the Court in the determination of a Plaintiff's claim, if it has been adopted by the person who deposed to it as his testimony during the trial. If it is not so adopted, it is deemed abandoned and therefore cannot be examined by the trial Judge.[46] However, affidavit on the other hand, is the evidence of a witness made in writing. So, whether or not the deponent appears in Court, such depositions are capable of being evaluated by the Court as evidence.[47] From the above analysis, FREPR, 2009 provides a procedure for speedy intervention by the Courts in protection of these rights involving the liberty of the individual and is given priority over all other matters and heard immediately they are filed in Court. It is clear using Writ of Summons or petition is not in conformity with procedures for the enforcement of fundamental rights.[48]

---

44 See *Funtua v. Tijani* (2011) 7 NWLR (Pt. 1245) 130. See also *Splinters Nig. Ltd v. Oasis Finance Ltd.* (2013) 18 NWLR (Pt. 1385).

45 See Garner, B. 2004. *Blacks' law dictionary* 9th ed. Minnesota: West Publishing Co. 66. See also *Ezeudu v. John* (2012) 7 NWLR (Pt. 1298) 1; *Maraya Plastics Industries Ltd v. Inland Bank of Nigeria Plc.* (2008) FWLR (Pt. 120) 1832; *Josien Holdings Ltd v. Lornamead Ltd.* (1995) 1 NWLR (Pt. 371) 254.

46 See *NNB Plc v. IBW Ent.* (1998) 6 NWLR (Pt. 558) 446, *Maraya Plastic Ltd. v. Inland Bank* (2002) 2 NWLR (Pt. 765) 109; *Lonestar Drilling Nig. Ltd. v. Treven Engr. Industries Ltd.* (1999) 1 NWLR (Pt. 558) 622". *Abubakar v. Ali & Ors* (2015) LPELR-40359(CA) Per Ridwan Maiwada Abdullahi, J.C.A (pp. 47-48, paras. E-B)

47 See *Splinsters (Nig.) Ltd & Anor v. Oasis Finance Ltd* (2013) 18 NWLR (Pt.1385) 188 at 227 per Izoba, JCA; *Agagu v. Mimiko & Ors* (2009) 7 NWLR (Pt. 1140) p. 34; *Oraekwe v. Chukwuka* (2012) NWLR (Pt. 1280) 87 at 201.

48 *Climax Hotel (Nig) Ltd & Anor v. Venitee Global (Nig) Ltd & Ors* (2019) LPELR-47103(CA); *Benson v Commissioner of Police* (2016) 12 NWLR Part 1527 Page 445; *Danfulani v. EFCC* (2016) 1 NWLR Part 1493 Page 223 at 246-247 Para F-H; Onoja O. J. (2020) *Fundamental Rights (Enforcement Procedure) Rules, 2009 Practice, Procedure, Forms and Precedent* Abuja: Bar & Bench Publishers Limited at 35-36.

3.2 Commencement of fundamental rights proceedings by Petition

Civil action can also be commenced through petition.[49] In filing Notice of Petition in the High Court, the petitioner must accompany his petition with the following documents: (a) a petition containing the facts of the case; (b) affidavit of verification; (c) certificate relating to reconciliation (as it is in matrimonial cases), (d) notice of address (e) acknowledgement of service. The respondent may file answer to the petition or cross-petition stating facts of the cross-petition, Affidavit of Verification, Certificate Relating to Reconciliation, Notice of Address and Acknowledgement of Service. A Petitioner may also file a Rejoinder to the Answer or file Answer to the Cross-Petition. When a matter is commenced via Petition, pleadings are completed and exchanged, it is fixed for hearing, witnesses shall be required to enter witness box and be led in evidence.

