

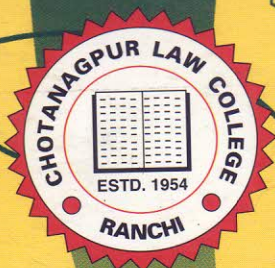
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THE PROSCRIPTION OF INCORPORATED LAW PRACTICES (ILPs) IN NIGERIA: THE LEGAL AND CONSTITUTIONAL ISSUES ARISING

ABDULLAHI SALIU ISHOLA^{1*}

Abstract

This paper critically examines the legality and constitutionality of the provision of Rule 5 sub-rule (5) of the Rules of Professional Conduct for Legal Practitioners, 2007 (the Rules), prohibiting the practice of law in Nigeria as a corporation. The appraisal is done on the scales of the provisions of Sections 40 and 42 of the 1999 Constitution of the Federal Republic of Nigeria, as amended (the Constitution), providing for rights to freedom of association and peaceful assembly and freedom from discrimination, respectively; on one hand, and, Section 18 of the Companies and Allied Matters Act (CAMA), allowing any two or more persons to form and incorporate a company; on the other hand. The illegality is also appraised from the purview that, the Rules is a mere subsidiary legislation which cannot override the Constitution as the supreme law of the land and CAMA as a substantive enabling Act. On another angle, following a consideration of the significant purpose of protective measure which the provision of the Rules sets out to achieve for law practice in the country, the paper concludes by suggesting the better way the Rules could enact the regulation without falling into the trap of illegality.

[Key words: Illegality; Incorporated Law Practices; Proscription; Nigeria]

Introduction

The structure and general nature of law practice in Nigeria is that of "sole proprietorship"² whereby the firm's name is usually, albeit deceptively and illegally,³ depicted by the title XYZ & Co.; where XYZ is the name of the lone lawyer in control of the practice, ownership of the firm and all the benefits accruable to the firm goes to him alone.⁴ Partnership is also on course as an

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² This term is particularly adopted in this paper in context. The popular term is sole practice or solo practice. For proper guide on the appropriate term, see Jay G. Foonberg, How to Start and Build A Law Practice, (USA: Law Practice Management Section, American Bar Association, Law Students Division, Platinum Fifth Edition, 2008) 47.

³ Rule 5 sub-rule (4) of the country's Rules of professional Conduct for Legal Practitioners, 2007 states that; "Where a lawyer practices alone, he shall not hold himself out as a partner in a firm of lawyers using a firm such as A, B. and C or such other name as may suggest that he is in partnership with others".

⁴ Although such law firm might however have grown to employ many other lawyers as its members of

other form of law practice in the country, especially now that there is a serious clamour for a shift from a sole proprietorship to partnership based practice informed by the concern for the need for succession to rein in law practice in the country, after the demise of the proprietor.⁵ The practice in the country is equally tailored towards "associateships".⁶ It has particularly been argued that, all in all, there are four types of law firms in Nigeria, namely; "sole practitionership"; "sole proprietorship"; "associateship"; and, "partnership".⁷

However, focus has not yet been shifted to and neither has any need been realized for law to be practiced in the federation in a corporate manner, whereby a number of lawyers come together and float a company for the purpose of practicing law.⁸ Hope is not however lost that law practice in the country would eventually advance to that level, especially now that this is fast becoming the norm in the global village which the world has now turned into. There is however some sorts of legal constraints, informed by the provision of Rule 5 sub rule (5) of the country's *Rules of Professional Conduct for Legal Practitioners, 2007* (hereinafter called "the Rules"), that may make it difficult, if not completely impossible, for the country to attain that level of law practice and eventually dash the seemingly glowing hope for incorporated law practice in the state.

Accordingly, this paper critically analyses the legal implication of the provision of Rule 5 sub-rule (5) of the Rules, prohibiting the practice of law in Nigeria as a corporation, in view of the provisions of Sections 40 and 42 of the Constitution, providing for rights to peaceful assembly and association, and freedom from discrimination, respectively; and, section 18 of the *Company and Allied Matters Act* (CAMA), allowing any two or more persons to form and incorporate a company; and given the fact that the Rules is a mere subsidiary legislation, the Constitution is the supreme law of the land while CAMA is a substantive or enabling Act which cannot be overridden by subsidiary legislations.

The Modern Trend On Incorporated Law Practices

Incorporated Law Practice (ILP) is fast becoming the trend in the modern world. Many countries are already diversifying into that form of practice so much that Nigeria has no excuse to now reverse from such practice at this corporate age. It is interesting to note in particular that in England, where legal profession in Nigeria was borrowed from,⁹ corporate law practice is in vogue. According to Mayson, law firms in England can be classified into six types namely;

i. "sole practitioner"

staff, yet the control and management of the firm will still remain a "one-man show" affair.

