The right to work in the legal profession: An analysis of *Senator Bello Sarakin and Another v Senator Atiku Abubakar Bagudu and Others*

Dr. Akinola E. Akintayo*

1. INTRODUCTION

There is an ongoing controversy regarding whether and the extent to which legal practitioners in position of servants or in salaried employment and those in public offices can practice law in Nigeria. This controversy is much more acute with regard to law lecturers. While some argue that law lecturers and other legal practitioners deemed to be public officers or in salaried employment are prohibited by the Code of Conduct for Public Officers (Code of Conduct)[1] in the 1999 Constitution of the Federal Republic of Nigeria 1999 (the Nigerian Constitution) and other laws from legal practice in Nigeria, others argue that the Regulated and Other Professions (Private Practice Prohibition) (Law Lecturers Exemption) (No. 2) Order 1992 (Order No. 2) is an existing law under the Constitution and exempted law lecturers from the above prohibition.

The purpose of this article, however, is not to get into the murky waters of this controversy as I think the issue has more or less been adequately addressed, if not finally settled, by the jurisprudence of the Nigerian courts and some literature on the issue. Some of these will be adverted to in this article. The main purpose of this article is to show that the way the Supreme Court of Nigeria has read Rule 10 of the Legal Practitioners Rules of Professional Conduct, 2007 (Rule 10)[2] in *Senator Bello Sarakin and Another v Senator Atiku Abubakar Bagudu and Others (Senator Bello Sarakin)*[3] and the mandatory and discriminatory manner the leadership of the Nigerian Bar Association (NBA) is implementing that interpretation in

* Dr Akinola E. Akintayo is a lecturer of law in the Department of Public Law, Faculty of Law, University of Lagos, Akoka-Yaba, Lagos, Nigeria. Email address: akinat2002@yahoo.com

[1] The Code of Conduct is in Part 1 of the Fifth Schedule to the Nigerian Constitution.

[2] Rule 10 of the Legal Practitioners Rules of Professional Conduct, 2007 require legal practitioners to affix their bar stamp or seal to documents to be executed or processes to be filed in court. The documents and processes will be invalid otherwise.

[3] Suit No.SC.722/2015 delivered on 13 November 2015.

apparent attempt to exclude law lecturers and other legal practitioners in salaried employment from legal practice are unconstitutional and a violation of legal practitioners' right to work in the Nigerian Constitution and the African Charter on Human and Peoples' Rights (the African Charter). I argue further that the earlier decision of the Supreme Court on the same issue in *Mega Progressive Peoples' Party v INEC and Others* (*Mega Progressive*)[4] which held to the contrary is to be preferred as more in tune with the human rights obligation of the Nigerian state to respect, protect and fulfil the right to work.

To achieve the objective of this article, I examine the facts and the decisions of the Supreme Court in *Mega Progressive* and *Senator Bello Sarakin* in the next section below. Thereafter I briefly examine the content and scope of the right to work in the context of the present discourse under the Nigerian Constitution and African Charter. This is followed by the analysis of how the Supreme Court interpretation of Rule 10 in *Senator Bello Sarakin* and the discriminatory and exclusionary application of that interpretation violate the legal practitioners' right to work in Nigeria. This is followed by an interrogation of the question whether the violation occasioned by the Supreme Court's interpretation of Rule 10 and the discriminatory application of that interpretation will pass constitutional muster. The article is thereafter concluded with a brief summary and recommendations.

2. FACTS AND DECISIONS OF THE SUPREME COURT IN *MEGA PROGRESSIVE* AND *SENATOR BELLO SARAKIN*

Mega Progressives originates from one of the numerous election petition matters which normally trailed conclusion of elections in Nigeria. In it, the appellant had brought an application to raise a jurisdictional issue for the first time before the Supreme Court. The appellant had complained that the Chairman of the Election Petition Tribunal sat alone in entertaining and determining the appellant's election petition. This, the appellant contended is contrary to the provisions of section 285 (4) of the Nigerian Constitution which required the Chairman and at least one member of the Tribunal to sit in order to form a valid quorum. One

[4] Suit No.SC.665/2015 delivered on 12th October 2015.

of the respondents counsel opposed the appellant's application on the ground that the appellant did not affix his bar stamp to the motion that was filed to raise the issue and that this vitiated the process pursuant to Rule 10. The Supreme Court agreed with the appellant's counsel and ruled that the issue of the quorum of the trial Tribunal was an issue that relates to the jurisdiction of the Tribunal which can be raised at any time and even for the first time before the Supreme Court. On the issue of the bar stamp, the Supreme Court ruled that the requirement of affixing the bar stamp to processes is contained in a circular of the Chief Justice of Nigeria for the betterment of the legal practice and that same has not metamorphosed into a practice direction so as to be binding in law. Furthermore, the Court pronounced that Rule 10 relied upon by the respondent's counsel is not mandatory in nature but directory only and that failure to affix the stamp cannot vitiate any process filed in any court of law in Nigeria.

Senator Bello Sarakin is another election petition matter. The case originates from the Kebbi State Election Petition Tribunal wherein the Tribunal dismissed the petition of the petitioners/appellants as having been abandoned due to the appellant's failure to apply for the issuance of pre-hearing notice within the time stipulated by the extant Electoral Act. On appeal to it by the petitioners/appellants, the Court of Appeal affirmed the decision of the trial Tribunal. Dissatisfied with the decision of the Court of Appeal, the appellants and the respondents appealed and cross-appealed against the decision of the Court of Appeal. One of the issues that arose for determination in the cross-appeal was whether the Court of Appeal was right to hold that the failure of appellants' counsel to affix his bar stamp/seal to the appellants' notice of appeal as mandated by Rule 10 did not render the notice defective and incompetent. The cross-appellants had argued that the failure of the appellants counsel to affix his bar stamp/seal to the appellants' notice of appeal renders the document defective and incompetent; while the cross-respondents argued that Rule 10 is an abridgment of the constitutional right of appeal of litigants.

