APPLICATION OF STARE DECISIS AND JUDICIAL PRECEDENCE IN LOWER COURTS IN NIGERIA

BY:

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1. INTRODUCTION:

I start by first expressing my profound gratitude to his Lordship, Hon. Justice R.P.I. Bozimo, OFR, the very honourable Administrator of the National Judicial Institute (NJI), the director of studies and other directors and hardworking stakeholders of NJI for giving me this opportunity to interface with the distinguished participants at this workshop on the topic under discussion.

For effective discussion, the paper is broken into segments as hereunder disclosed. The kernel issue in the paper is to put in the proper perspective, the role, if any, **stare decisis** and judicial precedent play in justice delivery in our grass root oriented courts, namely, Area/Sharia/ Customary Courts whose judges constitute the audience in this workshop.

It is hoped that the discussion would succeed in bringing out clearly, the full contents and precise implications of the doctrine of judicial precedent with particular reference to Area/Sharia/Customary Courts in

Nigeria. As a corollary, the discussion is expected to refresh the knowledge and understanding of the Hon. Judges participating in this workshop on the issues at stake so as to enable them put the doctrine to a more effective utilization in their courts' quest for substantial justice.

2. The meaning of Judicial Precedent.

Simply put, judicial precedent means that like cases should be treated alike[1]. The Chamber's Twentieth Century Dictionary defines a precedent simpliciter as, **"that which precedes; a past instance that may serve as an example".** Similarly, the New International Webster's Comprehensive Dictionary of the English Language, (Encyclopedic Edition, 2010) defines precedent, **interalia,** as **"a judicial decision taken as furnishing a rule for subsequent decisions".**

As a doctrine of law, judicial precedent (a-k-a **stare decisis**) is one of the attributes of the common law system. The whole essence of judicial precedent demonstrates, in the words of **Paton G.W,** that, questions ought to be decided today in the same way as they were decided yesterday[2]. Simply put, it means to abide by a former decision where the same points come up again in litigation.

Stare decisis is the other name for judicial precedent. It is the abbreviation of the Latin phrase, **stare decisis et non quieta movere** which means, "**to abide by a former decision where the same points come up again in litigation**[3]".

Judicial authorities also conform to this graphic delineation of the doctrine under consideration. We can see this well mirrored in **Clement**

[1] Per Akande, J.A, Miscellary at Law and Gender Relations, (Lagos: MIJ Professional Publishers Ltd, 1999) pt. cited in Okeke, G.N, Judicial precedent in the Nigeria Legal System….", JILJ, 2010, p107.
[2] Per Ogbu, O.N. Modern Nigeria Legal System (Enugu, CIDJAP press, 2007)130.
[3] G.W. Paton, ***A Textbook of Jurispurdence,*** 3rd edition by David P. Derham (Oxford: Oxford University Press, 1964)p 181, cited in Ogbu, O.N. op.cit.

v. Iwuanyanwu[4] where, Oputa JSC stated **interalia,** that a precedent is an adjudged case or decision of a higher court considered as furnishing an example or authority for an identical or similar question afterwards arising on similar question of law.

Ogbu added that the binding decision needs not necessarily be that of a higher court as some courts are bound by their own decisions. This is obviously true of virtually all the Superior Courts of Records in Nigeria.[5] It is therefore true that the doctrine of judicial precedent or **stare decisis "requires that the principle of law on which a court bases, its decision in relation to the material facts or issues before it must be followed by a court of coordinate jurisdiction or a court lower in hierarchy in future similar cases"**[6]

3. The Nature and Constituents of Judicial Precedent

Judicial precedent has the nature and character of judge-made-law. Of course, case law, otherwise known as judge-made-law is one of the sources of Law in common law systems whose origins are traceable to the United Kingdom. Most, if not all the modern states initially colonized by the United Kingdom had foisted on them, the English common law tradition which has as its major component, judicial precedent, which in turn is dependent on previous decisions of courts designed to bind other courts lower in hierarchy in subsequent proceedings.