5 See for example Rule 5(4), 2007 Rules and Rule 50, 1975 Rules.

6 See generally, Rule 5, 2007 Rules. See in particular Rule 36, 1975 Rules. For explanations on all these forms of law practice in Nigeria, see Oluwatoyin Doherty, *Legal Practice and Management in Nigeria* (London: Cavendish Publishing Ltd, 1998) 39-47.

7 Doherty, above n5, 39

8 There are countries where this form of practice has gained notoriety. It even appears to be the demanding form of practice in the modern world where lawyers now deal mostly with cooperate clients. See Foonberg, n.1, 48.

9 There is an argument on whether advocacy was known to the Nigerian people prior to the arrival of the British imperialism or not. Despite this controversy, the settled understanding is that legal practice in its sophisticated formality was introduced by the colonial masters. On the history of legal profession in the country, see J. Olakunle Orojo, *Professional Conduct of Legal Practitioners in Nigeria*. (Lagos, Nigeria: Mafix Books Limited 2008) 3-20

- ii. "sole principal"
- iii. "partnership of individual practitioners"
- iv. "partnership integrated entrepreneurs"
- v. "mixed partnership" and
- vi. "incorporated law firms".¹⁰

It would therefore not be strange for law to be practiced as a corporation anywhere in the world; particularly in common law jurisdictions like Nigeria. After all, it is not proper for any person to be more English than the English man himself.

Incorporated law practice has also gained prominence in Australia, especially in the New South Wales state. The step towards diversification into incorporated law practices in that country is traceable to the year 1998. In that year, a federal government review declared the hitherto partnership model of law practice as anti-cooperative and insensitive to the legal need of the populace.¹¹ Thus, in 2001, legislation was passed allowing incorporated legal practice to operate in the New South Wales state. It is informative to note that, it has been particularly argued that, as at 2nd May 2008, based on the data made available from the Office of the Legal Services Commission (OLSC), there have been over 800 ILPs in the New South Wales alone.¹² Nigeria thus has no justification for now outlawing incorporated law practices when it aims at joining the league of 20 leading countries by the year 2020, a period when incorporated law practice is expected to have gained global prominence.

The demand of the twenty-first century requires that, law practice should be capable of being divorced from the person of the lawyer himself, so much that the corporate entities dealing with a law firm as clients will be able to treat the law firm as a legal entity, which can share their feelings with fellow legal entities and which can sue and be sued, in the event of any dissatisfaction with its conduct trampling upon their rights.¹³

Contrary-wise however, it readily came into the fore during a research by this writer, projecting into the prospects for corporate law practice in Nigeria that, it would be unprofessional for any individual or group of lawyers to practice law in the country as a corporation, i.e. incorporating a company, having its main or part of its objectives as law practice. The provision of Rule 5 sub rule (5) of the Rules¹⁴ which is express and self explanatory is very instructive on this position and it

¹⁰ Mayson S, *making Sense of Law Firms: Strategy, Structure and Ownership* (London: Blackstone, 1997) pp145-160; cited in Doherty, note 5; p39, fn 12.

¹¹ Angela Priestley, "Incorporate This: Law firm compliance in a modern world", 2 May, 2008, *Lawyers Weekly*, 24 also available at www.lawyersweekly.com.au

¹² Angela Priestley, above n10, 25

¹³ By the general nature of the law practice in the country as at now, if any person, natural or corporate, has any cause to sue a law firm, the proprietor of the firm will have to be sued personally while the name of the firm will be indicated as the name and style under which he is trading. For example, *Testimony Limited v. ABC Esq.* (Trading under the name and style ABC & Co. "His Powers Chambers"). This arrangement does not go down well with corporate clients of lawyers.

¹⁴ It was made by the country's then Attorney-General of the Federation and Minister of Justice and Chairman, General Council of the Bar, Bayo Ojo, in exercise of the powers conferred on him by section 12(4) of the *Legal Practitioners Act* (LPA), CAP 207, Laws of the Federation of Nigeria (LFN) 1990 or CAP LII, LFN, 2004. See particularly section 10 of the *Legal Practitioners (Amendments) Decree No. 21, 1994* where section 12(4) relied on has been inserted.

thus declares thus:

"(5) It shall be unlawful to carry out legal practice as a corporation"¹⁵

The above provision of the Rules will appear to have made actualization of such practice impossible in Nigeria. Besides, there are many intriguing legal issues intrinsic in the implication of the impossibility of practicing law as a corporation occasioned by the stipulation of that provision of the Rules. Essentially, there are scores to be settled between the provisions of Section 40, providing for right to peaceful assembly and association; and, section 42, stipulating right to freedom from discrimination; of the *1999 Constitution of the Federal Republic of Nigeria Constitution (as amended)* (hereinafter called "the Constitution");¹⁶ and, Section 18 of the *Companies and Allied Matters Act (CAMA)*,¹⁷ allowing any two or more persons to form and incorporate a company, and Rule 5 sub-rule (5) of the Rules.