In deciding the issue, the Supreme Court in a unanimous decision held that failure to affix the bar stamp or seal to a legal document renders such document defective and incompetent until the defect is remedied by affixing the requisite stamp or seal as required by Rule 10. The

Court, per Sylvester Ngwuta JSC, held that no right, including the right of appeal is absolute.[5] According to the Court, per Onnoghen JSC, the rationale for Rule 10 are so that a legal practitioner will provide evidence of his or her qualification to practice law in Nigeria; it therefore saves the time for the conduct of necessary search at the registry of the Supreme Court to determine the authenticity of the legal practitioner's claim that he is so qualified.[6] In the Court's view therefore, any legal document executed by any lawyer in Nigeria must have affixed to it the bar stamp or seal as approved by the NBA to be valid. By this decision, the Supreme Court in *Senator Bello Sarakin* made the bar stamp or seal approved by the NBA a mandatory requirement for legal practice in Nigeria without which Nigerian legal practitioners will be unable to practice the profession they are otherwise duly qualified to practice.

3. THE CONTENT AND SCOPE OF THE RIGHT TO WORK UNDER THE NIGERIAN CONSTITUTION AND THE AFRICAN CHARTER

The right to work emerged as a result of social and economic justice concerns pioneered by the International Labour Organisation (ILO) in the early years of the 20th century.[7] This pioneering initiative and the values and norms resulting therefrom later diffused into the corpus of international labour laws and international, regional and domestic human rights norms. The right to work is composed of two related and complementary components: the right to work and the rights in work.[8] With regard to the right to work component, it is generally agreed that there is no right for anybody to gain or obtain employment. It has however been argued that there is a right to insist that government adopt policies, programmes and strategies that will promote full employment.[9] This is said to be implicit in the right to work. The rights in work on the other hand, are generally treated under four broad headings, viz: the freedom of workers to freely form and join trade unions of their choice for

[5] Pg 7 of Sylvester Ngwuta JSC judgement.
[6] Pp 7 – 8 of Walter Samuel Nkanu Onnoghen JSC judgement.
[7] K Drzwewicki 'The right to work and rights in work' in A Eide *et als (*eds) *Economic, social and cultural rights* 2nd ed. (2001) 223 – 224.
[8] I respectfully borrow the right to work and the rights in work phrase from Drzwewicki. See K Drzwewicki (ibid). See also R L Siegel 'The right to work: South Africa's core minimum obligations' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 207 at 210 – 211.
[9] R L Siegel (id) at 211.

the promotion and protection of their labour related interests; elimination of exploitative child labour; prohibition of forced or coerced labour; and the right not to be discriminated against in all labour related matters.[10] As can be seen from the foregoing, the rights in work component of the right to work are akin to civil and political rights. They are therefore mostly protected as civil and political rights under both international and domestic human rights regimes. I now briefly elucidate the right to work under the Nigerian Constitution and the African Charter in the sub-sections below.

3.1 The right to work under the Nigerian Constitution

The right to work is contained in section 17 (3) (a) of Chapter II of the Nigerian Constitution. The sub-section provides that: 'The State shall direct its policy towards ensuring that – all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.'

According to this provision, the Nigerian state has a constitutionally imposed obligation to ensure access of all citizens of Nigeria to suitable employment opportunities that will ensure to them adequate means of livelihood without discrimination of any kind. It has been opined elsewhere that although the socio-economic rights in Chapter II of the Nigerian Constitution are not couched in the traditional language of rights, nevertheless, a good number of the provisions are in substance socio-economic rights the guarantees, realisation or enforcement of which are made contingent upon the happening of another event which may be availability of resources, executive or legislative action.[11]

It is however a notorious fact that the provisions of Chapter II of the Nigerian Constitution are not justiciable pursuant to section 6 (6) (c) of the Nigerian Constitution which ousted the

[10] Id at 210.
[11] A E Akintayo "Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010" (2014) 14 *African Human Rights Law Journal* 553 at 562 – 563.

jurisdiction of Nigerian courts from entertaining any question or issue as to whether any act or omission of any person or authority is in conformity with the provisions of Chapter II of the Constitution. This section of the Nigerian Constitution has been given judicial sanction by Nigerian courts.[12] The implication of the foregoing is that the right to work is not directly enforceable under the Nigerian Constitution.

However, the Supreme Court of Nigeria has, in the more recent case of *Ukpo v Imoke*[13] held that all organs of the Nigerian government are constitutionally obliged to ensure the attainment of the lofty objectives of Chapter II of the Nigerian Constitution pursuant to section 13 thereof.[14] The Supreme Court has also still more recently held with specific reference to section 17 (3) (a) right to work provisions of the Nigerian Constitution in *Lafia Local Government v The Executive Governor, Nasarawa State and Others*[15] that the Nigerian state has an obligation to ensure that citizens have adequate opportunity and access to suitable and freely chosen employment without discrimination. What is more, the Court on this ground set aside an Edict of the Nasarawa State Governor which directed all local government staff in the state to return to their local government council of origin in order to continue their work as a violation of the constitutional provision on the right to freely chosen work without discrimination, among others.[16]

A global examination and analysis of the Nigerian Constitution provision on the right to work therefore reveals that there is a constitutional obligation on the Nigerian state to guarantee access to suitable employment without discrimination; job security; right to freely chosen work and freedom of workers to associate for the promotion and protection of their work related interests; the latter component of the right being guaranteed via the fundamental rights provisions of freedom of association and assembly in Chapter IV of the Nigerian Constitution.