3.3 Commencement of fundamental rights proceedings by Originating Summons

When an action is commenced by an originating summons, it shall be in the forms specified in the Rules of High Courts where the action is to be instituted and with such variations as circumstances may require. It shall be prepared by the applicant or his legal practitioner, and shall be sealed and filed in the Registry, and when so sealed and filed shall be deemed to be issued. Originating Summons shall be accompanied by: (a) an affidavit setting out the facts relied upon; (b) all the exhibits to be relied upon; and (c) a written address in support of the application. The person filing the originating summons shall leave at the Registry, sufficient number of copies thereof, together with the documents in the Rules of Court for service on the respondent(s).[50] Where the respondent intends to oppose the application, he shall file his written address and may accompany it with a counter-affidavit. The applicant may on being served with the respondent's written address, file and serve an address on points of law and may accompany it with a further affidavit. When pleadings are completed, originating summons would be fixed for hearing and parties would move their application, relying on the affidavits and exhibits attached where parties adopt their written addresses.

[49] Order V of the Matrimonial Causes Rules
[50] Order 3 Rule 8 of the Oyo State High Court (Civil Procedure) Rules, 2010

3.4 Commencement of fundamental rights proceedings by Originating Motion

Originating Motion is another mode of commencement of action in the High Court. Where, by the rules of High Courts, any application is authorized to be made to a Judge, such application shall be made by Motion on Notice, which may be supported by affidavit and shall state under what rule of Court or Law the application is brought. Every Motion on Notice shall be served within 5 days of filing. Where the other party intends to oppose the application, he shall within 5 days of the service on him of such application, file his counter affidavit. Upon receipt of the counter affidavit, the applicant shall file a written address and further affidavit if necessary, to be served on the opposing party within 5 days. The opposing party shall then file and serve his written address not later than 7 days on receipt of the applicant's written address and further affidavit, if any. The Respondent shall file and serve his written address not later than 7 days thereof.[51] When pleadings are completed, motion on notice would be fixed for hearing and parties would move their application, relying on the affidavits and exhibits attached when parties adopt their written addresses.

3.5 Consequences of commencement of fundamental rights suit by Originating Summons and Motion on Notice

From the specific procedures enumerated under Order II of the FREPR 2009 and judicial precedent,[52] it is crystal clear that fundamental rights enforcement proceedings are determined strictly on affidavit evidence.[53] Therefore, this paper contends that; only two out of the four originating processes identified above conform with the spirit of FREPR, 2009 can be used to initiate fundamental rights lawsuit accompanied by affidavit evidence; that is, originating summons or motion on notice. In another word, fundamental rights lawsuits cannot be commenced by filing of writ

---

51 Order 39 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, 2010

52 *Jack v. University of Agriculture, Makurdi* (2004) LPELR-1587 (SC)

53 *SSS & Anor v. El-Rufai* (2018) LPELR-45080 (CA) Per Omoleye, J.C.A (Pp. 27-31, paras. A-D); *Akinsete v. Akindutire* (1966) 1 All NLR p. 147; *Chairman, National Population Commission v. Chairman, Ikere Local Govt. & Ors.* (2001) LPELR-3166 (SC) and *Eze v. Unijos* (2017) LPELR-42345 (SC). *Jack v. University of Agriculture, Makurdi* (2004) LPELR-1587 (SC); *IGP & Ors. v. Eze* (2017) LPELR - 42923 (CA); *Bamaiyi v. The State* (2001) FWLR (Pt. 46) 956, 978; *ASCO Investment Ltd. & Anor. v. Ezeigbo & Anor.* (2015) LPELR-24460 (CA); *B. N. Mbang v. W/PC Janet* (2015) All FWLR (Pt.767) 766, 784; *Ukaobasi v. Ezimora* (2016) LPELR -40174 (CA) In the case of: *Ikudaisi & Ors. v. Oyingbo & Ors.* (2015) LPELR-40525.

of summons or petition. This is owing to the fact that FREPR 2009 specifically stipulates the procedure for the enforcement of the fundamental rights by a person whose rights have been, is being or likely to be violated. The law is equally trite that where a statute stipulates a particular method of performing a duty regulated by the statute, that method, and no other method must be followed in performing the duty.[54] The procedure prescribed by the FREPR 2009 being a requirement of law, must be strictly adhered to. For this purpose, the said Rules clearly provide that the applicant in a fundamental right proceeding must file an affidavit setting out the facts relied upon by him and a written address accompanying his application for the enforcement of the fundamental right allegedly breached. In addition, the applicant may file a further affidavit in conjunction with his reply on point(s) of law.