Nigeria, being a former colony and protectorate of the United Kingdom, equally inherited the English legal system and its major feature of

[4] (1993) 3 NWLR (pt.107)54

[5] Namely, the Supreme Court, Court of Appeal, Federal and State High Courts, National industrial Court, Sharia and Customary Courts of Appeal. Section 6(5)(a)-(i) of the 1999 constitution, FRN, as amended.

[6] Ogbu, O.N, Op. Cit, p 130

common law with its huge dependence on Judicial precedent.[7] Consequently, judicial precedent in Nigeria refers to the binding effects of decided cases of various courts in Nigeria and even of certain foreign countries who also practice common law doctrines and principles of equity.

Whether such decided cases are of binding or persuasive authority to subsequent proceedings depend on where the courts that decided the said cases belong in the hierarchy of courts with particular reference to the courts called to apply the decided cases in subsequent proceedings.

Judicial precedent is therefore driven by the principle of hierarchy of courts. It is a principle well rooted in the constitution of Nigeria. This is because the extant constitution[8] provides for the Supreme Court, Court of Appeal, the Federal High Court, the National Industrial Court, the High Court of the Federal Capital Territory (FCT), the State High Courts, the Sharia and Customary Courts of Appeal of the FCT and States as the superior courts of Record.[9]

Aside from the courts so listed in section 6(5)(a – i) of the constitution as reproduced above, section 6(5) (j and k) are the windows by which other courts of competent jurisdiction emerged or can emerge. Section 6(5) (j) provides for the creation of "**such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws…. Section 6 (5)(k), on the other hand, provides for the creation of, "such other courts as may be authorized by law to exercise jurisdiction at first instance or**

[7] Sources of Nigeria Law are: English Law which consists of English enactments extended to Nigeria before Independence, Received English law (the common law, the doctrines of equity statutes of general application in force in England on the 1st day of January, 1900, statutes and subsidiary legislation on specified matters) Nigerian Legislature, Nigerian Case Law, Nigerian Customary Law, etc

[8] The 1999 constitution as amended

[9] See section 6 (5) (a-i) of the Constitution.

on appeal on matters with respect to which a House of Assembly may make laws".

Magistrate's Courts, Area Courts, Sharia Courts, Customary Courts and such similar courts in Nigeria exist as created by various Federal and State legislations, pursuant to the powers conferred on the Federal and State Legislatures to so do by the constitution as reproduced above. All such courts are under obligation, pursuant to the doctrine of judicial precedent, to look up to the decisions of the listed superior court of Records, especially the Supreme Court and follow such decisions in relation to similar facts and issues in their own proceedings. Putting it more graphically, Okeke G.N. stated thus:

> According to the principle of judicial precedent, a magistrate 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 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[10]

From the picture painted by Professor G.N. Okeke as reproduced above, it can be seen that Area, Sharia and Customary Courts are missing. The omission is apparently not inadvertent. It had to do with the controversy in some quarters over whether or not such courts specialized in Customary and Sharia questions are contemplated in the doctrine of

[10] See, Okeke, G.N., "Judicial Precedent in the Nigeria Legal System…." (JILJ, 2010) p.107 at 108.

judicial precedent which in itself is a feature of common law and which ought to be limited to British type of courts like magistrate's and High Courts.

We shall return to this controversy shortly as it is also one of the key targets of this paper. For now, let us throw more light on the workings of the doctrine.

Everything considered, we are in agreement with Okeke,[11] that, "**the principle of precedent endeavours to control future decisions. 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 and on the basis of judicial precedent. Lower courts are therefore constrained and this constraint brought upon these courts cannot be removed except in situations where the facts of the decided case by a higher court and a pending case in a lower court differ substantially**".[12]

This brings us to the question, what actually is the binding force of a judicial decision under the doctrine of judicial precedent? Without much ado, the answer is simple: **Ratio Decidendi** is the part of a judicial decision that has binding effect.