[12] For a more detailed discussion of the scope and extent of this constitutional ouster of courts' jurisdiction in respect of the provisions of Chapter II of the Constitution see, for instance, S T Ebobrah 'The future of economic, social and cultural rights in Nigeria' (2007) 1 (2) *CALS: Review of Nigerian Law and Practice* 108.
[13] (2009) 1 NWLR (Pt. 1121) 90.
[14] Section 13 of the Nigerian Constitution provides that: 'It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution'.
[15] (2012) 17 NWLR (Pt. 1328) 94 (SC).
[16] Ibid.

3.2 The content and scope of the right to work under the African Charter

The African Charter is an Afrocentric human rights instrument.[17] In furtherance of the Afrocentric understanding of and standpoint of the Charter, it conceived work as both a right and a duty. A combined reading of articles 15 and 29 of the Charter evidences this fact.[18] According to article 15 of the African Charter, "[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." And by virtue of article 29 (2) and (3) of the Charter every individual is obliged to serve his community by placing his physical and intellectual abilities at its disposal and work to the best of his abilities and competence in furtherance of the interests of the society. This standpoint of the African Charter on the right to work is consistent with the African notion of work and society where idlers and the lazy are abhorred and work is seen as an obligation incumbent upon every able bodied individual. This notion is aptly captured by Nyerere thus: "The work done by different people was different, but no one was exempt. Every member of the family, and every guest who shared in the right to eat and have shelter, took it for granted that he had to join in whatever work had to be done".[19]

The African Commission on Human and Peoples Rights (the African Commission)[20] has helpfully thrown light on the meaning, content and scope of the right to work in the African Charter.[21] According to the Commission, the right to work is essential for the realisation of other socio-economic and cultural rights and is critical to both survival and human

[17] A look at the Preamble and other provisions of the Charter evidence this fact. For instance, according to one of the Preambles to the Charter, the Charter takes into consideration '…the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights'. Another one of the Preambles also states that the African Charter takes into account the importance traditionally attached to the rights and freedoms contained in the Charter in Africa.

[18] A point also advanced by Ndombana. See N J Udombana "Social rights are human rights: Actualizing the right to work and social security in Africa" (2000) 39 *Cornell International Law Journal* 181 at 187 et seq.

[19] J K Nyerere *Ujamaa: Essays in socialism* (1968) 108.

[20] The African Commission is the quasi-judicial body established under the African Charter for the elaboration and enforcement of the Charter.

[21] The African Commission on Human and Peoples' Rights *Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (African Commission Principles and Guidelines) available at http://www.achpr.org/files/instruments/economic-social cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed on 30 December 2015).

development.[22] The Commission also states that "[t]he right to work should not be understood as an absolute and unconditional right to obtain employment."[23] The right rather obliges state parties to facilitate employment through the creation of an enabling environment for the full employment of individuals consistently with human dignity.[24] The right to work is also said to include the right to freely and voluntarily chosen work.[25]

In addition, the African Commission identifies three principal obligations imposed by the right to work in the African Charter on state parties:[26] First, the minimum core obligation to prohibit slavery, forced labour and all forms of coerced work; to guarantee the right to freedom of association, collective bargaining and other trade union rights; provision of adequate protection against unfair, unjustified and arbitrary dismissal, among others.[27] Second, the principal obligation to adopt national employment strategy and plan to realise the right of everyone to voluntary and freely chosen work and the right to equitable working conditions and fair remuneration.[28] Third, the obligation to ensure equality and non-discrimination in all work related matters for vulnerable groups and disadvantaged individuals in the society and the criminalisation and prevention of the worst forms of child labour.[29]

The case law of the African Commission appear to support some of the above elucidated aspects of the right to work in the African Charter. In *Mauritania: Malawi African Association and Others v Mauritania*,[30] for instance, the African Commission held that slavery, coerced and unremunerated work and *domination of one section of the community by the other in work related relationships* is a violation of international human rights norms and the provisions of the African Charter.[31] Also, in *South Africa: Prince v South Africa*,[32] the African Commission recognised the right of everyone to occupational choice. The

[22] Id at para 57.
[23] Id at para 58.
[24] Ibid.
[25] Ibid.
[26] Id at para 59.
[27] Id para 59 (a) – (c).
[28] Id para 59 (d) – (h).
[29] Id at para 59 (i) – (p).
[30] (2000) AHRLR 149 at paras 132 – 136.
[31] Emphasis supplied.
[32] (2004) AHRLR 105 at paras 45 – 46.

Commission therefore opined that the purpose of the provision of the Charter on the right to work was to ensure that state parties respect and protect the right of every individual to access the labour market without discrimination. The Commission however held in that particular case that the prohibition on the use of cannabis and the consequent disqualification of the complainant from legal practice because of his avowed intention to continue the use of the prohibited substance is a legitimate exception to the right to work under the African Charter.

Furthermore, in *Angola: Institute for Human Rights and Development in Africa v Angola*,[33] the African Commission held that arbitrary arrest, detention and deportation which resulted in loss of jobs of persons working lawfully in the territory of a state party and negatively impacted their job security is a violation of article 15 right to work provision of the African Charter. Lastly, in *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*[34] where the defendant government closed the business premises of the complainants, confiscated their work equipment and forcefully prevented them from carrying on their work resulting in loss of jobs and negation of the security of their jobs, the African Commission held the defendant government was in violation of article 15 of the African Charter.