Ethics And Nature Of Law Practice In Nigeria

By ethics of law practice, it is meant herein the rules of professional conduct in the legal profession, which must guide the practice and conduct of all legal practitioners commonly called lawyers in Nigeria.¹⁸ And by nature, it is meant the form of organizations in which law practice is carried on in the country.¹⁹ The nature of law practice in Nigeria is essentially informed and determined by the rules of ethics in place in the country. Thus, both ethics and nature of law practice in the country can be gleaned from the *Rules of Professional Conduct in Legal Profession* applicable in the country at any period in time.

It instructive to note that, the *Rules of Professional Conduct in Legal Profession* operative in the country since 1975 was replaced by another one made in 2007 and by which substantial amendments were made²⁰ and many new innovations have been introduced. Of particular interest of such innovations is that, contrary to the latitude given by the earlier 1975 Rules, corporate law practice has been expressly annulled by the 2007 Rules via its Rule 5 sub-rule (5). There also seems even not to be any encouraging provisions on the practice of law either as partners or associates in the same 2007 Rules. The concern of this paper is however not with any other loopholes in the new 2007 Rules, but basically with the legal implication of its newly introduced Rule 5(5).

It suffices to note therefore that, by the extant 2007 Rules, the possible modes of prac-

15 This is a very novel innovation of the new 2007 Rules. The old Rules of 1975 did not contain such provision.

16 Formally cited as the *Constitution of the Federal Republic of Nigeria (Promulgation) Decree No. 24, 1999*, but now CAPC23, LFN 2004

17 CAP C20, LFN 2004

18 For a person to qualify to practice as a legal practitioner (i.e. as a barrister and solicitor) in Nigeria, his name must be on the roll kept at the Supreme Court of the Country. See section 2(1), LPA, above note 13. Also, it is a punishable misconduct for any lawyer to violate any provision of the Rules. See Rule 55, 2007 Rules.

19 For a general study on the types of business organization, i.e. sole proprietorship, partnership and corporation, in which form law can also be practiced, see J. A. Bamiduro, *Introduction to Management and Society* (priv.pub, 2000) 44-63; and, K. R. Abbot and N. Pendlebury, *Business Law*, (London and New York : Continuum, 1996) 236-332.

20 For example, the express reference made in Rule 36 of the 1975 Rules to the instances when lawyers can practice as associates is completely omitted in the 2007 Rules. There is equally no replica of the provision of the 1975 Rules, expressly encouraging practice of law in partnership, in the 2007 Rules.

practicing law in the country is one of sole-proprietorship, partnership or associate-ship. It is proscribed for any group of lawyers to practice the profession in the country as a corporation to be incorporated with the objective of practicing law. This explains the ethics and nature of law practice in Nigeria, which every lawyer in the country must observe and strictly abide by.

Regulatory Statutes And Rules On Legal Profession In Nigeria

Before examining the legality and constitutionality of Rule 5(5) of the 2007 Rules, it is necessary to note that, apart from the Rules, there are many other statutes, orders and subsidiary rules regulating law practice in Nigeria. At least for record purpose, the major ones²¹ of those other regulatory statutes and Rules are listed as follows:

1. Legal Practitioners Act, 1975²²
2. Legal Practitioners (Amendment) Decree, 1990²³
3. Legal Practitioners (Amendment) Decree, 1992²⁴
4. Legal Practitioners (Amendment) Decree, 1993²⁵
5. Legal Practitioners (Amendment) Decree, 1994²⁶
6. Legal Education (Consolidation, etc.) Act, 1976²⁷
7. Legal Education (Consolidation, etc.) (Amendment) Decree, 1992²⁸
8. Subsidiary Legislations to the Legal Practitioners Act, 1975 (as amended)²⁹
9. Rules of Professional Conduct for Legal Practitioners, 2007³⁰

21 The list here is not exhaustive. There are many other Orders which still pertain to regulation of legal profession in the country, which this paper could not make mention of.

