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Raising legal giants: The agency of the poor in the human rights jurisprudence of the Nigerian Appellate Courts, 1990-2011

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Summary

This article examines the extent to which the jurisprudence of the Nigerian appellate courts has expanded, maintained or contracted the opportunities of the poor for exercising as robustly as possible their own 'agency' to act to redress human rights abuses committed against them during the period between 1990 and 2011. In doing so, the article mostly utilises a critical socio-legal framework which situates Nigeria's human rights law relating to the agency of the poor within its historical, social, economic and political context. Specifically, it utilises – among others – the kernel ideas of Upendra Baxi's seminal trade-related market-friendly human rights theory. While it is often assumed that the weak, excluded and deprived are passive victims of their condition, the starting position of the article is that, where sufficient opportunities exist in law and policy, or are allowed by the adequate availability of resources, or are made possible through pro-poor judicial action, the poor are actually able to resist this characteristic and to struggle to transform their life conditions. The main

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question the article addresses is the extent to which the Nigerian appellate courts have – in the course of developing their human rights praxis – helped to provide or restrict opportunities for poor Nigerians to exercise their agency within the legal system so as to more effectively ‘struggle to transform their life conditions’. With what conceptual apparatuses have these courts examined and decided the relevant cases in ways that expand or contract the agency of the poor to seek legal redress and social justice? We argue that many factors interact in this regard to produce certain outcomes, some within and others outside the control of the courts. We also believe that courts should, where necessary, ameliorate the factors within their control such that the poor can more robustly exercise their agency in this regard.

Key words: *Nigeria; courts; human rights; agency; poverty*

1 Introduction

The process of translating human rights norms into practical effect/reality centrally engages the question of the place of the ‘agency’ of victims of human rights violations themselves in the struggle to vindicate their rights and redress their grievances.¹ But what is meant by a victim’s ‘agency’? As used in this article, ‘agency’ means the exercise of the capability to deal with an issue, question or problem.² This is the sense in which the term is used in Giddens’s widely-accepted and highly-influential work on this concept. Understood in this way, the concept suggests that the victim of a human rights violation should ordinarily have a significant role to play in challenging that violation or seeking to redress it. As such, the exercise of ‘agency’ by a victim or victims of a human rights violation denotes the capability that that individual or group has of ‘fighting’ to resolve the human rights problems or challenges that confront them.

The article examines the extent to which the jurisprudence of the Nigerian appellate courts (namely, the Court of Appeal and the Supreme Court) has expanded, maintained or contracted the opportunities of the poor of exercising as robustly as possible their own ‘agency’ to act to redress human rights abuses committed against them in Nigeria during the period 1990 to 2011 (focused upon here because it was during this period that the most ferment occurred in the areas of the law that are focused on in this article). In doing so, the article mostly utilises a critical socio-legal framework which, among other things, situates Nigeria’s human rights law

1 A Sen ‘Elements of a theory of human rights’ (2004) 32 *Philosophy and Public Affairs* 319 (‘Human rights generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms’).

2 See A Giddens *The constitution of society: Outline of the theory of structuration* (1984); S Loyal *The sociology of Anthony Giddens* (2003); R Stones *Structuration theory* (2005).

relating to the agency of the poor within its historical, social, economic and political context. Specifically, it utilises – among others – the kernel ideas of Baxi’s seminal trade-related market-friendly (TREM) human rights theory.³ This theory sees a deep connection between the increasing displacement of a much more people-centred Universal Declaration of Human Rights paradigm by a TREMF human rights paradigm that emphasises the promotion and protection of the collective interests of powerful governmental actors and various formations of global capital. This socio-economic and legal drama, Baxi claims, is often enacted at the direct expense of human beings and communities, especially the poor and the relatively excluded.

The article’s argument and analysis also build upon the tradition of human rights scholarship which not only sees the transformative possibilities of human rights law, but also maps its limitations. For example, one of the questions raised by this tradition of human rights scholarship is whether human rights law, which ostensibly is aimed at ameliorating the effects of poverty and suffering, could also harbour factors, norms, doctrines, rules and tendencies that inhibit the ability of the poor and those suffering abuses to exercise their ‘agency’ to seek remedies. In addition to Baxi’s TREMF theory, note is also taken in the article of Kennedy’s assertion that the human rights language is ‘absolutist’ and reduces inter-group and inter-individual sensitivity.⁴ He argues that⁵

encouraging people [agents] to imagine themselves as rights holders, and conceptualising rights as largely absolute, make the negotiation of distributive arrangements among individuals and groups less likely and less tenable.

As importantly, he concludes that⁶

the legal vocabulary of rights makes it hard to assess distribution among favoured and less favoured rights holders and forecloses the development of a political process for tradeoffs among them, leaving only the vague suspicion that the more privileged got theirs at the expense of the less privileged.

The gendered nature of poverty in Nigeria (as elsewhere) should also be kept in mind in conducting the kind of pro-poor analysis undertaken in the article.⁷

3 U Baxi *The future of human rights* (2002) 132. See also U Baxi ‘Market fundamentalism: Business ethics at the altar of human rights’ (2005) 5 *Human Rights Law Review* 1.

4 D Kennedy ‘The international human rights movement: Part of the problem?’ (2002) 15 *Harvard Human Rights Journal* 113.

5 As above.

6 As above.

7 See N Aniekwu ‘Gender and human rights dimension of HIV/AIDS in Nigeria’ (2002) 6 *African Journal of Reproductive Health* 30. See also N Ezumah ‘Gender issues in the prevention and control of STIs and HIV/AIDS: Lessons from Awka and Agulu, Anambra State, Nigeria’ (2003) 7 *African Journal of Reproductive Health* 89.

While it is often assumed that the weak, excluded and deprived are passive victims of their condition,⁸ the starting position of the article is that, where sufficient opportunities exist in law and policy, or are allowed by the adequate availability of resources, or are made possible through pro-poor judicial action, the poor are actually able to resist this characteristic and to struggle to transform their life conditions.⁹ Against this background, the main question the article addresses is the extent to which the Nigerian appellate courts have – in the course of developing their human rights praxis – helped to provide or restrict opportunities for poor Nigerians to exercise their agency within the legal system so as to more effectively ‘struggle to transform their life conditions’.¹⁰ With what conceptual apparatuses have these courts examined and decided the relevant cases in ways that expand or contract the agency of the poor to seek legal redress and social justice? We argue that many factors interact in this regard to produce certain outcomes, some within and others outside the control of the courts. We also believe that courts should, where necessary, ameliorate the factors within their control such that the poor can more robustly exercise their agency in this regard.