In other words, oral evidence, except when it is ordered by the Court, is alien to fundamental right enforcement proceedings.[55] It is the affidavit evidence placed before the Court that must be fastidiously evaluated in order to reach a just resolution of an application of an applicant. Therefore, the facts averred in the affidavits placed before the Court by the parties in fundamental rights enforcement proceedings constitute the pleadings and the adduced evidence in the matter.[56] It is a general principle of law that, where a matter is being tried on affidavit evidence, and the Court is confronted with conflicting or irreconcilable evidence relied on by the opposing parties on a very material issue as placed before the Court for determination, the Court cannot achieve the resolution of such conflict or contradiction by mere evaluating the conflicting or contradictory evidence. Rather, in order for the Court to arrive at the justice in the matter, it can only resort to the "*viva voce*" evidence from the

---

[54] See the cases of: *Nigeria Social Insurance Trust Fund Management Board v. Klifco Nigeria Limited* (2010) LPELR-2006(SC); *Chief Emmanuel Osita Okereke v. Alhaji Umaru Musa Yar'adua & Ors* (2008) LPELR-2446(SC); *Attorney General of Kwara State & Anor v. Alhaji Saka Adeyemo & Ors* (2016) LPELR-41147(SC); *Commerce Bank Nig. Ltd v. A.-G., Anambra State* (1992) 8 NWLR (Pt. 261) 528: *Ibrahim v. I.N E C.* (1999) 8 NWLR (Pt. 614) p. 334; *Governor, Ekiti State & Anor v. Chief Femi Akinyemi & Ors* (2011) LPELR-4218(CA); *System Applications Product (Nig) Ltd. v. C.B.N.* (2004) 15 NWLR (PT.897) 663 at 687."

[55] *IGP & Ors. v. Eze* (2017) LPELR - 42923

[56] See the cases of *Jack v. University of Agriculture, Makurdi* (2004) LPELR-1587 (SC); *IGP & Ors. v. Eze* (2017) LPELR - 42923; *Bamaiyi v. The State* (2001) FWLR (Pt.46) 956, 978; *ASCO Investment Ltd. & Anor. v. Ezeigbo & Anor.* (2015) LPELR-24460 (CA); *B. N. Mbang v. W/PC Janet* (2015) All FWLR (Pt.767) 766, 784; *Ukaobasi v. Ezimora* (2016) LPELR -40174 (CA); *Ikudaisi & Ors. v. Oyingbo & Ors.* (2015) LPELR-40525, Per Abiriyi, J.C.A

deponents of the relevant affidavit/counter affidavit and such other witnesses as the parties may be advised to call.[57]

In commencing an action for the enforcement of fundamental right, Order II Rule 3[58] provides that an application for the enforcement of fundamental right shall be supported by a statement setting out the names and description of the applicant, the relief sought, the grounds upon which the reliefs are sought and supported by an affidavit setting out the fact upon which the application is made. There are no processes such as statement setting out the names and description of the applicant, and an affidavit setting out the fact upon which the application is made if violations of fundamental rights are enforced by Writ of Summons and Petition. What the applicant can file in support of writ of summons is statement on oath of witnesses not an affidavit.

3.6 Argument for Reform

The Supreme Court has held on the importance of validity of originating process in a plethora of cases[59] that the validity of originating processes in a proceeding before a court is sine qua non for the competence of the suit and indeed proceeding initiated by such processes. Therefore, failure to commence a suit with a valid mode of commencement of an action goes to the root of the action since the conditions precedent to the exercise of the Court's jurisdiction would not have been meet for placing the suit before the Court. This issue is as a matter of substantive law and its breach renders an action a nullity *ab initio*. At this point Order IX, Rule 1 FREPR 2009 becomes apposite. It provides thus *"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 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- (i) Mode of commencement of the application;*

---

57 *SSS & Anor v. El-Rufai* (2018) LPELR-45080(CA) Per Oyebisi Folayemi Omoleye, J.C.A (Pp. 27-31, paras. A-D); *Falobi v. Falobi* (supra); *Olu-Ibukun v. Olu-Ibukun* (1974) NSCC p.51; *Akinsete v. Akindutire* (1966) 1 All NLR 147; *Chairman, National Population Commission v. Chairman, Ikere Local Govt. & Ors.* (2001) LPELR-3166 (SC) and *Eze v. Unijos* (2017) LPELR-42345 (SC).