22 CAP L11, Vol. 8, LFN 2004. For a copy, see Tahir Mamman (E-in-C), *The Nigerian Law School Course Handbook on Professional Ethics and Allied Matters, Bar Part II Course 2005/2006 Edition* (Abuja: Council of Legal Education, Nigerian Law School, 2006) 116-156.

23 No.2 of that year; made by General Ibrahim Babangida, the then Military President of the State on 25th January, 1990.

24 No.9 of that year; also made by Babangida, above note 22, on 25th February, 1992. For a copy, see Mamman, above note 21, 180

25 No.21 of 1999; equally made by Babangida, above note 22, on 18th February, 1999; but with retrospective effect from 31st July, 1992 and cited as *Legal Practitioners (Amendment) Decree, 1993*. For a copy, see Mamman, above note 21, 181-185

26 No.21 of 1994 made by Babangida on 9th November, 1994 and deemed to have commenced on 31st July, 1992. For a copy, see Mamman, above note 21, 159-164.

27 CAP L10, LFN 2004. For a copy, see Mamman, above note 21, 111-115.

28 No. 8 of 1992. For copy, see Mamman above note 21, 179

29 These are: *Legal Practitioners (Disciplinary Committee) Rules*; *Legal Practitioners (Remuneration for Legal Documentation and Other Land Matters) Order*; *Entitlement to Practice as Barristers and Solicitors (Federal Officers) Order*; *Entitlement to Practice as Barristers and Solicitors (National Assembly Office) Legal Practitioners Order*; *Entitlement to Practice as Barristers and Solicitors (Federal Housing Authority (Legal Practitioners) Order*; *Entitlement to Practice as Barristers and Solicitors (Federal Road Safety Commission Legal Officers) Order*; and, *Legal Practitioners (Bar Practicing Fees) Notice*. For copies of all of these, see the Schedule in Mamman, above note 21, 139-156.

30 i.e. the Rules herein.

A painstaking study of the above listed legal documents will provide an appreciation of the standard of conduct expected of a legal practitioner in the country and make one to understand how the profession is jealously preserved in that part of the world. At this stage, it is now apt to proceed to appraise the legality of the provision of the Rules under consideration.

Constitutionality Of Rule 5 Sub-Rule (5) Of The 2007 Rules

In Nigeria, the settled position of the law is that, the litmus test document for the legal validity of any other law, act or conduct is the Constitution. This position is a declaration made by the Constitution itself in conferring that esteemed position on itself via its Section 1 Sub-sections (1) and (3) which states thus:

1. (1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
2.
3. If any law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

In a recent case of *Adekoye v. N.S.P.M. Company Limited*,³¹ the Supreme Court of Nigeria, which is the apex court of the land and has final say what law is, restated the supremacy of the Constitution succinctly in the following emphatic words:

"We all know, and infact (sic) it is long settled that the provisions of the Constitution are supreme over any other provisions, Law or Act of the National Assembly."³²

Similarly, in an earlier decision of the Court of Appeal in *Phoenix Motors Ltd v. N.P.F.M.B.*,³³ the esteemed status which the Constitution enjoys as the apex law of the land was captured by Niki Tobi JCA (as he then was),³⁴ in the following eulogizing words as follows:

"The constitution is the highest law of the land. All other laws bow or kowtow to it for salvation. No law which is inconsistent with it can survive; that law must die and for the good of the society. This is the constitutional position entrenched in Section 1 of the Constitutional. While S1 (1) provides for the Supremacy of the Constitution, S1 (3) provides for the prevailing power of the constitution where any law of the land is inconsistent with it."³⁵

31 (2009) ALL FWLR (Pt. 463) p1263.

32 Above note 30, 1276, Paragraph B

33 (1993)1 NWLR (Pt. 271) 611.

34 His Lordship rose to become a Justice of the Supreme Court before he retired in 2010 when he clocked constitutional mandatory retirement age of Seventy (70).

35 Above note 32 p619

What follows from the foregoing is simply that, if this paper comes to the conclusion that the provision of Rule 5(5) under scrutiny is inconsistent with any provision of the Constitution, then it will stand void. It should be stated that the paper is not embarking on any constitutional frolic or verbose analysis; its concern is mainly to examine if the provision of the Rules does not contradict sections 40 and 42 of the Constitution. This is the next analysis to follow.

Section 40 Of The Constitution And Rule 5(5) Of The Rules

Section 40 of the Constitution preserves right to freedom association and peaceful assembly of all citizens, including lawyers; and, it provides as follows:

“40 (1) every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests:

Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that commission does not accord recognition”.

