JUDICIAL PRECEDENT IN THE NIGERIAN LEGAL SYSTEM AND A CASE FOR ITS APPLICATION UNDER INTERNATIONAL LAW*

Abstract
Judicial precedent is an age-long feature of municipal judicial systems of the common law including Nigeria. The review of the practice in Nigeria reveals that its serves the cause of justice and makes predictability of the outcome of legal suits possible. Three models of judicial precedent have been identified and they comprise the natural model, the rule model and the result model. It is noted that International Court of Justice is not bound to follow judicial precedence in its decisions. The statute of the International Court of Justice expressly foreclosed the adoption of precedence in decisions of the court. This is an exclusion that impacts negatively on the cause of justice in international judicial forum like the International Court of Justice. An amendment of the relevant article, Article 59, of the Statute of the International Court of Justice with the purpose of including this important judicial practice in arriving at the Court's decisions is, therefore, suggested.

Introduction

Judicial precedent is a basic principle of the administration of justice in Nigeria. Judicial precedent simply means that like cases should be decided alike.[2] The Chamber's Twentieth Century Dictionary defines a precedent as "that which precedes; a past instance that may serve as an example".[3]

Precedence, though an important legal principle may lead to an entrenchment of a vice.[4] It has been observed that the foolishness and ignorance of the past may be repeated in the present.[5]

The term judicial precedent is in technical term known as '*stare decisis*'[6]. '*Stare decisis*' is a latin term which means 'let the decision stand'[7]. The principle maintains that cases with like facts should be decided alike. In other words, a decision of a superior court should be followed as a guard by lower courts in a circumstance where the facts of the case decided by a superior court are similar to the facts of the case before a lower court. The decision of the superior court must stand and is binding on the lower court.

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1. *J.A.* Akande, **Miscellary at Law and Gender Relations,** Lagos: MIJ Professional Publishers Limited, 1999, p. 1.
2. *Ibid.*
3. P.U. Umoh, **Precedent in Nigerian Courts,** Enugu: Fourth Dimension, 1984, p. 3.
4. *Ibid.*
5. *Ibid.*
6. S. Ulmer, **Supreme Court, Policymaking and Constitutional Law,** New York: McGraw-Hill Book Company, 1986, p. 26.
7. *Ibid.*

Nature of Judicial Precedent

Three schools of thought on judicial precedent canvass for support. The first is the school that believes that judicial precedent should be gleaned from court decisions viewed as responses to facts and not from past cases,[8] which may not issue from doctrinal consistency[9] Fred Kort is of this school.[10]

The second school favours the analysis and grouping of facts on topical ground, for example in a fact of discrimination, whether it is attributable to chance or intention, before the application of stare decisis.[11] Sidney Ulmer is of this view.[12] The third school is of the opinion that the traditional judicial precedent is broken down because it is difficult to come across two similar facts. Shapiro[13] is the champion of this view. The school maintains that it is the employment of analogy that has survived[14] and this is dependent on idiosyncratic characteristics, attitudes, activism and passivity of judges.[15]

Again, there is a curiosity which hangs on the neck of *stare decisis* which borders on whether English cases should be consulted in a bid to follow precedent in a case strictly indigenous to Nigeria.[16] Precedent is mainly based on hierarchy of courts. The 1999 Constitution of the Federal Republic of Nigeria made provisions for the Supreme Court[17], Court of Appeal[18], the Federal High Court[19], the High Court of the Federal Capital Territory (FCT)[20], the FCT Sharia Court of Appeal[21], the FCT Customary Court of Apeal[22] and State High Courts.[23] It is pertinent to note that Magistrate Courts[24] and Customary Courts[25] are created by the Laws of State Houses of Assembly.

According to the principle of judicial precedent, a magistrate court is bound to follow the decision of a High Court in any case having similar facts with that of a case decided by the High Court; the High Court is also bound to follow the decision of the Court of Appeal where the facts of the case decided by the Court of Appeal are similar to a case pending before a High Court; while the Court of Appeal is bound to follow the decision of the Supreme Court on the same consideration of similar facts relating to the case before it and that of a case decided by the Supreme Court.

8. *Ibid.*
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. C. Okpaluba, **Judicial Approach to Constitutional Interpretation in Nigeria,** Enugu: Optimal Computer Solutions Ltd, 1992, P.480.
17. S. 230.
18. S.237.
19. S.249.
20. S.255.
21. S.260.
22. S.265.
23. S.270.
24. Court of inferior jurisdiction
25. Created by the states to address customary issues.