It is granted, of course, that this category of persons may suffer material, physical and psychological limitations and that these concrete circumstances often combine to render them insufficiently equipped to resist their victimisation or struggle against their impoverishment in an effective way. Yet, the point is that the fact that sometimes government policies and judicial attitudes align to perpetuate rather than ameliorate the factors that hinder the poor from exercising their agency to resist their oppression through the utilisation of the institutions and processes of human rights law, requires us to take a closer look at the ways in which these dramas of oppression are enacted and legitimised.¹¹

Since the analysis in the article is largely based on an inquiry into a specific portion of the jurisprudence of the Nigerian appellate courts, it follows that case analyses and the examination of the legal reasoning central to the development of that jurisprudence will be a major methodological pillar of the article. This will, for the most part, take the form of reading and understanding the relevant pool of cases and assessing the reasoning presented in each of them for the extent to which it exemplifies or challenges the TREMF and other socio-legal theories that are utilised here.

The article has been organised into five main sections, including this introduction. Section 2 considers the position that the poor can in

8 See N Webster & L Engberg-Pedersen (eds) *In the name of the poor* (2002).

9 See eg IG Shivji ‘Constructing a new rights regime: Promises, problems and prospects’ (1999) 8 *Social and Legal Studies* 253.

10 As above.

11 See H Yusuf ‘Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific reference to Nigeria’ (2008) 8 *African Human Rights Law Journal* 79.

fact exercise their agency in the struggle to ameliorate their own social conditions (something that must be possible for the courts to even have a role to play in expanding or constricting that agency), and hopefully refutes the contrary argument. In section 3, we consider a number of objective factors that shape the capacity or otherwise of the poor to ameliorate their own human rights situation (that is, the extent to which the poor use the courts in the first place, the challenges presented by the architecture and nature of the courts, the role of standing rules, and the role of certain conceptual dichotomies). Thereafter, in section 4 we critically examine the role that the Nigerian appellate courts have played or not played in shaping the capacity of the poor in the country to exercise their agency in the hope of ameliorating their human rights conditions, and the role that these courts can in fact play in doing so in the future. Also included in this section is a critical analysis of the actual and potential contribution of Nigeria's 2009 Fundamental Rights Enforcement Rules to this process of enhancing or restricting the exercise of pro-poor agency in human rights litigation in Nigeria. Thereafter, the article ends with a few concluding comments.

2 Lifting legal power from the depths of weakness?

How much of a 'burden' to redress their poor social conditions should be borne by the relevant victims? Do real opportunities to utilise the human rights resources and processes that can help them ameliorate their deprivation and exclusions even exist? If these opportunities do in fact exist, how might the poor utilise them to ameliorate their condition, and to what effect? In the course of carrying out its adjudicatory tasks, does the Nigerian judiciary (and specifically the appellate courts) bear any particular responsibility for the expansions or restrictions that have occurred during the period under study regarding access of the poor to those ameliorative resources and processes?

Before discussing the question of how the poor might or might not be able to utilise the available human rights resources and processes (within the courts) to resist the systems that exclude and impoverish them, and how the courts may facilitate this process, let us first dispense with the opposite argument. This position holds that the poor are all too often complicit in their own exclusion and impoverishment, and that this complicity robs them of the necessary agency to resist their oppression. An author describes this phenomenon in terms of the theory of 'false consciousness' in which victims of a social problem seem to actively support mechanisms and practices that are inimical to their own interests and agendas.¹² While she discusses this issue from a feminist perspective, we suggest that it

12 S Mahmood *Politics of piety: The Islamic revival and the feminist subject* (2005) 2.

could be extrapolated to this article's concern with the agency of the oppressed in the context of human rights litigation before the Nigerian appellate courts.

The same questions that are raised within a feminist framework might be equally relevant to an analysis of the agency of the poor in pursuing or sabotaging solutions to their own human rights problems. When the poor accept human rights violations perpetrated against them because they do not possess sufficient education or lack the power or resources to pursue their claims for redress, they exhibit some of the characteristics of supposed Muslim feminine passivity and submissiveness described by Mahmood.¹³ The danger that this poses for the robust exercise of the agency of the poor is compounded by the fact that, as has been argued, there also seems to be a 'middle class linguistic enclosure'¹⁴ that inhibits ordinary people who, although they are 'proficient in their own languages', are not adept at speaking the 'languages of the law, government and business, ... from influencing the reconceptualising of the dominant human rights discourse'.¹⁵

Weighed against Griffen's description of agency, the danger becomes even clearer.¹⁶ According to Griffin:¹⁷

To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own course through life – that is, not be dominated or controlled by someone or something else (autonomy). And one's choice must also be real; one must (second) have at least a certain minimum education and information and the chance to learn what others think. But having chosen one's course one must then (third) be able to follow it; that is, one must have at least the minimum material provision of resources and capabilities that it takes. And none of that is any good if someone then blocks one; so (fourth) others must also not stop one from pursuing what one sees as a good life (liberty).

This conceptualisation of agency recognises that individual or group autonomy is not self-executing, but is contingent upon the existence of other objective factors. However, it should be kept in mind that, merely because victims of human rights abuses may sometimes be docile to their conditions does not mean that they cannot ever be

13 See S Mahmood 'Feminist theory, embodiment, and the docile agent: Some reflections on the Egyptian Islamic revival' (2001) 16 *Cultural Anthropology* 205.

14 PT Zeleza 'The struggle for human rights in Africa' (2007) 41 *Canadian Journal of African Studies* 494.

15 As above.

16 See J Griffin 'First steps in an account of human rights' (2001) 9 *European Journal of Philosophy* 311.

17 As above. See also J Griffin 'Discrepancies between the best philosophical account of human rights and the international law of human rights' (2001) 101 *Proceedings of the Aristotelian Society* 4; D Jacobson & GB Ruffer 'Courts across borders: The implications of judicial agency for human rights and democracy' (2003) 25 *Human Rights Quarterly* 75, where agency is defined as implying 'the ability of the individual to act as an "initiator" and "self-reliant" actor, and to be an active participant in determining his or her life, including the determination of social, political, cultural, ethnic, religious, and economic ends'.

roused to challenge or overcome them.¹⁸ Instead, it may well be that they simply lack the additional resources and other circumstances upon which the effective exercise of their agency may depend.

3 Nigeria, human rights and agency of the poor

The discussions in the previous section are especially relevant to Nigeria where, despite significant strides in poverty reduction recently recorded, poverty is still a widely-prevalent phenomenon notwithstanding the country's wealth in natural resources.¹⁹ Poverty is the enemy of human rights, in part, because of its connection to the depletion of the people's agency to act towards the protection of their rights. As is often stressed, poverty has both a materialistic aspect dealing with socio-economic goods and services, as well as a capability dimension that is related to access to justice and the exercise of human rights.²⁰ What is not in doubt is that when poverty prevails, especially in its material form, it tends to denude to a great extent the human 'agency' to seek redress (whether in the courts or through other means). For this and other connected reasons, the poor too often constitute the most marginalised segment of all too many legal systems.