What is relevant to this paper, based on the provision of Section 40 quoted above, is to enquire whether by annulling practice of law as a corporation, Rule 5(5) of the Rules has not denied lawyers their right to associate with other persons (i.e. other fellow lawyers) and form an association in protecting an aspect of their interests, which in particular bothers on professional concern. It is clear, without much ado that the only rider to the enjoyment of the provision of Section 40 is as stated in the proviso thereto; i.e. with regard to the powers conferred on INEC in dealing with political parties which the Commission does not recognize.

It therefore follows that since forming a company having its objective as law practice is one of the ways or means by which any lawyer can freely assemble and associate with other fellow lawyers in the business of law practice, which is a sort of enjoying the right enthroned on them by the constitution, the prohibition of practicing law as a corporation by the provision of the Rules under consideration, automatically makes that provision of the Rules to stand glaringly inconsistent with Section 40 of the Constitution. It will thus to that extent, pursuant to Section 1(3) of the Constitution, be void. Or, is formation of a company by a group of lawyers for the practice of law cannot be a way for them to freely assemble and associate with each other?

For an understanding of what the word “association” connotes, reference can be made to Section 229 of the Constitution which defines association to mean;

“any body of persons corporate or unincorporated who agree to act together for any common purpose, and includes an association formed for any ethnic, social, cultural, occupational or religious purpose”

It is very worthy of note that, Section 40 of the Constitution expressly stipulates

that, every individual is particularly entitled to belong to any association for the protection of his interests without qualifying the kind which such interests can or must be and equally without limiting the aspect of his interests he must seek to protect in forming or belonging to such association. Similarly, the constitutional definition of the word "association" quoted above clearly shows that an association is any body of persons whether corporate or incorporated; but what matters is their agreement to act together for any common purpose and such purpose may be for occupational advancement, such as practice of law. It is significant that any number of lawyers coming together to form a company for the common purpose of practicing law will therefore fit in as an association formed for occupational purpose and it is therefore their constitutional right under the Section to so come together in that manner and for that common occupational purpose of engaging in corporate law practice.

It should be noted that, it will be too extraneous for any qualification not expressly placed on this aspect of the provision of the Constitution, as regard what an association is, to be placed thereon. The accepted and recognized principles of constitutional interpretation will not permit that to be done. In the case of *Oso Aya (Allais) Oso Effiong & Anor v. Emmanuel Daniel Henshaw & Anor*³⁶, the Supreme Court pronounced on what should be the approach to the interpretation of any statutory provision, like the provision of the Constitution under consideration in this paper, in the following words:

"Moreover when there is statutory provision it should, as we have often said, be given its ordinary natural, grammatical meaning and here we do not see on that basis any justification for importing into the words contained in Order 56 Rule 16 any limiting words that the judge on appeal may only exercise his discretion with the consent of the parties.

Where there is specific statutory provision, it is certainly not the duty of any court to try to avoid its consequences and interpret it in such a manner as to fit into English practice if it is in fact differently and clearly expressed as to our mind Order 56 Rule 16 is".³⁷

To better appreciate the fact that under the Nigerian law, a corporation is a form of association, recourse can also be made to Sections 33 to 35 of CAMA, referring to both Articles and Memorandum of "Association". If what is undergone by forming a corporation is not an association, these provisions of CAMA would not have so christened those two most important incorporation documents of bond for the association which those who decided to come together in forming of a corporation have to subscribe to.

Following the foregoing analysis therefore, it can rightly be posited, and this is the position of this paper, that, the provision of Rule 5(5) of the Rules is inconsistent with the provision of Section 40 of the Constitution and must therefore, to the extent of its inconsistency be null and void. Having arrived at this conclusion, the paper will also go further to consider what will become of the provision of the Rules in the face of Section 42 of the Constitution.

36 (1972)5 SC (Reprint) 56

37 Above note 35, 62

Section 42 Of The Constitution And Rule 5(5) Of The Rules

Section 42 of the Constitution preserves right to freedom from discrimination against any person in Nigeria, including lawyers. The section states unequivocally as follows:

“42- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

- a. be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizen of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or
- b. be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action, any privilege or advantage that is not accorded to citizen of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.”

The legal issue that arises from the above provisions of the Constitution vis-à-vis the provision of rule 5(5) of the Rules is simply whether by proscribing practicing law as a corporation, the lawyer in Nigeria is not being discriminated against or being subjected expressly by the application of Rule 5(5) to a disability merely by the reason that, he belongs to a community of professionals whose occupation is law practice. The answer is in the affirmative. Two points confirm this.