4. Ratio Decidendi, its meanings and **Scope in Judicial Precedent.**

Generally speaking, **ratio decidendi** of a judgment implies the reason for the judgment. It demonstrates the very essence of the judgment. According to R.W.M Dias,[13] three shades of meanings can be attached to the term **ratio decidendi**. The first, according to him, is the reason for the decision. The second meaning as postulated by Dias, is the rule of

[11] Prof. G.N. Okeke of the faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State of Nigeria in his article on the doctrine.
[12] G.N. Okeke, "Judicial precedent in the Nigerian Legal System…." Op.cit.
[13] Dias, RWM, Jurisprudence, 5th edition (London, Butterworths, 1985)p 140

law proffered by the judge as the basis for the decision. The third meaning is the rule of law which others regard as being of binding authority. Ogbu rationalizes this third sense as including subsequent elucidation or interpretation of the previous decision.[14]

In a similar vein, Salmond[15] describes ratio **decidendi** as the rule of law applied by, and acted on, by the court or the rule which the court regarded as governing the case. In yet another very germane postulation, Julius stone canvases that **ratio decidendi** is the very principle propounded by the precedent judge or court as necessary for, or as a basis of his decision.[16]

Professor Ilochi Okafor defines **ratio decidendi** as "the principle of law, based on material facts of the case, on which the case has been ultimately decided."[17] The value of this definition lies in its ultimate link with the facts of the case upon which the relevant principle of law was applied.

This is so because it is on facts that subsequent courts can find the expediency to distinguish the otherwise binding decision on the ground that the facts in the previous case are not exactly the same with the facts of the subsequent case.

Interestingly, in a decided authority, Mikkailu JCA, defined **ratio decidendi** as the enunciation of the reason or principle on which a question before a court has been decided. That is to say, that it is the general ground on which it is based, detached or abstracted from the specific peculiarities of the particular case which gave rise to the

[14] Ogbu, O.N. op.cit; p137.
[15] Salmond on Jurisprudence, 12th edition by P.J. Fitzgerald (Bombay: N.M Tripathi Private Ltd, 2001)pp 176-177.
[16] Stone, J. Legal System and Lawyers' Reasonings (Sydney: Maitland publications pty Ltd, 1986) p268.
[17] Okafor, Ilochi, "The Appellate System of Justice in Nigeria" in Elias, T.O. ed, Nigerian Essays in Jurisprudence (Lagos, MIJ publishers, 1993)p314

decision. Justice Mikailu's definition is seen in his lead judgment in **Ajibola v. Ajadi**.[18]

According to Ogbu, which I have no reason to differ from, "this definition corresponds with Salmond's conception of **ratio decidendi** and explains why a case can be an authority for another case whose facts, though similar, are not the same.[19] For clarity sake, it needs to be reiterated that what is meant here is the point that when a principle of law is enunciated in a given case, it can be followed in subsequent cases, even when the facts are not exactly the same but the principle is found applicable in the analogical sense.

The authoritative view of Oputa, JSC in **Clement v. Iwuanyanwu**[20] illustrates this view accurately. He posited thus:

> Courts attempt to decide cases on the basis of principles established in prior cases. Thus, prior cases which are close in facts or legal principles to the case under consideration are called precedents. The two cases (the one under consideration and the other used as precedent) must be similar for the doctrine to apply.

Professor Osita Nnamani Ogbu finally made the clarity clearer when he stated that what is required is not necessarily that the facts of the previous and the subsequent cases should be the same or similar, it is sufficient if the same question decided in previous case arises in a subsequent case"[21].

[18] (2004)All FWLR 1273 at 1289, cited and discussed in Ogbu, O.N, op.cit, p139.
[19] Ogbu, O.N., op.cit.
[20] (1989)3 NWLR (pt.107)54
[21] Ogbu, O.N; op.cit.