Thus, from the provision of article 15 of the African Charter and jurisprudence surrounding it as analysed above, at least four broad aspects of the right to work can be identified viz: the concepts of full employment and job security; non-discrimination and equal treatment; voluntary and free choice of work and occupation, freedom of association of workers, collective bargaining and strike for the promotion and protection of work related interests.

The African Charter has been domesticated by the Nigerian legislature pursuant to section 12 of the Nigerian Constitution through the African Charter (Ratification and Enforcement) Act.[35] Having been enacted into domestic law, the provisions of the Charter have become part and parcel of the corpus of Nigerian laws. The Supreme Court of Nigeria confirmed this

[33] (2008) AHRLR 43 at para 76. The same was earlier held in *Angola: Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18.
[34] (2009) AHRLR 235 at para 179.
[35] Cap A9 LFN 2004.

reading of the domestication of the African Charter in the *locus-classicus* case of *Abacha and Others v Fawehinmi*[36] where the Supreme Court held that the African Charter is a statute with international flavour in Nigeria; it is superior to other domestic statutes but inferior and subject to the provisions of the Nigerian Constitution and that in cases of conflict between the provisions of the Charter and other local statutes the provisions of the Charter shall prevail.[37] In consequence of the foregoing, I suggest that the civil and political as well as socio-economic and cultural rights in the African Charter have become part and parcel of Nigerian human rights regime notwithstanding some arguments to the contrary.[38]

In conclusion, I suggest that the combined reading of section 12[39] of the Nigerian Constitution pursuant to which the African Charter was domesticated and section 315[40] of the same Constitution confers a quasi-constitutional status on the provision of African Charter in Nigeria. This viewpoint is buttressed by the pronouncement of the Nigerian Court of Appeal in *Bewaji v Obasanjo*[41] where the Court pronounces that 'a statute made pursuant to the Constitution enjoys constitutional flavour'. Having examined the content and scope of the right to work under the Nigerian Constitution and the African Charter above, I turn to the main argument of this article below.

4. ANALYSIS OF HOW *SENATOR BELLO SARAKIN* VIOLATES THE RIGHT TO WORK OF NIGERIAN LEGAL PRACTITIONERS

As stated in the introduction, the main aim of this article is not to merely regurgitate the arguments for or against the entitlement of law lecturers and other legal practitioners in

[36] (2001) AHRLR 172 para 15.
[37] See also *Abiodun v A.G., Federation* (2007) 15 NWLR (Pt. 1057) 359 at 412.
[38] For a bird's eye view of the arguments for and against the African Charter as grounding socio-economic rights in Nigeria see E Azinge and B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010); S T Ebobrah (note 11 above); A Otubu 'Fundamental right to property and right to housing in Nigeria: A discourse' (2011) 7 (3) *Acta Universitatis Danubius Juridica* 25.
[39] Section 12 of the Nigerian Constitution provides that any treaty ratified by the Nigerian government and enacted into law by the National Assembly pursuant to the provisions of that section will have the force of law throughout the territory of Nigeria.
[40] Section 315 of the Nigerian Constitution provides that any law in existence before the coming into force of the Constitution shall be deemed to be a law made under the provisions of the Constitution and shall take effect with such necessary modifications to bring it into conformity with the provisions of the Constitution.
[41] (2008) 9 NWLR (Pt. 1093) 540 at 581.

public offices or salaried employment to practice law in Nigeria. Those arguments I think has been adequately canvassed by others.[42] The main objective of this article is show that the mandatory interpretation of the stamp requirement of Rule 10 by the Supreme Court in *Senator Bello Sarakin* and the mandatory and discriminatory manner the NBA is administering the seal and stamp requirement of Rule 10 to exclude law teachers and other legal practitioners in salaried employment from legal practice are both a violation of the right of legal practitioners' to work in the Nigerian Constitution and the African Charter and therefore unconstitutional.

There are at least six grounds upon which Rule 10 as interpreted in *Senator Bello Sarakin* and the action of the NBA can be impugned. First, both are retrogressive measures on the right of legal practitioners' to work in Nigeria. Second, both are likely to and may have handed-over control of the professional destiny of law lecturers and other legal practitioners in salaried employment to the practicing elites of the NBA. Third, following from the second ground above, the Rule as applied and administered to unduly favour one segment of the Nigerian legal practitioners over others may eventually lead to the domination of one segment of the profession by the other. Fourth, Rule 10, a subsidiary legislation, as interpreted in *Senator Bello Sarakin* took away what the parent statute granted. Fifth, Rule 10 as interpreted by the Supreme Court is likely to increase legal transaction cost and hinder the access of the less privileged to legal services and justice. Sixth, the leadership of the NBA is labouring under an erroneous assumption that extant laws disqualify law lecturers and other legal practitioners in public offices or salaried employment from legal practice. These grounds will now be traversed seriatim.