The principle of precedent endeavours to control future decisions.[26] In other words, decisions made by higher courts are supposedly believed to be better in quality and as a result are made binding on lower courts on the basis of judicial precedent. Lower courts are therefore, constrained and this constraints brought upon these courts cannot be removed except in situations where the facts of the decided case by a High Court and a pending case in a lower court differ substantially.

Models of Judicial Precedent

Models of judicial precedent have been advocated by some scholars. The first model is termed the natural model.[27] J.F. Horty[28], in explaining the natural model stated that:

> A decision in a precedent case is best thought of as nothing but an ordinary event in the natural world. Like any other natural event, a precedent decision might figure into the reasoning of a court in its attempt to reach the correct decision in a current case, but on the natural model, this is the extent of precedential constraint.

He pressed the point home when he stated further that:

> …since courts place a high value on similar treatment of similar cases, and on the predictability of judicial decision, the reasons derived from precedent cases tend to be fairly strong. Nevertheless, they are supposed to be reasons like any other without any special pedigree and capable of being overridden by stronger reasons from a different quarter….

Judicial precedent flows from the natural reasoning of the court. The reasoning factor in precedent cases makes precedent assume a natural position that is not different from any other natural decision flowing from human reasoning.

The second model is the rule model. It has been explained by J.F. Horty that "a precedent case normally contains, not only a decision, but also a statement of some particular rule through which the decision was reached."[29] It is the rule in precedent cases that places constraint[30] on lower courts. According to Horty:

> Constraint by precedent is just constraint by rules, a constrained court must apply the rules of precedent cases in reaching current decision…. Precedent rules are to have the form: "If facts A and B are present, and fact C is not, then decide for the plaintiff." When the antecedents of a rule applies to a current case, a constrained court then has only two choices: it can either accept the rule's consequent as the outcome of that case, thereby following the rule, or else it can overrule the precedent…[31]

26. J.F. Horty, **The Result Model of Precedent,** Legal Theory vol. 10 No1, Cambridge: Cambridge University Press, 2004, P.19.
27. *Ibid*.
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*

The rule model has to do with the *ratio decidendi*, i.e., a statement of some particular rules through which a court arrived at its decision. Rules are important in regulation of affairs. A binding rule is one that allows no derogation from it. For precedent rules to be binding the facts of a case before a court constrained to follow an earlier decision of a higher court must be the same with that of an instant case before the constrained court. Therefore, the similarity between facts of cases decided and pending is a strong element that determines whether a particular precedent would be followed or overruled according to the rule model of precedent.

The third model is the result model. In describing the nature of this model, L. Alexander States:

> To follow precedent, a constrained court must decide its case for the party analogous to the winner in the precedent case; if the constrained case is as strong or stronger a case for that result than the precedent case was for its result. The constrained court must do so even if under the natural model it would have decided its case differently and regardless of any rule stated in the precedent case conversely, however the constrained court may depart from the precedent's court's result if the constrained case is a weaker case for that result than was the precedent case, even when the stated rule of the precedent case covers the constrained case and demands a similar result.[32]

The result model favours a practice where the facts of a new case agree even more with all the facts of a precedent case and favours the plaintiff the new case is then stronger than the precedent case, that is, an *a fortiori* case and would therefore be decided in favour of the plaintiff.

However, where any particular fact of the new case favours the defendant more than the defendant in a precedent case which was decided in the favour of the plaintiff, the court would have the discretion

either to decide in favour of the plaintiff or the defendant. The result of or outcome of the case would depend on the position that the court takes. It is to be noted that in result model, precedents are supposed to control *a fortiori* cases.[33]

Precedent, therefore is to the judges what the compass is to the pilots as regards finding the legal direction which the resolution of new cases should follow. It is a construction plumb line introduced by legal technocrats for the building of society based on maintenance of justice. Justice without precedent is akin to the blind without an animate or inanimate guide.