58 FREP Rules, 2009

59 *Dr Tunji Braithwaite v. Skye Bank Plc* (2012) LPELR-15532(SC) Per Suleiman Galadima, JSC (P. 20, paras. B-C); *Madukolu v. Nkemdilim* (supra) and *Mohammed Mari Kida v. A.D. Ogunmola* (2006) 13 NWLR (Pt. 997)

(ii) The subject matter is not within Chapter IV of the Constitution or the African Charter on Human and People's Rights (Ratification and Enforcement) Act"

It is clear from the above provision that the effect of non-compliance with the FREPR 2009 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 mode of commencement of the application. By implication, the FREPR 2009 envisages a specific mode of commencement of fundamental right application and not by any originating processes accepted to the Court. The FREPR 2009 expects that if fundamental right application is not commenced by proper mode of commencement, it will not be treated as irregularity but it will nullify such proceedings.[60] This paper opines that it is inelegant drafting for the FREPR 2009 to allow fundamental rights proceedings to be commenced by any originating processes accepted to the Court and by other means talking about inappropriate mode of commencing the action.

Are the procedures outlined under Order II, Rules 3, 4 & 5 of FREPR 2009 in conformity with all the mode of commencing civil suits acceptable in High Courts? The answer is in the negative. Then, what happens if an applicant commences enforcement of his fundamental rights through writ of summons or petition? This paper considers that where an applicant commences enforcement of his fundamental rights through writ of summons or petition, such defect is not an irregularity but fundamental as to render the process or proceedings a nullity. It is a matter of law that is capable of rendering the process invalid.[61] It will affect the jurisdiction of the court because the matter will not be seen to have been commenced through the due process of law due to lack of fulfilment of conditions precedent to the exercise of jurisdiction.[62]

4. Conclusion and Recommendation

Against the backdrop of the above analysis, the potency of human rights lies in its enforcement. The CFRN 1999 has, like its predecessor (CFRN

[60] Order IX, Rule 1 FREPR 2009

[61] See *Ibibiama F.G. Odom & Ors. v. The P.D.P. & Ors* (2015) LPELR- 24351 (SC); *Mobil Production (Nig.) Unltd v. LASEPA* (2002) 18 NWLR (pt. 798) 1.

[62] *Madukolu v. Nkemdilim* (2001) 46 WRN 1; *Adeniji, S.A, Legal Armoury, Brighter Star Publishers Nigeria Ltd,* (2006) 74-75.

1979), has a mechanism for the enforcement of fundamental rights in Nigeria encapsulated in the FREPR 2009. While the Rules contain laudable provisions such as promotion of public interest ligation, abolition of limitation period, liberalization of *locus standi,* as well as jettisoning of leave of court requirement, FREPR 2009 is not free from uncertainty. Under the Rules, the mode of commencement of fundamental rights suits at the High Court is neither certain nor precise as a litigant could adopt any of the four originating processes accepted for commencement of cases in court. This uncertainty is capable of hampering the process of justice administration as far as fundamental rights enforcement is concerned, as same has unintendedly subverted the *sui generis* nature of fundamental rights enforcement, making it seem like a regular civil suit where the various originating processes are used. It is therefore necessary to remove the uncertainty associated with the mode of commencement of fundamental rights matters.

Based on the foregoing, it is recommended that, Order II Rules 2, 3, and 4 of the FREPR 2009 which deals with mode of commencement of fundamental rights proceedings be amended and a specific originating process, most suitably, originating motion[63] should be made the sole originating process to be used in the commencement of fundamental rights proceedings in Nigeria. After all, seeking redress in matrimonial matter has a peculiar mode of instituting it, that is, through filing of petition alone. Likewise, seeking redress in election petition has a unique procedure. Having a unique procedure for the enforcement of violation of fundamental rights should be embraced.