Essentially because Professor Ogbu's definition is wide enough to encompass all the conceivable nuances of the term **ratio decidendi**; it is apt to be adopted here as the working instrument for our subsequent discussions on judicial precedent in this paper. It is reproduced hereunder thus:

> Ratio decidendi may be defined as the reasoning, or principle or ground or general proposition of Law, on which a case or an issue in a case is decided or subsequent interpretation of the reasoning or principle or ground or the proposition of Law in future cases.[22]

5. How To Decipher Ratio Decidendi

Having laid out the essential features of **ratio decidendi** as articulated above, it is now germane to highlight how and where it can be found in a binding court's judgment for the due guidance of subsequent subordinate courts. Professor A. L. Goodhart[23] propounded extensively on this but summed up the rules he enunciated for finding the **ratio decidendi** of a case as hereunder reproduced:

(1) The principle of a case is not found in the reasons given in the opinion.

(2) The principle is not found in the rules of Law set forth in the opinion.

(3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision

[22] Ogbu, O.N., op.cit.
[23] In his, "Essays In Jurisprudence and the Common Law"

(4) The principle of the case is found by taking account of (a) the facts treated by the judge as material, (b) his decision as based on them.

(5) In finding the principle, it is also necessary to establish what facts were held to be material by the judge, for the principle may depend as much on exclusion as it does on inclusion.

To drive home the points, Goodhart further adumbrated to the effect that the main reason for his general rules are that as regards (1) the courts often state their reasons too widely and sometimes incorrectly but the cases are nevertheless authoritative; as regards (2), sometimes there is no rule stated; as regards (3), (4) and (5), it is the fact which the judge regards as material which is important.

We can therefore surmise that it is from the material facts upon which an adjudication is made that **ratio decidendi** evolves. However, Professor Ogbu criticizes Goddhart's theory on this point as, according to him, the theory, **"presupposes that the facts of a case must have been found before the ratio of a case can be deduced."**[24] Continuing, the Learned Professor Ogbu opined that, "some cases are actually decided on assumed facts and yet the legal reasoning leading to the decision will constitute a **ratio decidendi**".[25] Viewed from a broader perspective, Prof Ogbu's criticism has merely scratched the surface of Goodhart's theory. In otherwords, it has not done any serious violation to the theory as both Professors are still in agreement that material facts of a decided case, whether proved or assumed, are the pivotal ingredients that bring about a **ratio decidendi.**

[24] Ogbu, op.cit, p.142

[25] He cited and relied on the case of *Adesanya Vs the President* (1981)2 NCLR 358 which is the locus clasicus on locus standi and which was decided based on assumed facts upon reference to supreme court

Interestingly, the pronouncement of Karibi – Whyte, JSC in **Uba v Gmbh & co**[26] cited by Ogbu on the point does not strictly differ from Goodhart's theory but rather illustrates it. It says:

> The ratio decidendi of a case is not determined from isolated dictum in the judgment. It is determined on considerations of the issues in dispute between the parties and the facts pleaded and found in support of the contention of the issues. Hence, every judgment ought to be read as applicable to the particular facts proved or assumed to be proved. The generality of the expressions found therein are not intended to be exposition of the whole law but are governed and qualified by the particular facts of the case in which such expressions are to be found.

For greater clarity, it is also expedient that we bring up again in this paper, the practical hints for the ascertainment of ratio decidendi as enunciated by Oblade[27] which Ogbu slightly modified as follows:

> In practice, in determining the **ratio decidendi,** of a case, the courts usually consider anyone of the following factors: the reason or reasons for the decision as stated by the Judge; the ground or grounds or the principle or principles of law stated or implied by the judge as that on which the decision on the case or an issue in the case was based, and the actual decision in relation to the material facts. In addition, the court may consider the interpretation of

[26] (1986)3 NWLR (pt.110)374 at 402

[27] Obilade, A.O., The Nigeria Legal System (London: Sweet & Maxwell (1979)113.

the case in any later case determined after the instant case.[28]

6. Identifying the Ratio Decideni in a court consisting of more than one Judge in a coram; A-K-A a collegiate court.

In a court manned by a panel of judges; identification of the ratio decidendi in its judgment is more cumbersome. However, the general rule is to follow what the majority decided. The minority judgment or judgments are merely dissenting in nature and do not resolve the matters in contention. They can only be reference points or window through which an appellant can portray an alternative judgment to the appellate court upon his appeal against the majority judgment.