In the Nigerian and other contexts, therefore, where the human rights abuses carried out against the poor are all too often unlitigated and unredressed, it may not be because of a failure of the autonomous exercise of agency on the part of the victims, but rather due to an absence of certain objective factors. The following questions could be asked in this regard: To what extent has the jurisprudence of the Nigerian appellate courts either facilitated or hindered the efforts of the poor to ameliorate their own social conditions? Further, to what extent has that jurisprudence provided or failed to provide a real basis for, or complement to, the more effective social mobilisation of the poor, thus advancing their capacity for an effective human rights struggle? Even where the poor accept human rights atrocities committed against them on account of the disempowering conditions that they have been forced to endure, could the courts be helpful in

¹⁸ Mahmood (n 12 above) 15.

¹⁹ A Oluwarotimi 'Poverty: World Bank rates Nigeria among extremely poor countries' *Leadership* 3 April 2014 <http://leadership.ng/news/362263/poverty-world-bank-rates-nigeria-among-extremely-poor-countries>; S Oshewolo 'Galloping poverty in Nigeria: An appraisal of government interventionist policies' (2010) 12 *Journal of Sustainable Development in Africa* 264-274; JS Omotola 'Combating poverty for sustainable human development in Nigeria: The continuing struggle' (2008) 12 *Journal of Poverty* 496; O Ogunleye 'Towards sustainable poverty alleviation in Nigeria' (2010) 4 *African Research Review* 294; C Ucha 'Poverty in Nigeria: Some dimensions and contributing factors' (2010) 1 *Global Majority E-Journal* 46.

²⁰ See FD Costa 'Poverty and human rights: From rhetoric to legal obligations: A critical account of conceptual frameworks' (2008) 9 *Sur - International Journal on Human Rights* 83.

enhancing their agency in resisting those conditions and vindicating their human rights in any significant manner?

Before addressing these questions, we will first examine, albeit necessarily in outline, the objective factors that tend to shape the ability of any group (including the poor) to effectively exercise their agency in human rights litigation and other struggles. Our analysis proceeds from an initial understanding that these factors discourage the poor from coming forward with their human rights claims. The next section, therefore, builds upon the intimate connection that we think exists between these factors and the paucity of human rights cases that are litigated in the courts, generally, and those involving the poor, in particular.

3.1 Where are all the poor litigants?

It is beyond debate that human rights violations in Nigeria are endemic.²¹ The period covered in this study is not exempt from this trend and, almost needless to state, most of these violations are perpetrated against the poor and the excluded. Yet, one would also notice that the cases that are examined in the article appear relatively sparse. This would seem to contradict the claim that human rights violations are institutionalised, endemic and widespread. The question implied by this situation, therefore, is the following: If, indeed, a host of incidences of serious human rights abuses against the poor do occur in Nigeria, why are these claims not reflected in the number of cases being taken to the courts, and specifically the appellate courts?

This is a very legitimate concern. Nonetheless, it is one that could very easily be accounted for. First, there is no inherent contradiction in the fact that there are fewer cases filed in the courts relative to the degree of human rights violations alleged. Second, the fact that fewer cases are filed, especially by the poor, may simply indicate that the victims were prevented by factors outside their control to pursue their grievances (in other words, that their agency is restricted) than for other considerations. Our contention is that, if there are not many poor litigants placing human rights claims before the courts, it could be because of the factors discussed in this section.

In fact, some may even argue plausibly that expecting a person to be poor and at the same time to possess the agency necessary to pursue legal grievances in a context such as Nigeria's is too optimistic. This could be for a variety of reasons, some of which are explained below. In the first place, the cost of litigation in Nigeria (as in many other similarly-situated legal jurisdictions) is very high.²² The Nigerian courts act only on the basis of cases that are actually presented before

21 See US State Department *Country Reports: Nigeria* <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm> (accessed 24 June 2015).

22 In the case of *General Oil Ltd v Oduntan* [1990] 7 NWLR (Pt 63) 433, Justice Niki Tobi, then of the Nigerian Court of Appeal, stated that '[i]t is common knowledge that litigation is a very expensive thing in this country, and the present economic

them. Nigerian judges cannot take any proactive steps to initiate litigation, even if they notice wrongs being committed against citizens. For most would-be litigants in Nigeria, taking the initial steps towards challenging a human rights abuse is not done lightly. It requires a careful analysis and balancing of the costs against the anticipated benefits. Even where it is possible to strike the balance between costs and benefits, the fact of a deprived economic condition often causes the costs to weigh more significantly on the prospective poor litigant than whatever benefits may be anticipated.

What is more, even if poor litigants expect to win their cases at the courts of first instance, they have to consider the cost of defending those victories on appeal in the event that the relevant adversarial party decides to exhaust his or her rights to appeal, and the more cases move up the jurisdictional ladder, the more likely it is that the cost of maintaining lawyers and travelling to and from venues will escalate steeply.²³ Therefore, there is a limited incentive for deprived citizens to effectively challenge human rights violations through judicial means, especially when it is recognised that, even if victory is achieved in court, there is no guarantee that the judgment will be implemented by the government.²⁴ Thus, when this scenario is considered, taking appeals to the appellate courts in Nigeria seems, therefore, to be more or less an elite entitlement.

To be clear, the reference to the cost of litigation here is to the resources that litigants expend in moving their cases from inception until they have received the full vindication that they requested from the courts. It includes official fees paid to the bureaucracy to commence and maintain the suit, legal fees paid to lawyers, transportation and other incidental costs and, if they succeed in their claims, the cost of enforcing the court judgment.

In Nigeria, there is widespread acknowledgment that these costs could impede the ability of the poor and not so poor to exercise their agency to seek legal redress for human rights violations committed against them. For instance, in *General Oil Limited v Oduntan*,²⁵ the Court of Appeal, speaking through Justice Niki Tobi (as he then was), stated that '[i]t is common knowledge that litigation is a very expensive thing in this country, and the present economic situation has made the position worse. Filing fees have over the years risen. So have fees for counsel.' Brems and Adekoya echo this assertion when they state:²⁶

situation has made the position worse. Filing fees have over the years risen. So have fees for counsel.'

23 See NS Okogbule 'Access to justice and human rights protection in Nigeria: Problems and prospects' (2005) 2 *Sur - International Journal on Human Rights* 101.

24 See *The Nation* 27 October 2014 <http://thenationonline.net/new/addressing-the-rate-of-disobedience-to-court-orders/> (accessed 24 June 2015).

25 [1990] 7 NWLR (Pt 63) 433.

26 E Brems & CO Adekoya 'Human rights enforcement by people living in poverty: Access to justice in Nigeria' (2010) 52 *Journal of African Law* 264.

Protecting or enforcing one's right in a court of law in Nigeria can be very expensive. Litigants have to bear several costs, such as filing fees, which in some cases depend on the plaintiff's claim. An additional cost that should not be underestimated is that of transportation to and from court, for each sitting. For people living in poverty, access to justice can indeed be hindered by the impossibility of physically reaching the court building. The inability of people living in poverty to bear any expense for transport often forces people to walk to the court.