One, a look at the meaning of the word community, will reveal that members of the legal profession in Nigeria can rightly be regarded as a community. Since, the lawyer has therefore been prohibited from practicing his occupation in incorporation simply because he belongs to the community of learned minds; the provision of the Rules is to that extent discriminatory, unconstitutional and therefore null and void. In the case of *Salisu v. Odunmade*,³⁸ the Supreme Court per Ogbuagbu, JSC, defines the word “community” inter alia to mean “people having common rights”.³⁹ All lawyers in Nigeria, by virtue of their belonging to the same profession have common rights. They are therefore a community.

Two, other professionals in the country, like engineers, medical practitioners, architects etc are not precluded from forming incorporations for the purpose of practicing their professions. In fact, contrary-wise, floating a company seems to be imperative for those professions to properly operate in the country. They form companies by express indication of the purpose for which they will operate.⁴⁰ Why should the case for lawyers then be an exception? Well, the

38 (2010) ALL FWLR (Part 514) p15

39 Above n37, 26 Paras A-B

40 There abounds in the country many engineering companies registered with such names as XYZ Engineering Ltd.

paper will address the possible justifications for the provision of the Rules, which may tend to respond to this poser. It is noteworthy at this stage that, the paper has come to the conclusion that the provision of the Rules under consideration is discriminatory in nature and therefore in violation of Section 42 of the Constitution and is therefore to that extent null and void.

Section 18 Of Cama And Statutory Validity Of Rule 5(5)

The unambiguous wordings of Section 18 of CAMA are as follows:

"18. As from the commencement of this Act, any two or more persons may form and incorporate a company by complying with the requirements of this Act in respect of registration of such company"

It is very much necessary from the onset to note that, the latitude which the above statutory provision gave to any two or more persons inure to them in form of right, which they will be entitled to claim, enjoy and exercise.⁴¹ As a provision of a statute, and Rule 5(5) being a provision of a subsidiary legislation or a mere Rules made pursuant to the power derived from the provision of a similar statute like CAMA, rule 5 (5) cannot therefore override section 18 of CAMA. In *Nasir v. C.S.C., Kano State*,⁴² when faced with the challenge of whether a Rules of Court can override statutory provisions, the Supreme Court per Ogbuabgu, JSC, cleared the air and stated the position of the law as relevant to this paper as follows:

"I need emphasize as it is also settled that mandatory Rules of Court are not as sacrosanct as mandatory statutory provisions, and therefore, a Rule of Court cannot override a statutory provisions of the law".⁴³

It therefore follows that, notwithstanding the fact that the provision of Rule 5(5) is mandatory in nature; it cannot override the provision of Section 18 of CAMA, which is also mandatory in nature since it has donated some sorts of right to two or more persons to exercise. To this extent therefore, it would appear that Rule 5(5) cannot equally pass the test of statutory validity and is therefore null to that extent as well.

It is interesting to note that, apart from the general provision of section 18 of CAMA which permits any two more person to form a company, including lawyers, a special concession and privilege has further been granted to both Legal Practitioners and Accountants in that vide Section 19 of CAMA, they are exempted from registering compulsorily, as expected of other persons, even though they are more than twenty persons carrying on business in company, association or partnership. What this provision does is to give complete latitude to lawyers to incorporate a company to carry on their business or otherwise. The provision of Rule 5(5) may appear to be in harmony with this provision of CAMA, but it is absolutely a deviation from the intent of Section 18 thereof. It cannot therefore validly invoke this Section in aid to justify its own purport.

41 See J. Olakunle Orojo, *Company Law and Practice in Nigeria*, Third edition (1992; Mbeyi & Associates (NIG) Ltd, Lagos, Nigeria) 29.

42 (2010) ALL FWLR (Part 515) 195

43 Above n41, 211 Para F Katto v. Central Bank of Nigeria (1991)9 NWLR (Pt. 214) 126

Now, having gone this far, the paper will next proceed to consider the possible grounds of justification for the provision of Rule 5(5) as may be advanced by the progenitor of the constitutionality and legality of rule 5 (5) of the Rules and demonstrate why those grounds cannot hold water, as it is believed by this writer.

Likely Arguments To Justify The Provision Of Rule 5(5)

The starting point perhaps is to state that since all the provisions of the Rules of which Rule 5(5) forms a part were made pursuant to the provision of a Statute; they are ordinarily presumed to be valid until the contrary is established. However, while no one is contending this fact as the ideal, it is posited that no provision of a statute can be valid when it is contrary to any provision of the Constitution, especially with the provisions of fundamental human rights. Thus, its fate is that of nullity and nothing more.