The three models of judicial precedent may have varying degrees of attraction to judges.[34] The natural model, rule model or result model could be the best model to adopt in a particular case. Refusal to follow a precedent case by a lower court obviously affects its reputation but may in

32. L. Alexander, **Precedent in a Companion to Philosophy of Law and Legal Theory** 503-513, Dennis Patterson, e.d., 1996, as cited in John F. Horty, *Ibid.*
33. *Ibid.*
34. Where a judge is not inclined to one model, he may resort to another model if, in his opinion, that is the model suitable to the case at hand, i.e. the constrained case.

some way be a blessing to justice especially where the decision of the precedent case was given by mistake[35]. W.F. Frank observed:

> It is quite evident from reading law reports that a judge is occasionally (not) too keen to apply a precedent where he feels that it might do injustice in the case before him. He may refuse to follow the past decision if that decision has been given per incuriam, which means the court given the decision had omitted to consider some relevant Act of Parliament or some decision which was binding on it.[36]

The act of distinguishing a precedent case from a constrained case involved the employment of the cognitive processes which include the operation of the mind of the judges. The effect of a man's state of mind in matters such as relationship, character, or making a decision is well known even by people who are not specialists in phrenology.[37] When a person is happy or sad, the state of his mind affects his disposition or attitude to issues of life. Judges as human beings are not less affected in issues of life than others. The mind of the judge, therefore is a relevant factor on matters relating to precedent especially as it is essentially concerned with the use of discretion whether or not to follow particular precedent case or not.

Superiority versus Inferiority of Courts

Precedent hangs on the element of superiority as against the inferiority of courts. It is a notorious fact that courts are mostly manned by lawyers.[38] The process of becoming a lawyer involves time and money. Once a person enlists into the college or University to be trained as a lawyer, the underlying assumption is that he has counted the cost of training and accepted it. When he crosses the hurdle of training in the school, he passes through pupilage in a law firm in order to match theory with practice. All that he acquires theoretically in the University, he solidifies in practice as a pupil in a law firm. After this transitional stages, he pitches his professional tent with the Bar[39] or Bench[40]. The area of specialty a budding lawyer chooses to follow leaves him with the task of climbing the ladder of experience, expertise and concrete knowledge.

Beginners in the Bench are at the lower side of the professional ladder and look up to the more experienced judges who occupy the higher and the highest side of the said ladder for an informed and well-articulated guide on matters of similar facts and consequent decisions in decided cases. On this basis is precedent justified and any call for its abolition would not be apposite, especially, in the current dispensation of upholding justice. It is worthy to note at this

35. A court of law may mistakenly decide a matter with very limited knowledge of the law relevant to the matter in dispute. Such decision which does not take into consideration all the relevant laws is not a good precedent case.
36. W.F. Frank, **The General Principles of English Law,** 6th ed., UK: Thomas Nelson and Sons Ltd, 1985, 23
37. The practice of reading character from the shape of the skill. See **The World Book Dictionary**, Chicago: Scott Fetzer Co., 2001, P.1571.
38. Customary courts in some States of Nigeria though chaired by lawyers have members who are not legally qualified persons, but rather members who although are not lawyers, are well versed in the custom of the areas of the jurisdiction of such courts.
39. Body of practicing lawyers. In Nigeria, this body is known as the Nigerian Bar Association (NBA)
40. Body of magistrates and Judges.

point that at any time when it is a settled fact that junior judicial officers[41] do better in deciding cases than do the senior ones, then there would be no rational basis for still keeping to precedents.

Case Laws as a Catalogue of Precedents in the Nigerian Legal System

Case laws constitute a catalogue of precedents. The position is not different in the Nigerian legal system. Whenever a decision is made by a superior court of record[42], the catalogue is improved upon and updated. Consequently, selection is made from it by courts lower in status than the courts that decided the precedents' case.

Precedent is weighty in the Nigerian legal system. It has an overriding influence on judges and their decisions. Any arbitrary derogation from it by self-willed judges is costly because whatever decision or decisions such judges come up with might be upturned on appeal, thereby rendering their efforts at arriving at the decisions, exercises in futility; a waste of time, strength, money and other resources, an unwise adventure into legal foolishness and a willing exposure to unnecessary jeopardy.

A precedent leaves out a legal structure that judges' decisions on similar facts must fit into. Structuralism, therefore, is a concept which operates to develop adequately the paradigm on which justice is to be measured in order to know whether like cases-precedent case and constrained case are treated alike. Where the situation warrants that like cases are treated alike, justice is said to be done in the matter, except if the decision in the precedent case was made by mistake.[43] Deviation from precedent case in a matter having similar facts with that of the precedent case could be a valid basis of appeal.