As significantly, an empirical study on the challenge of access to courts in Nigeria found that 75,3 per cent of all the lawyers surveyed identified a 'lack of funds' as a very important constraint, while 13,6 per cent of these respondents viewed it as an important constraint.²⁷ In the specific field of oil mining-related litigation, the author of this report made a significant discovery in terms of its relevance to the theme of this article. He found that there was more reluctance to pursue this kind of litigation because of 'the financial imbalance between the affluent oil companies, on the one hand, and the poor village communities, on the other hand'.²⁸ This imbalance ensured that oil companies clearly had more resources that they could spend on the best lawyers and expert witnesses in a way that poor individual litigants and local communities could not.²⁹

3.2 Appellate courts as Jacks of all trades, long delays, and restricted access for the poor

The truism that 'Jacks of all trades tend to end up as masters of none' may apply to courts as well. The point being made here is developed in step-by-step fashion. First, appeals to the Supreme Court and Court of Appeal of Nigeria often take several years to be concluded, and the longer it takes to pursue the appeal to its conclusion, the more the litigant pays by way of time and resources. Physical as well as financial fatigue and exhaustion occur in such instances, which are prevalent. Thus, secondly, this further discourages litigants from considering litigation (even human rights litigation) as a viable option for seeking redress. Thirdly, there are possibly two major reasons why it takes inordinately long to conclude appeals at the Nigerian Supreme Court in particular. For one, the Court is not restricted in its appellate jurisdiction to purely constitutional questions in the fashion of contemporary constitutional courts,³⁰ for example. What is more, the Nigerian Supreme Court does not control its docket and, as such, does not have the same control over the kinds of cases that it receives

27 See JG Frynas 'Problems of access to courts in Nigeria: Results of a survey of legal practitioners' (2001) 10 *Social and Legal Studies* 405.

28 Frynas (n 27 above) 406.

29 As above.

30 See A Harding & P Leyland *Constitutional courts: A comparative study* (2009); S Gardbaum 'The new commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 717.

for adjudication as is the case with similar courts in other jurisdictions.³¹

Expanding on the first reason for delays at the Nigerian Supreme Court, it must be noted that, in addition to the jurisdiction it possesses as the final court in all constitutional matters, it is also the final arbiter in almost all other forms of litigation in the country.³² The only exception is that, aside from the fact that the Supreme Court adjudicates all presidential and governorship election petitions, the Court of Appeal is the final appellate court for all other election challenges.³³ The fact that the jurisdiction of the Supreme Court, for instance, presents opportunities to all litigants in this manner, therefore, creates a situation in which its docket is perennially cluttered by a variety of cases, ranging from the serious to the inconsequential. Human rights cases, which ordinarily should be accorded preference because of their nature and constitutional importance, suffer long delays alongside routine appeals.³⁴ The burdensome nature of the Court's case load, therefore, negatively affects the quantity and quality of its decisions.

Even so, the Court of Appeal presents the same challenges to litigants as does the Supreme Court, and this has been so notwithstanding the fact that the former has always been far more decentralised than the latter. It suffers from a clogged docket and the delays in the dispensation of justice that also afflicts the highest court. This aside, the poor also suffer the same manner of deprivation in the lower courts. As such, it could be said that financial circumstances are critical to whether or not an ordinary Nigerian would pursue a case in court, irrespective of the court's status to redress a perceived legal wrong.

Furthermore, in calculating the costs that could be incurred and benefits that could accrue from litigation, account must also be taken of the fact that the enforcement of judicial decisions in Nigeria is all too often inconsistent. In some cases, the government has not honoured court verdicts that it disagrees with.³⁵

31 Contrast the US and Canada.

32 Sec 233 Constitution of the Federal Republic of Nigeria 1999.

33 Sec 246(1)(b) Constitution of the Federal Republic of Nigeria.

34 The former Chief Justice of Nigeria, Justice Dahiru Musdapher, who was appointed after the retirement of Justice Ignatius Katsina-Alu, at his confirmation hearing before the Nigerian Senate proposed that the Constitution be amended to limit the number of appeals coming before the Supreme Court. See I Shaibu 'Diversion of funds: CJN blasts governors' *Vanguard* 22 September 2011 <http://www.vanguardngr.com/2011/09/diversion-of-funds-cjn-blasts-govs/> (accessed 26 June 2015).

35 JA Dada 'Judicial remedies for human rights violations in Nigeria: A critical appraisal' (2013) 10 *Journal of Law, Policy and Globalization* 11.

3.3 Narrow standing rules that impede access

Apart from the cost of litigation and its collateral consequences, the agency of the poor could also be impaired by a narrow judicial view of who is legally qualified to present a particular kind of claim of human rights violations. In many jurisdictions, the question of whether or not the poor are able to secure remedies for the human rights violations that have been meted out to them often involves a contest over the doctrine of standing or *locus standi*.³⁶ Until recently, opportunities for poor Nigerians to exercise their agency and access the Nigerian human rights justice system, either by themselves, through their representatives or through those who purport to be acting in the public interest, were notoriously and actively constricted in too tight a fashion by the Nigerian courts, including the Court of Appeal and the Supreme Court.

As Ogowewo correctly noted (at the relevant time):³⁷

The Nigerian standing rule has a very narrow concept of personal standing (one that focuses on private legal rights) and no concept of representative standing. Hence, persons with a real interest in an issue of local or national importance invariably will be denied standing; even if what is assailed involves obvious illegality.

Despite occasional flashes of liberalism over the years, the courts have been mostly consistent in holding that the breach of a public right, constitutional or statutory provision, without any infringement of personal legal rights, does not confer standing on an individual.³⁸

The Supreme Court of Nigeria reinforced this position in the case of *Attorney-General, Adamawa State v Attorney-General, Federation*³⁹ when it held that '[i]t is not enough for a plaintiff to merely state that an Act [law passed by the federal legislature] is illegal or unconstitutional. The plaintiff must also show how his civil rights and obligations are breached or threatened.' This rather unfortunate rule has often created injustice in glaring cases, resulting in the insulation of all too many unconstitutional acts from being challenged by victims who belong to a larger social constituency or other public-spirited individuals.

36 Defined first as 'entitlement to seek judicial remedy apart from questions of the substantive merits and the legal capacity of the plaintiff', and then more narrowly as 'the interest of the plaintiff in the matter to be decided'. See TA Cromwell *Locus standi: A commentary on the legal standing in Canada* (1986) 7.

37 TI Ogowewo 'Wrecking the law: How article III of the Constitution of the United States led to the discovery of the standing to sue in Nigeria' (2000) 26 *Brooklyn Journal of International Law* 529.

38 See, eg, Fatayi-Williams's *dictum* in *Adesanya v President of Nigeria* (1981) 2 NCLR 359. See also *Fawehinmi v Akilu & Togun: In re Oduneye* [1987] 4 NWLR (Pt 67) 797.