Another justification that may be advanced is to argue that, even though a matter of right which every lawyer should enjoy is to practice as a corporation, he can rightly be denied of the right because, by joining the legal profession, he has submitted all his rights and subjected them all to the overall Rules and regulations which the profession may require him to comply with, such as the provision of Rule 5(5). It is posited by this paper that, this argument stands contrary to the position of the law with regard to the issues of constitutional provisions and fundamental human rights in particular. The law stands that, an individual cannot waive, submit or deny himself the fundamental human rights conferred on him by the Constitution and neither can any law, rules or regulations take them away from him under whatever guise.⁴⁴

In the unreported case of *The Provost Kwara State College Education, Ilorin and 2 Others v Bashirat Saliu and 2 Others*,⁴⁵ the Court of Appeal, Ilorin Division, per Mukhtar JCA, extensively addressed a similar issue that arose in the matter as follows:

“An individual, as rightly submitted by the respondents counsel, could not waive a fundamental right. In an earlier decision of the Supreme Court in the case of *Bebdek State v. The Federation*⁴⁶ has held per Idigbe, JSC thus:

When the observance of the provisions of a statute is required on the grounds of public policy, it cannot be waived by an individual.

The Apex Court in a more recent decision in *Attorney General Ondo State v. Attorney General Ekiti State*⁴⁷ per Karibi-Whyte, JSC has held that:

⁴⁴ See however the case of *Olve & Ors v. Enenwali & Ors* [1976] 1 N. M. L. R, 44 at 51 where the appellant was held to have waived his fundamental human right to fair hearing under Section which requires that his matter be not adjudicated upon by a Judge whose position clothes him with likelihood of bias on the ground that he consented to a Judge who had earlier acted as counsel to the other party to still proceed to sit on the case, even when the Judge drew his attention to that situation.

⁴⁵ Appeal Numbers: CA/IL/49/2006 delivered on Thursday, 18th June, 2011.

⁴⁶ (1982)3 NCLR 1 at 63

⁴⁷ (2001)17 NWLR (pt. 743) 706 at 773

"parties cannot contract out their constitutional rights. That is clearly not permissible, and in my opinion not the subject matter for argument between the parties".⁴⁸

Perhaps a more debunking position of the law that will make the argument of waiver or submission of rights to go to no issue is the decision of the Supreme Court in the case of *Ariori v. Elemon*⁴⁹ per Obaseki JSC, where the court stated the position of the law clearly as follows:

"Fundamental rights entrenched in our 1963 and 1979 constitution are in my opinion, out of reach of the law of waiver. Our oath of office to protect and defend the constitution over all other laws ensures this. See section 1(1) of the 1963 constitution and section 1(1) of the 1979 Constitution. The right to life, right to personal liberty, right to freedom of expression, thought, conscience and religion, right to lawful and peaceful assembly and association which are vital to the human existence and democracy in this nation cannot in my view, be waived."

To cap the whole argument up that, looked from whatever angle, the provision of Rule 5(5) cannot stand in the face of the provisions of sections 40 and 42 of the Constitution and section 18 of CAMA, the following pronouncements of Oredola JCA in the same case of Bashirat Saliu,⁵⁰ draws home the point; His Lordship says:

"Let it be reiterated, that either a right or duty conferred or imposed by the constitution cannot be taken away or removed by any other legislation or regulation, outside the confines of the constitution itself. Any other law, rule or regulation, statutory or otherwise, which seeks to abrogate such a right or grant relief from such a duty as conferred or exacted by the Constitution will be void to the extent of its inconsistency. See *Okulate v. Awosanya*⁵¹, *Osungwu v. Onyeikigbo*⁵²

Can Rule 5(5) Be Sustained On Constitutional Limitations?

This paper will be incomplete if the constitutional limitations to the rights which Rule 5(5) has been earlier argued to have contravened are not considered. Under the Constitution, derogations from certain fundamental rights will be justified if done in some circumstances. The relevant provision of the Constitution that pronounced this limitation is Section 45(1) and it provides thus:

"45-(1) Nothing in sections 37, 38, 39, 40 and 41 of this con-

48 Above n44, 19-20

49 (1983)1 SCNLR 1

50 Above n44

51 (2000) 2 NWLR (pt. 646) 530

52 (2005) 16 NWLR (Pt. 950) 80

stitution shall invalidate any law that is reasonably justifiable in a democratic society-

- (a) in the interest of defence, public safety, public health; or
- (b) for the purpose of protecting the rights and freedom of any other persons".