First, regarding the retrogressive impact of *Senator Bello Sarakin* and the discriminatory and exclusionary application of the interpretation by the leadership of the NBA, requisite international human rights norms are very clear that any law or policy that has the effect of

[42] See for instance, E Ojukwu 'Entitlement to Practise as a Legal Practitioner in Nigeria: A Comment' 1994 Nigerian Current Law Review 130; A O Giwa 'Law Lecturers and Court Room Attendance' (2003) 1(4) Nigerian Bar Journal 503; R E Badejogbin 'Law lecturers and private practice'(2007) 1 (1) CALS Review of Nigerian Law and Practice 1 and A A Kana 'All Teachers can practice and act as consultants for free or for a fee: The case of law practice by law teachers' available at http://www.nigerianlawguru.com/articles/practice%20and%20procedure/LAW%20LECTURERS%20RIGHT%20TO%20PRACTICE%20LAW.pdf (accessed on 30 November 2016).

nullifying or taking away the enjoyment of existing socio-economic rights which includes the right to work is a violation of the right(s).[43] This rule of law stems from the international law obligation of the state to both respect and protect socio-economic rights. As rightly pointed out by Brand, the obligation of the state to respect dictates that states do not itself limit or take away people's existing access to socio-economic rights without providing alternatives where such limitations or taking away of existing rights becomes unavoidable; while the obligation to protect requires that states prevents third party from nullifying or limiting the enjoyment of existing socio-economic rights.[44]

It is clear that before the advent of Rule 10 as interpreted by the Supreme Court in *Senator Bello Sarakin*, legal practitioners in Nigeria, once qualified to practice law under the substantive statute, the Legal Practitioners Act;[45] were not required to comply with any other requirement(s) of law or policy that hinders them from freely practicing their trade. There is therefore an existing right of qualified legal practitioners to practice law before the advent of Rule 10 as interpreted in *Senator Bello Sarakin* which read its seal requirement as mandatory. The decision by specifying an additional requirement before legal practitioners can practice amounts to taking away an existing right of legal practitioners to work. And unless this can be justified as unavoidable and essential, such nullification or taking away will be illegal and unconstitutional as a violation of a guaranteed right. Such a rule of law will also run counter to the state's obligation to take steps to foster an environment conducive to full employment of the citizens under the Nigerian Constitution and article 15 of the African Charter as articulated earlier.[46] I will argue shortly that Rule 10 is not effective, essential or unavoidable.

Second, Rule 10 as read by the Supreme Court is likely to give practicing lawyers control over the practice and professional destiny of other legal practitioners in Nigeria, a brief recapitulation of the workings and the issuance of the bar stamp is necessary here for a proper understanding of this ground of objection. The larger majority of the active members of the

[43] Committee on ESCR General Comment 18 para 21; see also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights para 14 (3) available at https://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html (accessed on 16 February 2016).
[44] D Brand "Introduction to socio-economic rights in the South African Constitution" in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) 1 at 9 – 10.
[45] Cap 207 LFN 1990.
[46] *African Commission Principles and Guidelines* (note 21 above) para 58.

NBA are lawyers in private practice. Consequently, they are the ones holding positions of authority in the organisation and therefore get to decide what happens to the other members of the organisation who are not so active. In the case of the bar stamp for instance, three types of stamps have been designed and are being issued by the NBA to members: these are green, black and red coloured stamps. The green colour seals are issued to private practitioners, the blacks to government and in-house lawyers and the red to law lecturers.[47] Only the green, and I apprehend, for restricted purposes, the black seals for government lawyers are approved for processes in courts; the red seals are not approved for use in the courts because according to the leadership of the NBA law lecturers are not entitled to practice law because they are public officers within the meaning of the Code of Conduct. The leadership of the NBA is said to have convinced the Chief Justice of Nigeria to issue notice to all courts to disregard any processes not bearing the approved or appropriate stamps.[48] However, as rightly pointed out by Kana, the classification of the seals into categories and colours is not a requirement of Rule 10; it is an innovation of the leadership of the NBA apparently in furtherance of their dark desire to exclude law lecturers and other legal practitioners in salaried employment from legal practice.[49] Lawyers in private practice will therefore appear to have assumed control over the practice destiny of other categories of lawyers through the instrumentality of Rule 10 and the meaning assigned to it by the Supreme Court in *Senator Bello Sarakin.* This assumption of control of destiny by lawyers in private practice is however illegal and unconstitutional on at least two grounds:

One, the NBA is not competent to dictate who and who cannot practice law in Nigeria or question any lawyer in paid employment who decides to sign any court paper or appear in court in breach of any existing rule of law. This has been clearly stated by the Supreme Court in *Ahmed v Ahmed*.[50] In *Ahmed v Ahmed* the Supreme Court unequivocally held that an allegation that a lawyer in the employ of the Federal Government of Nigeria is practising in breach of the Code of Conduct cannot be raised or challenged by any other person or authority other than the Code of Conduct Tribunal (CCT) and that processes signed or filed by such lawyers therefore remains valid and effectual until requisite action before the CCT.[51]

[47] A A Kana (note 42 above).
[48] Ibid.
[49] Ibid.
[50] (2013) 15 NWLR 224.
[51] Id at 330 – 331.

The same conclusion has earlier been reached in *Ogbuagu v Ogbuagu*[52] and *Oloyo v Alegbe (Speaker Bendel State House of Assembly)*.[53] Private legal practitioners will however appear to be incapable of complaining at the CCT for the breach of the Code of Conduct in this respect as they lack the necessary *locus standi* to lay such a complaint. It is suggested that only the employers of lawyers in paid employment are entitled to complain about the breach of the provisions of the Code of Conduct by lawyers in their employment. Two, the reflection of particular group or elite criteria and interests in the formulation of rules or policies and in the administration or control of access to work as have been done in this case by the leadership of the NBA is a violation of the deeply entrenched rules against discrimination in work related relations under requisite norms of human rights and breaches the state minimum core obligation to ensure equality and a level playing field in work related interactions and relationships.[54]

Third, following from the second ground above, it can be seen that Rule 10 is being applied discriminatorily to favour one group of legal practitioners over the other. Apart from violating the equality and non-discrimination norm of the right to work, this mandatory and discriminatory application of the Rule by the leadership of the NBA to exclude a segment of the legal profession smacks of domination of one segment of the profession by the other. This is a violation of another norm of the right to work as has been shown in section 3 of this article above.