In **Union Bank of Nigeria Plc. vs Olori Motors & Co Ltd & 2 ors.**[44]**,** the trial court relied heavily on a precedent case decided by the Supreme Court i.e., **Vaswani vs Savalakh**[45] and granted the application to set aside the sale of two mortgaged properties of the respondents by the appellants. On appeal, the Court of Appeal distinguished the constrained case from the precedent case of **Vaswani vs Savalakh**[46] and stated, *inter alia* that: the main consideration that led to the grant of the application in **Vaswani vs Savalakh** is the fact that the Supreme Court regarded the acts of the respondents in executing the judgment of the High Court by obtaining writ of execution and warrant of possession from the High Court while the applicant's application for stay of execution pending appeal was pending at the Supreme Court, amounted to an abuse of the process of court because of the effect it had of denying the Supreme Court the power to exercise its own jurisdiction under section 24 of the Supreme Court Act to hear and determine the applicants application then pending before it at the time the judgment of the lower court was executed through the processes of the High Court.

41. Judicial officers in the persons of magistrates and judges in their capacity are saddled with the responsibility of deciding cases brought within their jurisdiction according to their jurisdictional powers.
42. The term, 'superior courts of record' refers to the Supreme Court, Court of Appeal and High Courts and Courts of co-ordinate jurisdiction, with the High Court.
43. Failure of a court to consider relevant legal materials before handing out its judgment on the issues before it is a grievous mistake.
44. (1988) 5 N.W.L.R. (Pt. 551) P. 652 at 654
45. (1972) All NLR 922
46. *Supra.*

The above case relates to a practical example where precedent is not followed in the Nigerian legal system: in a situation where the facts of the precedent case is dissimilar to that which is before the court. For instance, the facts of **Union Bank of Nigeria Plc. V. Olori Motors & Co. Ltd**[47] and **Vaswani V. Savalakh**[48] point to sale of properties but differ on the basis that where in the former, there was no stay of execution application, whereas in the latter, stay of execution was pending before the respondents obtained from the High Court writ of execution and warrant of possession.

The act of distinguishing the case of **Union Bank of Nigeria Plc vs Olori Motors & Co. Ltd & 2 Ors** from that of **Vaswani vs Savalakh** by the Supreme Court was an ideal approach to resolving of cases with dissimilar facts. Lower courts could equally resort to distinguishing of cases with such a feature when faced with such a legal challenge.

By that approach, a court seems to say, he who should depend on precedent case to win his own case must labour to show the court that the facts of his own case and that of the precedent case are so similar that it would amount to injustice if the decision in his own case differs from the decision in the precedent case. In the same vein, the attitude of the court to the defendant in such a case would be to say to him, if you must escape from liability, you must show that the facts of the precedent case are dissimilar to that as contained in the precedent case. Therefore, a defendant in a case where the plaintiff is relying on precedent has a burden of proving that the facts of the case involving him are significantly dissimilar to the facts of the precedent case.

Case Laws in International Law

International law generally does not provide for precedence. The Statute of the International Court of Justice provides that the decision of the Court has no binding force except between parties and in respect of that particular case.[49] For instance, in **Youmans Claim** case[50], Mexico was held responsible for the acts of the officials which led to the death of three Americans. Few years later, a French national was killed by Mexican soldiers and Mexico was held responsible on the merit of the case[51] without relying on the strength of the decision in Yourmans claim case [52].

In the case of **Land and Maritime Boundary between Cameroon and Nigerian (Cameroon V. Nigeria: Equatorial Guinea Intervening)**[53], the International Court of Justice treated all the issues raised in the case without making any reference to any case handled earlier by it or any other international judicial body or tribunal. This is keeping with the provision of the Statute of the International Court of Justice that there would be no binding present in the administration of justice by the Court.

47. *Supra*
48. *Supra.*
47. *Supra*
48. *Supra*
49. Art. 59.
50. (1926) 4.R.I.A.A. 110.
51. Caie claim case (1929), 5R I.A.A. 516.
52. *Supra.*
53. (2002) I.C.J. Press Release, 1.

The Statute of the International Court of justice does not proffer any reason why binding precedent is not sustainable before the International Court of Justice. As a court of Justice, it is expected that it would uphold the principles that promote justice one of which is that like cases should be treated alike. Precedent or authority is a legal case which establishes a principle or rule that a court or other judicial body utilizes when deciding subsequent cases.[54] This legal principle is not only good for the administration of justice in municipal judicial systems but also essential in the promotion of justice in the international judicial system.