It should be mentioned that, the other leg of Section 45, i.e. sub-section (2) thereof, relates to instances when an individual may be deprived of his right to life enshrined in section 33 of the Constitution. It should also be noted that, it is only in respect of right to private and family life;⁵³ right to freedom of thought, conscience and religion;⁵⁴ right to freedom of expression of the press;⁵⁵ right to peaceful assembly and association;⁵⁶ and, right to freedom of movement;⁵⁷ that, any law that is reasonably justifiable in a democratic society either in the interest of defence, public safety, public order, public morality, public health; or, for the purpose of protecting the rights and freedom of any other persons; will not be nullified, even when such law restrains enjoyment of those rights.

Thus, for the purpose of this paper, the question of constitutional constraint does not arise in respect Section 42 which guarantees right to freedom from discrimination. To this end, based on our previous analysis, Rule 5(5) still stands in violation of this section of the Constitution and is still therefore to that extent null and void. Attention must be drawn to the fact that, the only circumstances under which a law will not be invalidated when it derogates from the protection and respect for right to freedom from discrimination,, are in the case of restrictions imposed by such law with respect to the appointment of any person to any office under the State or as a member of the Armed Forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria. Rule 5(5) is not covered by any of these circumstances; its nullity therefore still stands confirmed.

With regard to Section 40; right to peaceful assembly and association; the circumstances under which it can be derogated from or restricted are as stipulated in Section 45(1) earlier mentioned. A critical look at those circumstances will reveal that, rule 5(5) is not intended to meet or satisfy any of them. Has Rule 5(5) been drafted in the interest of any defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of any other person? Is it the same rights of lawyers which the Rule has interfered with, as already argued in this paper; that the Rule still seeks to protect? What a right! It is therefore inconceivable that the provision of Rule 5(5) can be sustained on the platform or matrix of constitutional limitations to enjoyment of fundamental rights in Nigeria. It will be too extraneous for such possibility to be espoused. There is therefore no constitutional defence for the illegality

⁵³ See section 37 of the Constitution

⁵⁴ See section 38 of the Constitution

⁵⁵ See section 39 of the Constitution

⁵⁶ See section 40 of the Constitution

⁵⁷ See section 41 of the Constitution

⁵⁸ See section 42(3) of the Constitution

of rule 5(5) of the Rules.

The Remedial Option

Following the foregoing, it is therefore the position of this paper that, the General Council of the Bar, which is the official body that makes Rules for legal practitioners in Nigeria, should review the provision of Rule 5(5) of the *2007 Rules of Professional Conduct for legal Practitioners* in order to bring it in tandem and harmonious relationship with the provisions of Sections 40 and 42 of the Constitution and section 18 of CAMA. This is the only remedial option available to the Council in salvaging the provisions of the Rules from the scourge of illegality and curing it of the virus of unconstitutionality which has afflicted it.

Accordingly, it is strongly recommended that Rule 5(5) should be redrafted to read either as follows:

“It shall be unlawful to carry out legal practice as a corporation when members of the company include a non-lawyer or a lawyer who is not admitted to practice law in Nigeria”.

Or

A lawyer shall not carry out legal practice as corporation with a non-lawyer or with a lawyer who is not admitted to practice law in Nigeria

Or

A lawyer shall not from a corporation, whose objective includes practice of law, with a non-lawyer or a lawyer who is not admitted to practice law in Nigeria.

It is important to note that, the significance of the above restriction placed on the mode of corporation that can be formed, as redrafted above, is to preserve the dignity of the profession, which must have been the genuine intention why the provision of Rule 5(5) was introduced in the 2007 Rules. It is therefore hoped that what Rule 5(5) is meant to achieve will still be accomplished if the Rule is redrafted to read as suggested above, without running afoul of the Constitution and any other law.

Conclusion

Efforts to preserve the integrity of legal profession in Nigeria brought about proscription of practice of law in the country as a corporation. This was executed through the provision of Rule 5(5) of the *2007 Rules of Professional Conduct for legal Practitioners* operative in the country. This paper has however provoked a legal thought on the constitutionality and legality of the said rule 5(5) in view of the provisions of Section 40 and 42 of the country's extant 1999 Constitution and the provision of Section 18 of the *Companies and Allied Matters Act (CAMA)*, which is the regulatory statute for registration of companies in the state.

This study has revealed that the provision of Rule 5(5) is not in harmony with the two constitutional and statutory provisions and is therefore null and void to the extent of its inconsistency. The conclusion drawn by the paper is that, even though the Rule was genuinely enacted to achieve a lofty goal for the legal profession in the country, its inconsistency with constitutional and statutory provisions has overshadowed its good intention and defeated its purpose. Therefore, in order not to throw away the baby with bath water, a review and redrafting of the Rule has been strongly recommended. This is the saving grace for the Rule.