Another point is, the majority judgment may come with several reasons as every judge or Justice in support of the majority judgment may have written their respective personal judgments and adduced their respective reasons in support of same.

In practice, a particular judge or Justice is appointed to write the lead judgment. Other judges or justices in the coram are under obligation to write their respective individual judgments which may support the lead judgment or dissent from it. This is how majority and minority judgments come about. In so many instances, honourable Judges and Justices who support the lead judgments usually do not waste time writing detailed and copious judgments. They simply say something like this: "**I had the privilege of reading in advance, the lead judgment of my learned brother…. Just delivered in this case/appeal. I support the said lead judgment which I hereby adopt as my judgment in this case. I also abide by all the ancillary orders and decisions as are**

[28] Ogbu, O.N, op. cit at 144

contained in the said lead judgment which I have also adopted as my orders and decisions in this case. I have nothing more to add."

With this sort of supporting or concurring judgment, it is not difficult to decipher the **ratio decidendi** in the majority judgment. Efforts are rather concentrated in the lead judgment which contains all the reasons, principles and facts upon which the said majority judgment was delivered.

Where the matter can be complex is where the various judgments of the individual judges and justices advanced several reasons and principles and even emphasized several and different species of evidence in the case to support their said judgments. In that case, it is only in the aggregate that the several judgments are categorized as majority judgment.

This proposition is consistent with the provision of section 294(3) of the 1999 constitution[29] to the effect that, "a decision of a court consisting of more than one judge shall be determined by the opinion of the majority of its members." This appears to explain why, it is the usual practice to have the Court of Appeal, the Supreme Court and even Election Petition Tribunals, as well as Customary and Sharia Courts of Appeal and indeed all such collegiate courts constituted by odd number of judges. Some are 3,5 or even 7 (in the case of the Supreme court in particular)

A foremost authority of the Legal System in Nigeria, Professor Obilade captured the legal reality succinctly and yet graphically as follows:

> Where a court is divided and the majority judgments are consistent with one another even though each majority judge relies on a legal principle different from that relied upon by any other majority judge, it

[29] Of the Federal Republic of Nigeria, as amended.

> seems that all the legal principles relied upon in the majority judgments constitute the **rationes decidendi** of the case. Where the majority judgments are consistent with one another and they are based on the same legal principle, that principle is the **ratio decidendi** of the case: In cases where the majority concurs in the result but the majority judgments are inconsistent with one another, it is difficult to determine the **ratio decidendi**. Suppose, for example, that the majority of the judges in a case are in support of the order of the court but there is no majority in support of any of the grounds of the decision…. It appears that the case should not be cited as a binding authority for any proposition.[30]

This detailed description is vivid enough to lay to rest any further controversy in the matter. However, Professor Ogbu, while agreeing generally with the proposition, tried to query it with a scant criticism as follows:

> …it is difficult to agree with him (obilade) that where different legal principles are relied upon by each majority judge to arrive at their decisions, these divergent principles will constitute the rations. The question will readily arise, which of the principles will bind a lower court.[31]

While agreeing entirely with professor obilade's treatise on how to find the ratio in a majority judgment as quoted above, I venture to answer Professor Ogbu's puzzle, as to which of the principles is enunciated in

[30] Obilade, op.cit, p.113.
[31] Ogbu, O.N., op. cit, p.145.

various majority judgments, by stating that the said various and different principles may have addressed different segments of the facts or issues in the case and thus, the said principles would bind subsequent courts in subsequent proceedings on similar facts and issues as addressed by the various principles and reasonings of the said majority judgments.