[63] *The Chief of Naval Staff Abuja & Ors v. Eyo Archibong & Anor* (2020) LPELR-51845(CA)

> "The 1937 plunder of the Aksum Obelisk by Italian troops who dismantled it and took it to Italy as war booty is well known; less publicised in the public imagination is the pulling down and shipping to Rome of the Statue of the Lion of Judah"[5]

Prof Shyllon was unrelenting in his advocacy that African States use the limited functionalities of treaties to ensure the return of looted artefacts. In a 2000 article titled "The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration"[6], he lamented the need for African States to take advantage of international instruments in retrieving looted artefacts. First, he reported on the paucity of African States who had become State Parties to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. As at the time of writing of that article, only twenty (20) States had become State Parties of a Convention that had come into force in 1972. At present, there are Thirty-Four (34) African State parties to the UNESCO Convention of the One Hundred and Forty (140) State Parties in 2020. In the 2000 article, he urged African States to become State parties to, and take advantage of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects adopted in 1995, which also came into force on April 1 2019.As at the time of the 2000 article no African State was a state party. In 2012- when two African States- Nigeria and Gabon- had become UNIDROIT State Parties, he addressed the importance of the membership of African States in an article titled "Why African States must Embrace the 1995 UNIDROIT Convention"[7]At present, other African States like Egypt South Africa Burkina Faso, have become State Parties to the UNIDROIT Convention which appeared a viable alternative to the tepid provisions of the 1970 UNESCO Convention[8], that for long was shunned by European States[9] whose museums and private collections were in

---

5 Ibid, p. 123.

6 [2000] (5) *Uniform Law Review* 219-240.

7 2012 17(2) *Art Antiquity and Law* 135.

8 Article 7(b) of the 1970 UNESCO Convention required State Parties to prevent the import into their territory of cultural property stolen from another country and listed in an inventory from a time both countries of origin and host country of the artefact were State Parties to the Convention.

9 The United Kingdom ratified the 1970 Convention in 2002; Germany in 2007; Belgium and Netherlands in 2009.

possession of and exercised (questionable) property claims to these artefacts. Neither the 1970 UNESCO Convention nor the UNIDROIT Convention has been of much assistance to African States a fact that late Professor Shyllon acknowledged in many of his articles. For example, in "Restitution of Antiquities to Sub-Saharan Africa: The Booty and Captivity: A Study of Some of the Unsuccessful Efforts to Retrieve Cultural Objects Purloined in the Age of Imperialism in Africa"[10] he chronicled unsuccessful attempts to retrieve 'Benin Bronzes'; "Ife Bronzes and Terracottas"; and "Treasures of Maqdala". He also celebrated the return of Makonde Mask from Switzerland[11] as a righteous conclusion. He had almost a decade earlier criticized an arrangement whereby Nigeria allowed France to keep for 25 years (renewable) three (3) Nok objects that were illegally exported from Nigeria.[12]

There is little doubt of the acute awareness of the limp capacity of international law to assist African States in all the works of Prof Shyllon. That awareness is manifest in "The Rise of Negotiation (ADR) in Restitution Return and Repatriation of Cultural Property: Moral Pressure and Power Pressure"[13] He believed in multilateral and bilateral negotiations towards the return of looted artefacts but urged African States to '…stop lending items from their museums to western museums'[14] as a fitting response and bargaining chip to the '…contemptuous ignoring of the diplomatic and courteous demands for the return of African countries antiquities'.[15] The consequences of the incapacity of international law and the reality of moral suasion is evident in Professor Shyllon's reports and scholarship about the Benin Dialogue Group (BDG) that the National Commission established for Museums and Monuments to 'start an open dialogue on the accessibility of art treasures of the Benin Kingdom to Benin People and other Nigerians".[16] A contentious point in the BDG deliberations was the proposal that European Museums would lend looted

10 [2015] (20) *Art Antiquity and Law* 369.