39 [2005] 18 NWLR (Pt 958) 581.

3.4 Dichotomising 'main' and 'accessory' human rights claims

Finally, on the list of factors that could shape (for good or ill) the exercise of the agency of the poor in human rights cases is the curious main/accessory binary that the Supreme Court has created in such litigation. This doctrine simply holds that, whoever has a human rights complaint and wishes to present it to a court under the generally more beneficial Fundamental Rights Provisions⁴⁰ of the Constitution, must have that human rights component as the main claim and not as an accessory to a different claim that may not be of a human rights nature. This is derived from the decision of the Supreme Court in *Tukur v Government of Taraba State*.⁴¹ The complaint in this case was that the aggrieved had been deposed as the Emir of Muri in Taraba State without a hearing contrary to the constitutional requirement of a fair hearing. However, in its judgment the Court held that the issue of fair hearing was only collateral to his claim and was not the major question raised therein. It concluded, therefore, that the case ought to have been commenced by a writ of summons and not by an application to enforce a fundamental human right.

This decision has been criticised in the literature for setting a bad, gratuitous precedent.⁴² The reasoning was also described as 'dubious, irrelevant ... impossible to make and leads to a miscarriage of justice'.⁴³ Notwithstanding this criticism, the decision has produced a long line of precedents that can only increase the burden of litigation, especially for the poor who may not have the resources to multiply law suits into as many distinct claims as could be required to redress a grievance arising out of a single legal relationship. The following are some of the instances where the application of this doctrine overshadowed the very redress that victims of human rights abuses were seeking before the courts.

In *Nigeria Social Insurance Trust Fund Management Board v Adebiji*,⁴⁴ the question was whether a claimant who essentially claimed to be restored to a position from which he claimed to have been removed without a fair hearing could legitimately present the case as a human rights complaint. The Court of Appeal held that he could not do so. It concluded that the main claim hinged on the wrongful termination of employment, which is predicated on contract and not the violation of

40 These provisions are beneficial to the extent that they are justiciable and thus contrast very sharply with non-fundamental rights provisions in the Constitution, enshrined as non-justiciable Fundamental Objectives and Directive Principles of State Policy in Part Two of the Constitution. See, eg, S Ibe 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 225; D Olowu 'Human rights and the avoidance of domestic implementation: The phenomenon of non-justiciable constitutional guarantees' (2006) 69 *Saskatchewan Law Review* 39.

41 [1997] 6 NWLR (Pt 510) 549.

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

43 Nwauche (n 42 above) 67.

44 [1999] 13 NWLR (Pt 633) 16.

a fundamental human right. The same was the case in *Sea Trucks (Nigeria) Ltd v Payne*,⁴⁵ where the applicant had been removed from his post because of his insistence on joining a particular trade union as of right. Apparently, his employers felt otherwise. As in the earlier case, the Court concluded that it bordered on wrongful termination of employment more suited for commencement by writ of summons and not a fundamental human rights application.

Further, in the case of *Ibrahim Abdulhamid v Talal Akar & Another*,⁴⁶ the main question was whether an allegation of harassment, intimidation and seizure of personal property could ground a fundamental human rights suit. The Supreme Court concluded that a common law claim could properly be joined to an application to enforce infringed fundamental human rights, but that this case was different because the common law claim was secondary or ancillary to the claimed breach of human rights. The Supreme Court also held in *University of Ilorin v Oluwadare*⁴⁷ that a claim alleging the wrongful expulsion of a student from a university could not be commenced as a human rights suit.

A similar decision had been reached in the earlier case of *Sokoto Local Government & Others v Tsoho Amale*.⁴⁸ The judgment of the Court of Appeal in that case was that, where the dispute was over title to land, it could not validly be presented as a human rights enforcement claim. Granted that this factor is as much a hindrance to the poor and the not-so-poor in pursuing human rights cases, there is, however, the likelihood that the poor are more vulnerable to its damaging consequences than would be the case for the more financially well-to-do.

4 Ball in their courts: What have the appellate courts done and what can they do?

While the discussion in the last section may not exhaust the factors that could shape the ability of the poor to exercise their agency in search of judicial redress for violations of their human rights, it is in light of the significant challenges identified in that discussion that one must assess judicial performance in Nigeria in the area of the expansion or restriction of the poor's agency in the area of human rights litigation.

The factors that are considered here include the administrative costs of litigation (in terms of time and resources); the existence of constitutional provisions which permit the excessive cluttering of the dockets of the appellate courts; the interpretation that the courts offer

45 [1995] 6 NWLR (Pt 607) 514.

46 [2006] 13 NWLR (Pt 996) 127.

47 [2006] 14 NWLR (Pt 1000) 751.

48 [2001] 8 NWLR (Pt 714) 224.

regarding 'standing' requirements; and the attitude of the courts to the principal/accessory claim dichotomy.

The question that then arises is what the Nigerian courts have done, and what they could do, in relation to each of these categories of factors, to ensure that they tend to enhance rather than inhibit the exercise by the poor of their agency in human rights litigation.

Although the question of costs in the administration of the justice system in Nigeria is, in general, not really of the making of the courts, it could still be argued that the courts are well placed to take some action to block some of the avenues through which needless costs are incurred in litigation. One such area is in relation to the extended time that litigation and appeals last. While the Nigerian Constitution⁴⁹ and Rules for enforcing human rights claims in Nigerian courts are geared towards the expeditious disposal of such claims, in actual practice there is a departure from this expectation. And even though bureaucratic and administrative bottlenecks are contributing factors in this regard, the laziness of some judges or their failure to take control of their courts is also explanatory in this regard.

These two issues require further discussion. While important efforts have been made in the last few years to reform the judiciary, it is common knowledge that some judges in Nigeria apply themselves only minimally to their duties.⁵⁰ The lack of effective judicial oversight of their courtrooms and the challenges of ensuring proper accountability in the judicial system (despite some ameliorative efforts) further make this a significant problem.⁵¹ According to Okogbule, delays in the dispensation of human rights justice in Nigeria could arise from 'lawyers writing letters of adjournment of cases, inability of judges and magistrates to deliver judgments on time, failure of the police or prison authorities to produce accused persons in court for trial ...'⁵²

Some of these problems can fairly easily be redressed by a determined judge. A letter from a lawyer asking that a case be adjourned is hardly a superior dictate to the relevant judge. The judge must be satisfied that such a letter was written in good faith and not merely intended to stall or obstruct progress in a case. But among the strongest proof of the weakness of all too many judges in Nigeria is their easy susceptibility to the bullying tactics of unscrupulous lawyers.⁵³ These lawyers, who in most cases belong to the profession's top echelon, often intimidate judges by their sheer

49 Sec 36(1) of the 1999 Constitution provides for a fair hearing within a reasonable time in all cases involving a determination of civil rights and obligations. For a judicial interpretation of 'reasonable time', see the case of *Gozie Okeke v The State* [2003] 15 NWLR (Pt 842) 25.

