CASE REVIEW

A Law Lecturer in Public Institution Cannot Engage in Private Practice: A Review of The Decision in *Ogieva V Adams* By Oliver Omoredia - A Rejoinder

By

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Abstracts

This review is a rejoinder to Omoredia's recent essay titled 'A Law Lecturer in public institution cannot engage in private practice: A review of the decision in Ogieva v Adams' decided by the Edo State High Court in 2009 wherein the author touted the decision as correct law. The Court held in the case that lecturers in public institutions cannot engage in private practice. This short review sets the records and the law straight by pointing out specific areas of the High Court decision that are based on erroneous conception/conclusion of law and shows that existing laws exempts law lecturers and medical practitioners in the universities from the prohibition of private practice by public servants.

Introduction

In a piece published recently[1], a private legal practitioner, Oliver Omoredia had reviewed and touted as correct the 2009 decision of the Edo State High Court (the High Court) which held that lecturers in public institutions cannot engage in private practice. From all indications, the author is obviously unaware of recent developments in this area of the law since that decision was made by the High Court in 2009. Although, the controversy surrounding private practice by lecturers in public institutions is long and deep seated, I will, however, not reinvent the wheel or recapitulate the arguments here because the controversy has, in my view, been largely resolved in favour of law lecturers in the literature.[2]

In addition to the literature, however, I argue here that the law as it stands today is on the side of law lecturers in public institutions. The modest objective(s) of this short rejoinder is therefore to set the records and the law in this area straight by pointing out specific areas of the High Court decision that are erroneous and cannot be supported in law.

Where the High Court err

The High Court decision in *Ogieva v Adams*[3] errs in at least three respects: First, it is mad*e per incuriam*. It did not take into consideration applicable and relevant law which bears directly on

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[1] A Omoredia 'A Law Lecturer in public institution cannot engage in private practice: A review of the decision in *Ogieva v Adams'* The Nigeria Lawyer 02 May 2018 available at http://thenigerialawyer.com/a-law-lecturer-in-public-institution-cannot-engage-in-private-practice-a-review-of-recent-decision-in-ogieva-v-adams-by-oliver-omoredia/ (accessed on 17 May 2018).

[2] E Ojukwu 'Entitlement to practise as a Legal Practitioner in Nigeria: A comment' 1994 *Nigerian Current Law Review* 130; 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; A E Akintayo 'The right to work in the legal profession: An analysis of the Supreme Court of Nigeria decision in *Senator Bello Sarakin and Another v Senator Atiku Abubakar Bagudu and Others*' (2016) 3 *UNILAG Journal of Public Law* 231.

[3] Suit No: B/3/08/2009.

the issue(s) before the court. Second, it is against the current decision of the Supreme Court of Nigeria on the issue. Third, it is wrong on the *locus standi* of the respondents. Each of the grounds is discussed in turn below.

The decision is per incuriam

The Court did not take into consideration the applicable provisions of the Federal Government of Nigeria Public Service Rules (2008 Edition) (the Rules) which bear directly on the issue(s) before the Court. Para 030425 of the Rules provide that:

> In accordance with the provisions of the Regulated and other Professions Private Practice Prohibition Act, (Cap.390) Part II, no officer shall engage in private practice. However, exemptions shall be granted to private Medical Practitioners and Law Lecturers in the Universities.

As can be seen above, the Rules exempted law lecturers and medical practitioners in the universities from the absolute prohibition contained in the Regulated and other Professions Private Practice Prohibition Act. This is in addition to the Regulated and other Professions Private Practice Prohibition Act (Law Lecturers Exemption) Order No. 2 of 1992 which is also an existing law under section 315 of the 1999 Constitution of the Federal Republic of Nigeria, as amended (the Constitution); a point the High Court conceded in its decision. A lot has already been written about the Law Lecturers Exemption Order in the literature, some of which I already referred to above. I therefore will not dwell on it further here. To more properly appreciate the purport and impact of the Rules on this issue, however, a little elaboration of its status is desirable.

The Rules governs the employment of public servants in federal establishments of which federal universities are part. The Rules applies to federal establishments subject to the respective establishments' conditions of service and internal rules and regulations. In the absence of internal rules and regulations on any matter, the relevant provisions of the Rules apply.[4] The Rules in its application to public servants has constitutional force and thus supersedes ordinary statutes in its area of application.[5]

Having established the above, the only point left for resolution is the question of whether para 030425 of the Rules which exempted law lecturers and medical practitioners in the universities from the private practice prohibition is not inconsistent with para 2 (b) of the 5th Schedule to the Constitution as being alleged in some quarters? I argue here that para 030425 of the Rules is not inconsistent with para 2 (b) of the 5th Schedule to the Constitution.

The word 'inconsistent' has been defined by the Supreme Court in *Nigercare Dev. Co. Ltd v A.S.W. B*[6] thus:

> …mutually repugnant or contradictory, contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other as, in speaking of the repeal of a statute which is inconsistent with the Constitution.

The Court went further to say, '[i] the context of section 1 (3) of the Constitution, it simply means the statute speaking quite a different language from the Constitution…'[7] Thus, for a provision to be inconsistent with the Constitution, it must be incapable of being read

[4] Para 160103, section 1 of Chapter 16 of the Rules.
[5] See for instance, the Supreme Court of Nigeria decisions in *Olaniyan v University of Lagos* (1985) 2 NWLR (Pt. 9) 559 at 618; *Shitta Bey v Federal Public Service Commission* (1981) 1 SC 40; among others.
[6] (2008) 9 NWLR (Pt. 1093) 498 at page 529.
[7] Ibid.

compatibly or consistently with the Constitution. Mere difference(s) in provisions will not do. Thus, if a provision can be read compatibly or consistently with the Constitution, although the provision(s) creates exemptions or make clarifications not made by the Constitution itself, such a provision cannot be said to be inconsistent with the Constitution.