11 See F Shyllon " The Return of Makonde Mask from Switzerland to Tanzania- A Righteous Conclusion" [2011] (16) *Art Antiquity and Law* 79.

12 See F Shyllon 'Negotiations for the Return of Nok Sculptures From France to Nigeria- An Unrighteous Conclusion" [2003] (8) *Art Antiquity and Law* 133.

13 [2017] (22) *Art Antiquity and Law* 130.

14 Ibid, p. 137

15 Ibid.

16 See F. Shyllon "BENIN DIALOGUE GROUP: Perhaps no Longer a Dialogue with the Deaf! University of Cambridge Students to the Rescue!" [2017] (22) *Art Antiquity and Law* 299.

Benin bronzes to Nigeria as part of the Benin Plan of Action adopted at the third meeting of the Benin Dialogue Group in Benin in February 2013 of '…creating an enabling environment for exchange, joint exhibition and loans in both directions.' The fourth meeting of the BDG convened by Cambridge University included discussions of '…long term loan of Benin Bronzes from a group of European Museums'[17] which drew sharp rebukes from many including Dr Kwame Opoku[18] who lamented that "We have the so-called Dialogue Group on Benin City proposing a strange scheme whereby some of the looted Benin artefacts would be displayed in Benin City, but ownership of the artefacts would be with Western museums. And, they find some Africans to approve of such a ridiculous and insulting proposal."[19] Dr Opoku's criticism was roundly rejected by Prof Shyllon[20] in his report of the outcomes of the fifth meeting of the BDG held in Leiden in 2018 that rejected the idea of restitution as a matter of interest to the group.[21] It was ill-advised for Prof Shyllon to highlight Dr Opoku's criticism in detail and strongly suggest that he accepted the loan of looted Benin Bronzes to the proposed Benin Museum as appropriate. For example, he argued that:

> "Is it by refusing to take part in the activities of the Dialogue Group that the antiquities will return? The author Opoku, referred to above, has over the years published many strident articles calling for the return of African artefacts. Yet no Benin bronze or other looted or stolen African artefact has over this period returned to Africa. Therefore, the reproach to 'some Africans' engaging in a dialogue with Western museums is misguided. Is half a loaf not better than none at all? An 'all or nothing' approach to restitution has proven to be a road that leads nowhere. Be

17 Ibid, at p. 301.

18 See Kwame Opoku "Benin Dialogue Group Removes Restitution Of Benin Artefacts From Its Agenda" Available at <https://modernghana.com/news/924239/benin-dialogue-group-removes-restitution-of-benin.html> (Accessed October 5 2021).

19 Ibid.

20 See F Shyllon "Benin Dialogue Group: Benin Royal Museum-: Three Steps Forward, Six Steps Back" [2018] (23) *Art Antiquity and Law* 341.

21 The Leiden Statement stated that the return of the Benin Bronzes 'is not part of the business of the Benin Dialogue Group' and that 'questions of return as bilateral issues and are best addressed with individual museums'. Available at <http://docs.dpaq.de/14096-statement_from_the_benin_dialogue_19_october_2018_16.33.pdf> (Accessed October 6 2021).

> that as it may, the dissembling on the issue of restitution in the Leiden Statement is unfortunate. It is a backward step that is quite unnecessary. The Dialogue Group started unambiguously with the twin objectives of restitution and lease.
>
> They are two sides of the same coin, and it is quite unhelpful to abandon restitution in the Leiden Statement. Still, the criticism of the Dialogue Group by Kwame Opoku leaves much to be desired. If the British Museum and the Ethnology Museum, Berlin were today to declare that they would release 100 pieces each of the Benin antiquities in their possession, is there a museum in Lagos, Abuja or Benin City that can adequately house them and ensure their safety and proper handling?[22]