Fourth, the substantive law on the qualification and requirements to practice law in Nigeria is the Legal Practitioners Act.[55] It is this statute that defines the requirements for becoming a lawyer and grants the power to practice law in Nigeria.[56] The Rules of Professional Conduct (RPC) is a subsidiary law that is meant to make provisions for a more effective legal practice in Nigeria. The RPC is not meant to and cannot take away the entitlement to practice law conferred by the parent statute. The realisation that Rule 10 may in fact be used to negate or nullify the right to practice conferred by the parent Act appear to have been operating on the

[52] (1981) 2 NCLR 680.
[53] (1982) 3 NCLR 346.
[54] See also R L Siegel (note 8 above) at 220 – 221.
[55] Cap L11 LFN 2004.
[56] See section 2 of the Legal Practitioners Act.

mind of the Supreme Court also which probably moved the Court to emphasise in *Senator Bello Sarakin*, per Onnoghen JSC, that:

> It should be noted that the qualification to practice law as a legal practitioner is as provided under the Legal Practitioners Act which includes being called to the Bar and enrolled at the Supreme Court of Nigeria as a legal practitioner. *It is that qualification that entitles a legal practitioner to sign/frank any legal document either for filing in a Court of Law in a proceeding or otherwise*…. The above requirements constitute the substantive law on the issue. ….The provisions of the Rules, I must repeat, is not a substitute for the substantive law on the matter that is why non compliance (sic) thereto renders the document involved/concerned voidable, not void or a nullity.[57]

I am of the view that the distinction made by the Supreme Court above between voidable and void in relation to the effect of non-compliance with Rule 10 is with regard to its impact on the right to work a distinction without a difference. This is because the ultimate implication of the Rule is that a legal practitioner cannot validly exercise the power and entitlement to sign or frank a legal document conferred on him or her by the Legal Practitioners Act without compliance with the requirement of Rule 10 which requires that the legal practitioner obtains and affix the bar stamp. This scenario in my view subjects the provisions of the Legal Practitioners Act to the RPC and negates and nullifies the entitlement conferred by the former. I therefore suggest that the meaning placed on Rule 10 by the Supreme Court in *Senator Bello Sarakin* is *ultra-vires* the RPC and is therefore illegal and void *ab initio*. A subsidiary instrument can only supplement a principal statute which is the substantive law on a subject matter and not to supplant it. I argue here that the way Rule 10 has been read by the Supreme Court is a supplantation of the provisions of the Legal Practitioners Act on the entitlement of duly qualified legal practitioners to practice law in Nigeria and it is for that reason *ultra-vires*, illegal and unconstitutional.

Fifth, the effect of the meaning placed on Rule 10 in *Senator Bello Sarakin*, I suggest, is likely to raise legal transaction cost in Nigeria, hinder the right to work of not so well resourced legal practitioners and negatively impact access to justice of the less privileged in the society. Although, the amount that is directly required to obtain the seals which are in a

[57] *Senator Bello Sarakin (*note 3 above) at pp 7 – 8 of the judgment of Onnoghen JSC.

pack of 120 pieces and renewable every year is just about N6, 000 (N4, 000 for the seals and N2, 000 for administrative charges), a lawyer desiring to obtain the seals must however also compulsorily pay the practising fees and branch dues for any year of application and any arrears that may have previously accrued. Practising fees range between N5000 and N25, 000 (excluding fees payable by SANs and Benchers) while branch dues which vary from branch to branch also range between N5, 000 and N15, 000 every year. The total monies payable to get the seals therefore come to about N46, 000 yearly. This amount, on the face of it, may appear not too much for a well to do lawyer to pay yearly. If however one considers the fact that many lawyers are not well paid, receiving an average of N15, 000 monthly (wages not at all sufficient to take care of transportation and other basic needs), while many of the new wigs are not even paid at all under the pretext that they are still learning the ropes; one will see clearly that a yearly sum of N46, 000 may actually be beyond the financial abilities of many lawyers to pay for the bar stamps that they may not use or exhaust in the year. And not getting the stamps means not being able to work when work eventually become available.

Therefore, the increase in the financial burden of Nigerian legal practitioners occasioned by the interpretation of Rule 10 by the Supreme Court is likely to have two implications. The first is the likely impact on indigent litigants' access to justice because lawyers are bound to pass the increased cost on to their clients. This may on the one hand hamper poor clients' access to almost non-existent legal services and redress and on the other hand occasion a reduction in the number of persons seeking legal services ultimately leading to the reduction in the amount of work available for lawyers to do.

The second likely impact is the prevention of access to legal work by not so well to do lawyers who cannot afford the cost of obtaining the seals. As already explained above, most lawyers get paid a paltry sum of money as salaries monthly which cannot even take care of their basic personal needs not to talk of paying for the bar stamps. While many new and not so new wigs are not even paid by their principals for work done. These categories of legal practitioner may not be able to afford the cost of the seals which in turn will deny them of the needed extra income from independent work to better their lot in life.