50 See 'CJN threatens to sack lazy judges' *The Punch* 20 May 2013, <http://www.punchng.com/news/cjn-threatens-to-sack-lazy-judges/> (accessed 31 July 2014).

51 As above.

52 See Okogbule (n 23 above) 99.

53 As above.

presence.⁵⁴ On some occasions, however, the courts have in fact indicated quite clearly their unwillingness to countenance frivolous applications for adjournment. It happened once in the case of *Shell v Udi*,⁵⁵ where a claim for compensation was launched against an oil company for destroying fish ponds and economic trees while engaged in oil exploration activities. The Supreme Court frowned at a letter seeking adjournment filed by the oil company's lawyer for no other reason than that the lawyer had to attend a law conference. The trial judge read the application for adjournment on such a flimsy reason as an 'example of wilful refusal or neglect to comply with the Rules of Court',⁵⁶ refused to grant the adjournment and ruled in favour of the plaintiff. The Court of Appeal affirmed the decision, holding that 'the grant of an adjournment in a case is a matter entirely within the discretionary jurisdiction of the court which the court should exercise in accordance with the particular facts and circumstances of the case'.

The problem of the failure of all too many judges to deliver their judgments in a timely manner can also fairly easily be solved by judges themselves. There is even a constitutional provision that regulates the length of time needed to write up decisions after hearings have been completed. The Nigerian Constitution of 1999 provides:⁵⁷

Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.

If judges cannot abide by this precise constitutional requirement, that should be a cause for concern. It is in fact the failure to put this provision to as robust a use as possible that makes it seem as if there is nothing judges can do about the problem of undue delays in court proceedings or that it is a problem that is outside their control.

Just as important, certain problems that hinder the ability of the poor to robustly exercise their agency to seek legal redress for human rights violations could even more easily be resolved by the courts than the issues of costs and delays. For one, a much more liberal interpretation of the standing doctrine could be helpful in this regard. This issue is examined in some detail in the paragraphs that follow, before a much briefer consideration of the ways in which the Nigerian appellate courts could also boost the agency of the poor and their participation in the human rights process by reconsidering the dichotomy that they themselves created between so-called main and accessory human rights claims.

54 As above.

55 [1996] 6 NWLR (Pt 455) 483.

56 JG Fynas 'Legal change in Africa: Evidence from oil-related litigation in Nigeria' (1999) 43 *Journal of African Law* 146.

57 Sec 294(1) Constitution of the Federal Republic of Nigeria, 1999.

4.1 Liberalising Nigeria's *locus standi* rules

In examining how judicial attitudes to the *locus standi* doctrine could hinder the exercise of the agency of the poor in human rights litigation, the analysis will be limited to mostly two strands of cases. The first strand consists of cases filed against the executive branch of government, while the second strand consists of cases filed against oil companies by some indigenes of Nigeria's oil-producing communities. The concentration on these two strands of cases here is justified by the fact that it is in relation to such cases that the *locus standi* defence is utilised most robustly by the relevant defendants. We will also discuss changes brought about to the standing doctrine by the Fundamental Rights (Enforcement Procedure) Rules promulgated in 2009.

The law relating to *locus standi* is one of the most contentious aspects of Nigeria's body of legal norms. While the courts sometimes view it as 'troubling', scholars see the problem it creates as a 'perennial' one.⁵⁸ The main Nigerian case on the subject remains *Adesanya v President of the Federal Republic of Nigeria*,⁵⁹ where the Supreme Court held that 'standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of'.⁶⁰ Disturbingly, in the end, the Court came to a conclusion in this case which detracted from the reasoning it formulated.⁶¹

This judgment notwithstanding, the Supreme Court showed a more favourable tone regarding standing in the case of *Adediran v Interland Transport*⁶² regarding whether a private person could sue for a public wrong. In that case, residents of a housing estate formed a housing association which filed a suit against Interland Transport, a transport firm with offices nearby. The facts were that Interland Transport used its premises as a workshop and tractor-trailer park. The plaintiffs complained about the traffic of the trailers, which blocked the access roads to the estate, knocked down electric poles, damaged roads and generated noise.⁶³ Although the Court found that Interland Transport had committed a private rather than public nuisance, it still departed from its past tradition of upholding the common law position that only the Attorney-General could petition to protect a public right. In the words of Karibi-Whyte JSC (as he then was):⁶⁴

58 T Ogowewo 'The problem of standing to sue in Nigeria' (1995) 39 *Journal of African Law* 1.

59 [1981] 1 All NLR 1.

60 *Adesanya* (n 59 above) 39.

61 Ogowewo (n 58 above) 7; see also LA Atsegbua 'Locus standi: Beyond section 6(6)(b) of the 1979 Constitution of Nigeria: A comparative study' (1990) 2 *African Journal of International and Comparative Law* 314.

62 [1991] 9 NWLR (Pt 214) 155.

63 See Frynas (n 56 above) 134.

64 *Adediran* (n 62 above) 180.

I think the high constitutional policy involved in section 6(6)(b) [of the 1979 Constitution] is the removal of the obstacles erected by Common Law requirements against individuals bringing actions before the court against the government and its institutions, and the preconditions of the requirement of the consent of the Attorney-General. This becomes the more important when the provisions are procedural encrustments designed to protect peculiar social or political institutions.

Although, as a result of this decision, private persons no longer required the authorisation of the Attorney-General to commence litigation intended to protect a public right, it is as yet still unclear whether the decision is consistent with the 'civil rights' test laid down in *Adesanya*. Ogowewo is in fact of the view that the decision in *Interland* signifies that the courts now proceed only on a case-by-case basis, intuitively deciding who should have standing and who should not.⁶⁵

In terms of how the dominant restrictive attitude to the doctrine of *locus standi* impacts the decisions of the Nigerian courts in substantive cases, it appears that the courts tend to be less liberal in applying the standing rules in cases where the government or oil companies are defendants in the relevant suits. However, in fairness to the Nigerian courts, they have on many occasions held oil companies responsible and legally liable where oil communities had sued for compensation regarding the harmful impact of oil industry activities.⁶⁶ According to Frynas, in the 1990s various Nigerian oil communities won high-profile cases against oil companies. This includes cases such as *Shell v Farah*,⁶⁷ where the relevant community won about \$210 000 in compensation (according to the then official exchange rate).⁶⁸ He went further to state that this line of cases⁶⁹ could indicate a changing judicial posture in the Nigerian context.⁷⁰ At the same time, there are a range of cases that suggest either 'government interference'⁷¹ and/or judicial complicity in constricting the space for this kind of litigation through a narrower view of the standing requirement.

An important case with regard to both possible government interference and judicial complicity is that of *Oronto Douglas v Shell Petroleum Development Company Limited*,⁷² where the plaintiff alleged that the mandatory provisions of the Nigerian Environmental Impact

65 Ogowewo (n 58 above) 17.

66 See Frynas (n 56 above) 142.

67 (1995) 3 NWLR (Pt 382) 148.