Precedent has variously been projected as a judgment of a court of law cited as authority for deciding a similar set of facts[55]; a court decision that is cited as an example or analogy to resolve similar questions of law in later cases[56]; a judicial decision that serves as an authority for deciding a later case[57].It is equally projected as the process whereby judges follow previously decided cases where the facts or point of law are sufficiently similar,[58] a land mark decision that sets a legal precedent[59] or a judicial decision that may be used in subsequent similar cases.[60]

Precedent pre-supposes the establishment of hierarchy of courts. Municipal judicial systems have a well-established hierarchy of courts. In this hierarchy, the lowest court is at the base of the hierarchy while the highest one is at the apex of the hierarchy. Such an arrangement is lacking in international judicial forum. Consequently, the failure of the Statute of the International Court of Justice to prescribe judicial precedent as a means of promoting justice could be explained away.

However, the above position does not provide a complete defence to the omission of binding precedent in the matters brought before the Court. This is because earlier decisions of the Court could be made binding on it except where it sees reason to differ from such earlier decisions.

Precedent generally is not totally a new phenomenon in international law because customary international law is one of the sources of international law and it is mainly composed of rules that evolved from acts or practice of states accepted by other states as constituting a precedent to be followed by other states in similar circumstances. The weight of this argument fizzles out in the light of the consideration that this kind of precedent is more or less political rather than judicial since it does not emanate from the decisions of courts.

Conclusion

Precedent adherence in judicial decisions is the feature of all common law countries, Nigeria being one of them. The emphasis on the importance of its operation in the administration of justice appears to be insignificant in some quarters. The conception of natural reasoning as

54. Precedent – Wikipeida, the Free encyclopedia at en.wikipedia.org/wiki/precedent last accessed on 12/08/09.
55. Judicial Precedent at nuweb. Northumbria ac.uk/bedemo/sources of English Law, P.10 Last accessed on 12/08/09.
56. Judicial precedent legal definition of judicial precedent at legal-dictionary. The free dictionary com/judicial precedent last accessed on 12/08/09.
57. Judicial precedent definition of judicial precedent at encyclopedia 2 the free dictionary com/judicial + precedent last accessed on 12/08/09.
58. A Tufal, Judicial precedent, at www.a-level-law.com/els/judicial precedent htm last accessed on 12/08/09.
59. Precedent definition/dictionary.com at dictionary reference com/brose/precedent last accessed on 14/08/09.
60. *Ibid.*

being capable enough to handle issues of judicial nature with or without reference to judicial precedent and this view disfavours great attention paid to judicial precedence in modern times and asserts that the natural reasoning should be emphasized in judicial settlement of disputes.

In other words, a judge should not hang his reasoning faculty in the wardrobe and use the artificial reasoning technique which technical judicial precedent seems to promote. This pronouncement affects judges in the Nigerian legal system and other realms where judicial precedent is practised wholesale.

On a significant basis, the rule model of precedent has been seen in other quarters as a realistic way of ensuring justice. This apparently is the traditional position of most common law countries. The rule in a decision is the *ratio* upon which the whole decision is founded.

As regards the result model of precedent, once a judge establishes that the precedent case is similar to the case at hand, the result or the decision in the precedent case must be applied to the case at hand in order to make the result the same, otherwise, the judge handling the matter shall have no valid restraint to make the result of the case at hand conform to the precedent case. He, should as a matter fact, decide the case contrary to the result of the precedent case.

It is to be noted that without precedence, justice could still be done and still be manifestly seen as done. Moreover, with precedent in operation, injustice could still be perpetrated by courts as a result of judicial indiscipline and rascality. However, the rule of precedent introduces order in the judicial system and enhances predictability of legal suits subject to the consideration of all the facts and laws on issues before a court of competent jurisdiction. Its essentiality can be extended to the dispensation of justice in international legal bodies, especially the International Court of Justice.

On the basis of the natural model of precedent, it is rationally posited that the natural reasoning employed by the judges of the International Court of Justice is not an inferior one since such reasoning could even fare better than the decision in precedent cases. This admission is hanging on the balance of probability. The only objective way to ensure the entrenchment of precedence in such a judicial forum is by the amendment, the Statute of the International Court of Justice to introduce it. Judicial precedence that would give the judges of the Court a guide in the form of a rule or result which added to the reasoning faculty would serve the cause of justice better.

It is therefore submitted without any form of doubt that the introduction of judicial precedent in international judicial bodies as it operates in municipal judicial systems like that of Nigeria, with or without the establishment of hierarchy of courts, is presently due. Precedent in international judicial adjudication would help to check the infiltration of international politics into the decisions of international courts and tribunals. To introduce that in the legal transactions of the International Court of Justice, an amendment of article 59 of the Statute of the International Court of Justice is to be made.