Sixth, it appears that all the action of the NBA leadership in discriminatorily applying Rule 10 to exclude law lecturers and other legal practitioners in salaried employment from legal practice is based on the erroneous believe that such persons are already disqualified by the Constitution and relevant laws from legal practice. This believe is wrong and untenable having regard to the requisite provisions of the law. As it concerns legal practice in Nigeria, there is a difference between disqualification from practice and practice in breach of some rules of law. In the former case, the entitlement to practice is taken away while in the latter the entitlement to practice is not taken away although the practitioner may be liable to sanction for practising in breach of the particular law(s) in question. Thus, in the latter case the practitioner may still practice at his or her peril. As rightly pointed out by Ojukwu, the only legislation that can disqualify a legal practitioner whose name is on the roll from legal practice is the Legal Practitioners Act under which the entitlement to practice is derived.[58] He rightly observed thus:

> …Legislations such as the provisions of the *Code of Conduct*, the *Regulated and Other Professions (Private Practice Prohibition) Act* and the *Rules of Professional Conduct in the Legal Profession* cannot on their own disqualify a Legal Practitioner whose name is on the roll from acting as Legal Practitioner either in court or otherwise. To invoke any of these later mentioned laws, some form of trial must first be conducted by a body or tribunal responsible and a punishment (which for this purpose must include suspension or removal of name from the roll) administered.[59]

I agree with the conclusion of Ojukwu above.

Having qualified to practice law by virtue of the Legal Practitioners Act therefore, a legal practitioner whose name is on the roll is only disentitled to practice *only* in the circumstances and on the grounds laid down in the Act. Other rules of law will have effect only as a hurdle on the right of legal practitioners to practice and not as a disqualification or disentitlement. The Supreme Court also said as much in *Senator Bello Sarakin* in the passage quoted above where the Court pronounces that qualification to practice law in Nigeria is derived from the Legal Practitioners Act.

[58] E Ojukwu (note 42 above) at 129.
[59] Id at 130 (Emphasis in original).

Viewed from this perspective, it will seem that the importance of Order (No. 2) may have been overstated in the various arguments for and against legal practice by law lecturers. Having regard to the foregoing analysis, whether Order (No. 2) is an existing law or has been abrogated by the Code of Conduct has very little effect on the entitlement of law lecturers to practice law in Nigeria. And as the case law on this issue have established, the NBA leadership is not the appropriate body or tribunal that is authorised by law to enforce the provisions of the Code of Conduct or any other laws alleged to have disqualified law lecturers or legal practitioners in salaried employment from legal practice. The NBA and its leadership cannot purport to be able to cry more than the bereaved.

Having said the above however, it is my view that even assuming that the Code of Conduct have abrogated Order (No. 2), the Code could not have been intended to prevent law lecturers from legal practice having regard to the reasons which gave birth to the promulgation of Order; reasons which are as pertinent and germane today as they were then.[60]

From the foregoing analysis, it is clear that the interpretation of Rule 10 by the Supreme Court in *Senator Bello Sarakin* and the mandatory and discriminatory implementation of that interpretation by the leadership of the NBA because of their self-serving desire to exclude law lecturers and others from legal practice is a gross violation of these legal practitioners' right to work under the Nigerian Constitution and the African Charter. It remains to interrogate whether that violation will nevertheless pass constitutional muster.

5. WILL THE INTERPRETATION OF RULE 10 IN *SENATOR BELLO SARAKIN* AND ITS DISCRIMINATORY APPLICATION BY THE NBA PASS CONSTITUTIONAL MUSTER?

[60] See for instance, R E Badejogbin (note 42 above) for some of the reasons that led to the promulgation of Order (No. 2). See also A A Kana (note 42 above) for detailed arguments why the Code of Conduct and Rule 8 of the RPC are inapplicable to law teachers.

Save for a very few exception, no human right whether in international, regional or domestic human rights instruments is absolute. The same proposition applies to the rights in the Nigerian Constitution and the African Charter. Most rights in Nigeria can be limited in terms of section 45 of the Nigerian Constitution to safeguard public defence, security, welfare, health, morality and the rights and freedoms of others. As argued in more detail elsewhere,[61] analysis under section 45 of the Nigerian Constitution should involve a two stage process. The first stage is to interrogate whether a rule of law, policy, act or omission violates a right. If a violation is not found that is the end of the matter. If there is a violation, however, there is the further need to enquire whether the violation is justifiable in a democratic society.[62] If the violation is found to be justifiable in a democratic society, the law or policy will pass constitutional muster; otherwise it will be unconstitutional, null and void. Five different factors are involved in determining whether or not a law or policy is justifiable in a democratic society so as to pass constitutional muster: First is the nature and importance of the right(s) in question; second is the importance of the purpose of the particular limitation in question; third is the nature and extent of the limitation; fourth is the relation between the limitation and its purpose; the fifth is to answer the question whether there is a less invasive means to achieve the purpose of the limitation.[63] Each factor is now examined in turn against the limitation in issue here.

As regards the nature of the right in issue here, the right to work is a most important right. As pointed out earlier, the right is essential for the realisation of other socio-economic and other rights and indispensable for the survival and dignity of human beings. The right is also a *sine qua non* for both individuals and societal development. The law and policy that will justifiably limit the right must therefore not have a conjectural or cosmetic purpose but a real and substantial objective that must relate to the very essence of societal and democratic survival.