68 Frynas (n 56 above) 121.

69 *Shell Petroleum Development Company Ltd v Councillor F Farah & 7 Others* [1995] 3 NWLR (Pt 382) 148; *Edise & Others v William International Limited* [1986] 11 CA 187; *Elf (Nigeria) Limited v Sillo* [1994] 6 NWLR (Pt 350) 258; *Shell Petroleum Development Company Ltd v Tiebo* [1996] 4 NWLR (Pt 445) 657.

70 Frynas (n 56 above) 52; see also JG Frynas *Oil in Nigeria: Conflict and litigation between oil companies and village communities* (2000).

71 R Temitope 'Judicial recognition and enforcement of the right to environment: Differing perspectives from Nigeria and India' (2010) 3 *NUJS Law Review* 438.

72 Unreported Suit FHC/2CS/573.

Assessment Act had not been complied with in establishing the liquefied natural gas project that was at the time about to be commissioned. As plaintiff, Mr Douglas sought declaratory and injunctive orders that the defendants could not lawfully commission, carry out or operate their project at Bonny without complying strictly with the provisions of the Act, which mandated that for such new projects, an environmental impact assessment had to be carried out. The plaintiff also sought to restrain the defendants from carrying out or commissioning their project until an environmental impact assessment had been carried out with public participation by those to be affected. The trial court struck out the suit on the ground, *inter alia*, that the plaintiff had no standing to institute it. The court reasoned that in the absence of the plaintiff showing that he had suffered a personal loss by the failure to conduct the environmental impact assessment, his suit could not be sustained.

Interestingly, the verdict in this case must be mixed for, as it turned out, the Court of Appeal reversed the lower court's judgment and ordered a new trial. However, and quite disappointingly, the new trial which had been ordered could not take place because apparently there was nothing left to try, as the project in question had been commissioned while the case was being heard at the lower court. It is nevertheless clear that the Court of Appeal in this case seemed to prefer a more liberal reading of the standing requirement than the lower court, one that was in effect more pro-poor and anti-oil company.

The kind of strict construction of standing rules that frustrated the pro-poor litigation that Mr Douglas had embarked on in the former case has long been known to make human rights litigation difficult (although not impossible) in Nigeria. This situation has had significant negative consequences for the poor who tend to lack the resources to robustly exercise and give effect to their agency, and who could not (largely because of the restrictive nature of the standing rules) count on public-spirited individuals or groups (like Mr Douglas) to come to their aid. These strict standing rules tended to discourage what is commonly known as public interest litigation.⁷³

This position has, however, changed significantly since 1 December 2009, largely in favour of the poor – at least on paper. On that date, the Fundamental Rights Enforcement Procedure Rules of 2009 (FREPR 2009) were effectively issued by the then Chief Justice of Nigeria to

73 SL Cummings & DL Rhode 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 603; JK Krishnan 'Public interest litigation in comparative context' (2001-2002) 20 *Buffalo Public Interest Law Journal* 19; LG Trubek 'Crossing boundaries: Legal education and the challenges of the "new public interest law"' (2005) 2005 *Wisconsin Law Review* 455; T Abayomi 'Continuities and changes in the development of civil liberties litigation in Nigeria' (1990-1991) 22 *University of Toledo Law Review* 1035; R Atuguba 'Human rights and the limits of public interest law: Ghana's reaction to a messy world phenomenon' (2008) 13 *UCLA Journal of International Law and Foreign Affairs* 97.

replace the older 1979 version of that document. On the conceptual level, the *raison d'être* of the FREPR 2009 is, as Dakas has recently put it, 'enhanced access to justice' in a defined set of fundamental human rights cases 'for all ... especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented' (categories which all too often coincide in respect of poor Nigerians).⁷⁴ The Rules even go so far as to enjoin courts of law to encourage public interest litigation; to seek to greatly liberalise the formerly narrow scope of *locus standi* or standing requirements in Nigeria, perhaps virtually to the point of allowing the *actio popularis* (but see Order II Rule 1); and to encourage 'expansive and purposeful interpretation in human rights litigation'.⁷⁵ What is more, Order II Rule 2 of the FREPR 2009 dispenses with the requirement under the previous 1979 Rules that 'leave' of court be obtained first before a human rights matter is commenced under the Rules.⁷⁶ This is to help fast-track human rights cases through the courts. Another improvement introduced by the FREPR 2009 that aims to help this kind of fast-tracking is the charge that the Rules place on the courts to ensure that all documentation in human rights cases is frontloaded, and the related insistence in paragraph 3(g) of the Preamble, that priority in time allocation is given to human rights cases in 'deserving' circumstances.⁷⁷ Lastly, the Preamble of the FREPR 2009 also voids the applicability of any statutes of limitation to human rights cases.⁷⁸

All these features of the new FREPR 2009, in our own view, expand the opportunities for poor Nigerians to exercise their agency in human rights cases.⁷⁹ This is, therefore, a highly commendable development, one that clearly lends itself to the preliminary conclusion that the Nigerian Supreme Court has in some respects exhibited a pro-poor orientation. How these Rules are to be applied in practice is yet to be tested at the level of the superior courts. However, the government is already expressing its anxiety regarding some specific portions of the new Rules. In one particular case, the government showed displeasure that the new Rules were ever passed, accusing the Chief Justice of Nigeria of exceeding his powers in doing

74 See DCJ Dakas 'Human rights litigation in Nigeria under the Fundamental Rights (Enforcement Procedure) Rules: Novelties and perplexities' in E Azinge & CJ Dakas (eds) *Judicial reform and transformation in Nigeria* (2012) 334.

75 Dakas (n 74 above) 9-11. See also the Preamble, para 3(e) of the 2009 Rules.

76 Dakas 13.

77 Dakas 13-14. See also A Sanni 'Fundamental Rights Enforcement Procedure Rules, 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform' (2011) 11 *African Human Rights Law Journal* 511; E Nwauche 'The Nigerian Fundamental Rights (Enforcement Procedure) Rules 2009: A fitting response to problems in the enforcement of human rights in Nigeria' (2010) 10 *African Human Rights Law Journal* 502.

78 Dakas (n 74 above) 11.

79 See OC Okafor 'Poverty, agency and struggle in the human rights praxis of the Supreme Court of Nigeria (1990-2010): A preliminary assessment' in E Azinge & DCJ Dakas (eds) *Judicial reform and transformation in Nigeria* (2012) 311.

so.⁸⁰ The real impact of the new Rules will become apparent in the coming years as cases in which the Rules are used find their way to the appellate courts.