A proper reading of para 030425 of the Rules reveals that it only clarifies the prohibition contained in para 2 (b) of the 5th Schedule to the Constitution. What is more, the clarification/exception made in para 030425 of the Rules can be read consistently and compatibly with the prohibition in para 2 (b) of the 5th Schedule to the Constitution without the abrogation or abandonment of either. I suggest that this is the correct reading of para 030425 of the Rules since it is not possible in the nature of things for the Constitution to provide for all situations or exigencies. Para 030425 of the Rules is therefore not inconsistent with the Constitution.

The decision is against binding judicial precedents

The High Court is also in error to have held that the earlier case of *Ogbuagu v Ogbuagu*[8] which held that the Code of Conduct Tribunal (CCT) is the right forum to complain about or litigate a breach of the Code of Conduct by a public servant was overruled by the Supreme Court in *Okoya v Santilli*[9]. It should however be noted that the (un)lawfulness of a public servant participating in private practice was not an issue before the Supreme Court in *Santilli.* The main issue before the Supreme Court in that case was whether the third defendant was entitled to certain number of shares from the plaintiffs. The Supreme Court *suo moto* raised and addressed the issue of the third defendant being an employee of NEPA as at the time he was acting for the plaintiff's company. Thus, the pronouncement of Belgore JSC in that case to the effect that a court is entitled to take cognisance of illegality which it finds before it even if the illegality is not triable by the court, is only an *obiter dictum* which did not create a new norm or supplant existing one(s) with respect to public servants in private practice.

Also, that *Santilli* did not change the law in this regard is confirmed by the subsequent Supreme Court decision in *Ahmed v Ahmed*[10] where the Supreme Court restated the law that allegation of breach of the Code of Conduct is cognisable and triable only by the CCT. More recent case law continues to validate this position of the law. In *Ebere v IMSU*,[11] for instance, the Court of Appeal again restated the law that the (un)lawfulness of law lecturers in private practice is not an issue triable or cognisable by regular courts but is the duty of the Code of Conduct Bureau. The High Court is therefore also in error in this regard.

The respondents lack the requisite locus standi to maintain the action

The Court also erred when it held that the respondents had *locus standi* to raise the issue before it. Granted that the CCT may not be vested with criminal jurisdiction as has been opined by an eminent criminal law jurist, Justice Karibi-Whyte;[12] the jurisdiction of the Tribunal is also not civil simpliciter. The jurisdiction of the CCT can therefore be said to be quasi-criminal in nature with implication for proceedings before it and the type of persons entitled to apply to enforce the provisions of the Code of Conduct. That proceedings before the CCT is not an all-comer

[8] (1981) 2 NCLR 680
[9] (1993/1994) 1 ANLR 387
[10] (2013) 15 NWLR 224
[11] (2016) LPELR 40619
[12] Vanguard 'CCT not vested with exercise of criminal jurisdiction' available at: https://www.vanguardngr.com/2015/12/cct-not-vested-with-exercise-of-criminal-jurisdiction/ (accessed on 08 May 2018).

affair is confirmed by section 24 of the Code of Conduct Bureau and Tribunal Act (the Act)[13] which clearly set out the categories of persons and authorities entitle to institute proceedings before the Tribunal.

According to section 24 (2) of the Act, proceedings to prosecute any offence under the Act shall be instituted in the name of the Federal Republic of Nigeria by the Attorney General of the Federation (AGF) or officers in the Federal Ministry of Justice authorised by the AGF. The AGF may also authorise any officer in a state ministry of justice to prosecute directly or assist in prosecuting any of the offences in the Act after due consultation with the Attorney General of the State concerned: section 24 (3) (a) of the Act. Also, where the Tribunal requests or where contingencies require, the AGF may authorise any legal practitioner to prosecute cases under the Act or assist in the prosecution thereof: section 24 (3) (b) of the Act. Clearly, from section 24 of the Act therefore, no proceedings can be taken before the CCT by any person or authority without the express authority of the AGF. It is therefore clear that the respondents in *Ogieva v Adams* lack the locus to enforce the provisions of the Code of Conduct even before the CCT talk less of before the High Court.

Conclusion

From the foregoing, *Ogieva v Adams* was never the law on the issue of the (un)lawfulness of public servants participating in private practice. The decision is therefore erroneous and bad *in toto*. It follows also that the article supporting it is erroneous and cannot be supported in law.

Three key conclusions flow from the analysis in this rejoinder.

1. Existing laws exempts law lecturers and medical practitioners in the universities from the prohibition of private practice by public servants.
2. Even if that was not the case, the issue is not one that can be raised or ventilated before regular courts when law lecturers appear in proceedings as some private legal practitioners are wont to do; the only forum prescribed by existing law is the CCT.
3. Private legal practitioners and other aggrieved persons have no *locus standi* before the CCT to litigate or prosecute the issue without the express authorisation of the Attorney General of the Federation first had and obtained.

One however wonders why the issue of private practice by law lecturers is generating such heat when the same is not the case in the medical profession with similar professional characteristics.

[13] Cap C15 Laws of the Federation of Nigeria, 2004.