Nevertheless, it needs to be pointed out that it is desirable to always have collegiate/appellate courts achieve substantial level of unanimity in deciding cases, except where any judge or justice in the panel feels so strongly about an issue that compels him to write a clear cut dissenting judgment. Unanimity in majority is achievable by such courts if the Judges and Justices concerned can bring out quality time to meet and objectively discuss all relevant issues in their cases which meetings would culminate in sound lead judgments whereof other supporting judgments would merely concur to with very few general statements as exemplified above.

This has to be so, for maximum good effects because, as Niki Tobi noted in his lead judgment in **Emeka Nwanna v. Federal Capital Development Authority & 5 ors,**[32] a concurring judgment has equal weight with a leading judgment. According to him, it complements and adds to the leading judgment. It remains for me to add that the less verbose a concurring judgment is, the less difficult it would be to find out the rations decidendi in the judgment.

7. **The Obiter Dictum.**

Obiter dictum is an important pronouncement of a judge or court in a judgment but which was not the basis upon which the judgment was rendered or the issues and facts in the case were resolved. As Edozie

[32] (2004)All FWLR, 1243

JSC remarked in **AIC Ltd v. NNDC,**[33] "the word 'obiter' simply means, in passing, incidental, cursory." And as observed by the Supreme Court in **Abacha v. Fairehinmi,**[34] "an obiter dictum is what a judge says in his judgment that goes beyond what is necessary to decide the particular case. It is an expression of opinion made in giving a judgment by the judge, but not necessary for his decision and accordingly cannot form part of the **ratio decindendi** of the judgment. **Obiter dictum, not being a decision, cannot be made a subject of an appeal.**[35]

Yes, as highlighted above, obiter dictum is not subject to appeal for not necessarily being the decision of the court, vis-a-viz the relevant judgment. It is one cardinal point that differentiates obiter dictum from **ratio decidendi'**. It can, at best, be of persuasive authority to subsequent courts in cases where facts square up with the factual basis for an obiter dictum.

It is also true, as rationalized by Philips that:

> That weight to be given to an obiter depends on the following factors: the rank of the court, the prestige of the judge; whether there were different rations for the same decision; whether action was opposed or the point was argued by counsel; the reliability of the reporter.[36]

It is therefore necessary that in considering an obiter dictum in a judgment, we be very circumspect and wary, not to give undue deference to it. As observed by Okey Achike, JSC in **Oshodi & 2 ors v.**

[33] (2005)II NWLR (pt.937)563
[34] (2002)NWLR (pt.660)228
[35] Underlining for emphasis
[36] Philips, O.H, A First Book of English Law, 6th edu (London: Sweet & Maxwell, 1970)pp.194-5, quoted in Ogbu, O.N, op.cit, p.136

Eyifunmi[37] "If a judge is a luminary of high standing, his obiter dictum may, in due course, crystallize to good law. However, if it is the contrary, the dictum will sooner than later be ignored completely."

From the foregoing elucidations, the difference between a ratio decidendi and an obiter dictum is made clear. I urge us all to be properly guided, in the interest of justice.

Distinguishing

Another pivotal feature of judicial precedent or **stare decisis** is the concept of distinguishing. It is rooted in the factual or issue basis of the cases in question. It has to do with whether the facts or issues decided upon in the previous judgment are the same or at least relatively the same with the facts and issues trending in the present case whereof a lower court or court of coordinate jurisdiction is urged to follow in arriving at its judgment.

To that end, **"where a previous decision is cited to a court in a future case as a binding precedent, the court has a duty to examine the facts of the instant case in relation to the facts of the previous case sought to be relied on as a precedent. Where the court finds some material difference in the facts of the two cases, the cou**rt may distinguish the previous decision and will therefore not follow it."[38]

That is the kernel of the concept of distinguishing. The logic is simple: if the cases are not the same or at least similar, the basis for the instant case following a previous decision ceases to exist, hence, in the prevailing circumstances, judicial precedent would not operate.