What these cases and literature show is that there is much uncertainty regarding the interpretation and application of the standing doctrine in the Nigerian judiciary, as the courts blow hot and cold from time to time. In fact, because oil is very central to the Nigerian economy, the courts initially started from the position of tending to exercise their discretion in favour of the oil corporations.⁸¹ It is not entirely clear how deliberate this culture of doctrinal ambiguity is that makes it difficult to pin the courts down to a clear jurisprudential standard that could aid the prediction of future outcomes. When cases are approached in an unstructured case-by-case manner, it only promotes the shifting rationalisation of court decisions and creates room for the legitimisation of even the most blatant human rights violations. It certainly provides a handy refuge for judges who would want to align their decisions with either the policies of the government of the day and/or the interests of global/local oil-producing capitalism, all at the expense of the human rights of the poor (as is impliedly predicted by Baxi's TREMF theory). Over the years, the courts have decided many of the cases brought to them in ways that suggest that they are reluctant to render judgments that have the potential to disrupt the flow of oil to the international market. This, in the end, is not a wise strategy for, as Amechi argues:⁸²

When the poor cannot access the machinery of justice in order to defend themselves against the polluting or degrading activities of individuals, multinational corporations or state-sponsored companies, it constitutes a disincentive for them to either take action against persons whose actions degrade their property values, or invest in natural resource management.

4.2 Abolishing the main/accessory claims dichotomy

What is true of the impact of *locus standi* requirements on anti-government and oil production-related human rights litigation in Nigeria also holds true, at least substantially, in regard to the effect of the main/accessory binary distinction on all kinds of human rights claims in Nigerian courts. While the reason(s) for the judicial invention of this doctrine are not widely known, it has nevertheless achieved the dubious distinction of placing an undue and overly-technical burden on those who would challenge the violation of their human rights in Nigerian courts.

80 *Registered Trustees of Socio-Economic Rights and Accountability Project & Others v Attorney-General of the Federation & Another* Unreported Suit FHC/ABJ/640/10.

81 Frynas (n 56 above).

82 EP Amechi 'Poverty, socio-political factors and degradation of the environment in sub-Saharan Africa: The need for a holistic approach to the protection of the environment and realisation of the right to environment' (2009) 5 *Law, Environment and Development Journal* 116.

A cursory look at some of the cases that were discussed earlier in the context of this technical dichotomy shows that the major victims of the rule are workers challenging the wrongful termination of their employment (for instance, the Sea Trucks and Nigeria Social Insurance Trust Fund cases), and students litigating their unlawful suspension from school (for example, the Oluwadare case). In the Nigerian context, these two categories of citizens often find themselves in opposition to either the interests of global/local capitalism and/or the policies of the government. Nigerian workers and their labour movements have for long been in the vanguard of defiance to what they often see as either flawed government policies (such as excessive privatisation and commercialisation) and/or grossly unfair labour practices (excessive staff rationalisations and casualisation).⁸³ This often brings them into confrontation with global/local capitalism and the government alike, with them tending to be worsted in the encounter, à la the Baxian TREMF theory.⁸⁴ For their own part, Nigerian student movements have often protested the reduction of public expenditure on education, an element of the privatisation and commercialisation fundamentalism that has hitherto reigned almost everywhere, and which was all too often stated as a so-called conditionality for economic assistance from the Bretton Woods institutions.⁸⁵

Needless to state, the main/ancillary claim dichotomy that the Supreme Court created and which the Court of Appeal has equally embraced, as the latter must under the doctrine of precedent, has clearly undermined the agency of the generally-poor Nigerian workers and student groups to pursue the vindication of their human rights through litigation. It should therefore be abolished. And, since it was the appellate courts that created and explicated this binary, it is also to them that we must turn to abolish it. Fortunately, this is well within their power.

5 Conclusion

The major question investigated in this article is the degree to which the human rights jurisprudence of the Nigerian appellate courts has expanded, maintained or contracted the opportunity for exercising the 'agency' of the poor to pursue their own liberation and vindication through the courts of law during the period under study. The starting positions were the critical socio-legal insights that the poor do not tend to be passive subjects and often desire to take steps

83 See OC Okafor 'Assessing Baxi's thesis on an emergent trade-related market-friendly human rights paradigm: Recent evidence from Nigerian labour-led struggles' (2007) 1 *Law, Social Justice and Global Development Journal* 1.

84 As above.

85 As above.

to redress violations of their human rights, and that one never ought to assume that human rights jurisprudence is necessarily pro-poor.

After defining, albeit briefly, the understanding of 'agency' that applies to this article, and counteracting the notion that the poor are somehow inherently unable to exercise their agency, it was argued that the ability of the poor to exercise their agency within the context of human rights litigation depends, in large measure, on a number of objective factors. These factors, over which the poor tend to have little control, tend to hinder their ability to mobilise their agency in a way that effectively utilises the courts in support of their human rights causes. The question then was whether the appellate courts in Nigeria have through their jurisprudential activities helped or not helped to overcome the obstacles that hinder the exercise of the agency of the poor in human rights litigation. In this regard, several factors that could shape the capacity of the courts to attain this objective were examined. While some of them were well within the control of the courts themselves, others were not as much within that zone.

In the final analysis, the conclusion is that, while the Nigerian appellate courts are in a position to catalyse and strengthen the poor's agency in the context of human rights litigation, they have been rather ambivalent in this regard. While they have in some cases and respects (such as a more liberalised 'standing' doctrine in human rights cases) demonstrated a certain capacity to articulate jurisprudence that gives the poor the chance of exercising their agency, they have in other respects (such as with regard to the main/ancillary binary) taken the opposite approach. The reasons for this ambivalence can be traced to the pressures and counter-pressures on the courts from the poor and those who press claims on their behalf, on the one hand, and powerful governmental and global/local capitalist forces, on the other.

We have described various factors that could hinder the ability of the poor to exercise their agency in defending their rights. Some of these factors are within judicial control – expanding the standing requirements, abolishing the main/accessory claims distinction, delivering judgments with more clarity, showing that time-wasting tactics that increase the cost of litigation would not be tolerated. Some of these factors are outside the control of the courts, such as certain costs of litigation and dockets burdened by constitutional provisions on jurisdiction. Yet, the poor cannot be entirely priced out of the legal system. There are as such opportunities as well as threats to their effective participation in the legal system. In terms of exercising their agency for redressing human rights violations perpetrated against them, the opportunities for the poor have to be enhanced, while threats ought to be tackled.

In our considered view, this conclusion strengthens a number of pre-existing critical socio-legal human rights insights, including Baxi's theory on the emergence in our time of a TREMF human rights paradigm that emphasises the promotion and protection of the

collective interests of powerful governmental actors and various formations of global capital, at the expense – mostly – of the poor and the relatively excluded; Kennedy's theory that the very way in which human rights have been conceptualised in the dominant liberal legalist idiom (in largely individualistic and oppositional terms) makes the negotiation of (re)distributive arrangements that could favour the poor and the excluded less likely and less tenable; and the general insight of critical human rights scholars that efforts must be made not just to analyse the transformative possibilities of human rights law, but also to map its limits.