Prof Shyllon's frustration is palpable in the quoted phrase, and it is easy to conclude that he had abandoned the restitution of the looted Benin Bronzes. If one were to take a full measure of his works, a different conclusion would also be plausible. It is suggested that almost a half century of strong advocacy for the return of looted Benin Bronzes left him eager for even 'half a loaf'. It appears evident that Dr Opoku's reproach had some effect on him and a need to erase any doubt of his stand on restitution. In the last article, he published in the journal 'Art Antiquity and Law'[23] Professor Shyllon condemned the abandonment of the restitution of the Benin Bronzes in the Leiden Statement while noting that restitution was a prominent feature of the first meeting of the Benin Dialogue Group. The conclusion of this article is a reiteration of the fundamental moral obligation that we return what is not ours in our possession. He stated that "Restitution is the proper solution to the return of iconic cultural objects wrongfully acquired in colonial times and in war."[24]

---

22 Note 20.

23 See F. Shyllon 'Benin Bronzes: Something Grave Happened and Imperial Rule of Law is Sustaining it" [2019] (24) *Art Antiquity and Law* 274. My source is from https://blog.uni-koeln.de/gssc-humboldt/en/benin--bronzes-something-grave-happened-and-imperial-rule-of-law-is-sustaining-it (Last accessed October 6 2021).

24 Ibid.

To end this reflection, I would like to adopt the deserved tribute paid to Prof Shyllon by UNESCO. Ernesto Ottone R., UNESCO Assistant Director-General for Culture declared that:

> "Professor Folarin Olawale Shyllon's lifelong commitment to the protection of cultural property was matched only by his humility and generosity. His writings will continue to inspire present and future generations…With his passing, UNESCO has lost a longtime friend and an outstanding intellectual and Professor of Law who enthusiastically supported the ideals of UNESCO, the UNESCO 1970 Convention and the 1995 UNIDROIT Convention."[25]

Be that as it may, it seems that the greatest official tribute to Folarin Olawale Shyllon is the increased and sustained return of looted African artefacts in Europe and America. The International Journal of Cultural Property of which he was an editor, allude to this fact in a tribute paid to him:

> "When Folarin passed away, his dream of the return of African cultural objects seemed to becoming a reality following President Emmanuel Macron's 2017 speech in Ouagadougou on the repatriation of African treasures in museums outside of Africa"[26]

It is fitting to end by pointing to the recent but limited success of Prof Shyllon's scholarship and advocacy. First, Jesus College Cambridge on October 27 2021 returned a Benin bronze 'Okukor' to a delegation of the Oba of Benin.[27] Second, on the 29th of October, the University of

---

25 Available at <https://en.unesco.org/news/tribute-late-professor-folarin-olawale-shyllon-who-fought-over-50-years-against-illicit> (Last accessed October 6 2021).

26 "In Memoriam Folarin Shyllon (1940-2021)" [2021] (28) *International Journal of Cultural Property* 3.

27 See Nadia Khomani 'Cambridge College to be the First in the UK to Return Looted Benin Bronze' (The Guardian, UK October 15 2021. Available at <https://www.theguardian.com/education/2021/oct/15/cambridge-college-to-be-first-uk-return-looted-benin-bronze> (Accessed October 22 2021); Kingdom of Benin 'okukor returns home after 124 years' Available at < https://www.kingdomofbenin.com/oba-video/okukor-returns-home-after-124-years > (Accessed November 10 2021).

Aberdeen returned a Benin Bronze to the Benin Kingdom.[28] Third, the Art Newspaper reports that the Smithsonian Institute's National Museaum of African art has removed its Benin Bronzes from display to facilitate its return to the Kingdom of Benin.[29]

[28] See Lithiumgist ' University of Aberdeen returns Bibib Bronze 124 years after it was stolen from Nigeria'. Available at https://lithumgist.com/ng/202110/29/university-of-aberdeen-returns-benin-bronze-124-years-after-it-was-stolen-from-nigeria (Accessed November 10 2021).

[29] See Catherine Hickley ' Smithsonian Museum of African Art removes Benin Bronzes from display and plans to repatriate them' Available at < https://www.theartnewspaper.com/2021/11/05/smithsonian-museum-of-african-art-removes-benin-bronzes-from-display-and-plans-to-repatriate-them > (Accessed November 10 2021).