[61] A Akintayo 'Constitutional limit of entrapment as a method of crime detection in Nigeria' (2011) 1 *NIALS Journal on Criminal Law and Justice* 30 at 46 – 49.
[62] See for instance, *De Reuck v DPP* 2003 (12) BCLR 1333 (CC); *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders*2004 (5) BCLR 445 (CC); *Magajane v Chairperson, North West Gambling Board* 2006 (10) BCLR 1133 (CC).
[63] See for instance, *Case and Another v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC); *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

As regards the second factor, the purpose of the particular limitation must be important enough to trump the right in question. In this case, the purpose of Rule 10 according to the Supreme Court is so that a legal practitioner will provide evidence of his or her qualification to practice law in addition to the practitioner's name being on the Rolls at the Supreme Court.[64] The intendment here is probably that the bar stamp will provide quick evidence of a legal practitioner's qualification to practice law in Nigeria since the stamp will be issued by the legal practitioner peers who are obviously presumed to know or be familiar with the practitioner. This is confirmed by the Supreme Court in *Senator Bello Sarakin* when it opined that the system saves time needed for a search at the Supreme Court Registry to determine the authenticity of a legal practitioner's claim to qualification.[65] The objective of Rule 10 will therefore appear to be to root out quacks and impersonators from the system. This indeed is a laudable objective having regard to the rampant cases of quackery and impersonation in legal practice. Having said that, it remains to be seen through analysis below whether the mandatory acquisition of the stamps as mandated by the Supreme Court is the most effective or the least invasive means of achieving the objectives of the Rule as required by the norms governing limitation of fundamental human rights.

The third factor which relates to the nature and extent of the limitation has to do with the examination of the impact of the limitation on the enjoyment of the right(s) in question. The effect of the limitation in the present instance is to totally nullify the right of legal practitioners to work. This is because the ultimate effect of the Supreme Court's interpretation of Rule 10 on legal practitioner(s) who for one reason or the other do not have the bar stamp is to prevent that practitioner from legal practice. It is a case of no bar stamps no legal work. For whatever document the legal practitioner executed without the bar stamp is ultimately void. This is a very serious impact indeed.

The fourth factor speaks to the relation between the limitation and its purpose. The examination here relates mainly to the proportionality of the limitation when measured against its objective and the method employed to realise it. The law is that the method employed to realise the purpose of a limitation and its impact on the enjoyment of a right in

[64] *Senator Bello Sarakin* (note 3 above) pp 7 – 8 of the judgment of Onnoghen JSC
[65] Ibid.

question must be proportional.[66] In the instant case, the objective of the rule, the method employed and the impact of the method on the right in question could not be said to be proportional at all. As can be gathered from the above, the ultimate effect of the interpretation of Rule 10 by the Supreme Court is the total abrogation of the right of legal practitioner to work. When this is measured against the objective of ensuring a speedier check on the qualification of a legal practitioner, one is at pains to see how the abrogation of the right to work of duly qualified practitioner could be said to be proportional to the objective of an easier and quicker check on the qualification of practitioners. The method and its impact are disproportionate to the objective sought to be achieved.

Finally, the method employed to realise the objective of the limitation must also be the least invasive and the most effective. I suggest here that the interpretation of Rule 10 by the Supreme Court cannot pass these tests of effectiveness and invasiveness. Regarding the effectiveness requirement, the quackery and impersonation of legal practitioners that the interpretation is aiming to minimise is largely fostered by forgery syndicates who forge legal as well as other qualifications to enable quacks and impersonators ply their trades without let or hindrance. To just require that the NBA approve seals to authenticate documents produced and processed by duly qualified legal practitioners is not likely to cure the ills aimed at as the syndicates who routinely forge certificates and other documents will simply also forge the stamps. And if the presence of the stamps on documents is meant to dispense with the necessary due diligence and searches, then the interpretation of Rule 10 by the Supreme Court is most likely to leave the legal profession worse off than it met it. For the quacks and impersonators will simply continue to have a field day and no one will be any wiser. What the relevant authorities could have done is to address the root causes of quackery in the system, one of which is the forgery syndicates rather than treating the symptoms as appear to be the case here. As regards the least invasive requirement, there is a less invasive method than the one adopted by the Supreme Court's interpretation of Rule 10 in *Senator Bello Sarakin*. I suggest that the former method of due diligence and searches is less invasive and more effective than the compulsory acquisition of stamps and total bar upon work. The interpretation of Rule 10 by the Supreme Court in *Senator Bello Sarakin* therefore fails the constitutionality test also on this ground.

[66] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227.

6. CONCLUSION

This article has examined the compatibility of the Supreme Court's interpretation of Rule 10 in *Senator Bello Sarakin* with the norms of legal practitioners' right to work in the Nigerian Constitution and the African Charter. Analysis done in this article reveals that that interpretation and the mandatory and discriminatory application of it by the leadership of the NBA violate legal practitioners' right to work in the Nigerian Constitution and the African Charter. It has also been shown that the violation occasioned by that interpretation and its discriminatory application is not justifiable in a democratic society as it failed constitutional muster. The interpretation of Rule 10 by the Supreme Court and its discriminatory application by the NBA is therefore unconstitutional null and void.

The earlier decision of the same Supreme Court in *Mega Progressive* which read Rule 10 restrictively and held its provisions to be directory only and not mandatory is therefore to be preferred. That decision is more in tune with the requisite norms of the right to work in the Constitution and the African Charter and is therefore more compatible with the Nigerian state's obligation to respect, protect and fulfil the right to work. In view of this, it is suggested that the interpretation of Rule 10 by the Supreme Court be done away with by the Supreme Court reversing itself. The leadership of the NBA should also stop the mandatory and discriminatory issuance of seals of many colours to exclude law teachers and other legal practitioners as mentioned in this article from legal practice in Nigeria as this is incompatible with the rights and freedoms of Nigerians in general and the right to work of Nigerian legal practitioners in particular.