[37] (2000)3 NSQR,320
[38] Ogbu, O.N, op.cit, p.156

In **Chief Mene Kenon & 2 ors v. Chief Albert Tekan & 5 ors**,[39] the Nigeria Supreme Court,[40] held, **interalia,** that for a previous decision to be binding on a future court, the facts and issues pronounced upon in the earlier case must be on all fours with the facts and issues in the subsequent case.

Even more elastic on the issue was the Supreme Court's decision in **Adetoun Oladeji (Nig) v. Nigeria Breweries Plc,**[41] to the effect that the facts need not be entirely in all fours with the facts of the previous case. It suffices that there is a significant similarity in the relevant facts and/or issues. For a better understanding of the matter, the illuminating pronouncement of Niki Tobi, JSC in the cited case is reproduced thus:

> Factual distinctions or differences in cases can only avail a party when they are germane or material to the **stare decisis** of the case. **Stare decisis**….is based on a certain state of facts which are substantially the same…. This also means that the facts need not to be in all fours in the sense of exactness or exactitude. There can hardly be any two cases where the facts are exactly the same, and the doctrine of **stare decisis** which has been built by the judicial system over the years does not say that the facts must be exactly the same. Thus, there could be inarticulate differences that will not necessarily hinder the application of the doctrine.

From the way distinguishing has been explained out above, we can surmise that distinguishing differs from outright refusal to follow the

[39] Kenon v. Tekan (for short) (2001)14 NWLR (pt.732)45 at 89
[40] Per Ejiwunmi, JSC
[41] (2007)5 NWLR (pt.1027)415, per Niki Tobi, JSC

previous case because distinguishing has to do with the identification of the difference between the **ratio decidendi** of the previous case which otherwise should have been binding. On the other hand, refusal to follow and overruling of the previous case are courses available only to a court which is not bound to follow a decision of the earlier court.[42]

The implication is that the hierarchy of the court that gave the earlier decision or the court distinguishing such a decision is immaterial. What is important is that the two cases are not on the same or similar issues of facts and/or issues.

9. Hierarchy of Courts and Judicial Precedent in Relation to Sharia/Area/Customary Courts In Nigeria.

The discussion so far as laid out above shows that judicial precedent thrives on the solid platform of hierarchy of courts. This is because stare decisi or judicial precedent is a system whereby the decision of a court is binding on every court lower in hierarchy while some other courts, like the apex one (the Supreme Court) are bound by their previous decisions until they choose, through some special considerations, to set aside such decisions.

Consequently, to understand the detailed working template of judicial precedent, one must be fully acquainted with how the hierarchy of courts work in the legal milieu. In synopsis, the hierarchy of courts in Nigeria has the Supreme Court as the apex. Its decisions are binding on all other courts in Nigeria, especially to which the common law doctrine of judicial precedent applies.

For the avoidance of doubts and to underscore its pre-eminence as the apex court in the land, the Nigerian constitution unequivocally provides

[42] Ogbu, O.N., op.cit, p.157

that, "**no appeal shall lie to any other body or persons from any determination of the Supreme Court"**[43]

Following the Supreme Court in hierarchy is the Court of Appeal, established since 1976. It exercises jurisdiction in both Federal and State matters, hence, appeals lie from both Federal and State High Courts to it. In the same vein, appeals lie from Sharia and Customary Courts of Appeal of both FCT and the States to the Court of Appeal and subsequently to the Supreme Court. Same for Code of Conduct Tribunal, National and State House of Assembly Election Tribunals, Governorship Election Tribunals from where appeals lie to Court of Appeal.[44]

The Federal and State High Courts, as well as National Industrial Court, Sharia and Customary Courts of Appeal are the next in the rung of hierarchy of courts in Nigeria. Appeals go from them to Court of Appeal. The obvious implication is that they are bound by decisions handed down by the Court of Appeal, subject to the rules of judicial precedent already delineated above. On the other hand, their decisions are binding on the courts below them, like the Magistrate's Courts, Area, Sharia and Customary Courts. They are courts permitted to be established not directly by the constitution but by Acts of the National Assembly or Laws of House of Assembly of States.[45]

With regards to Magistrate's Courts, it is true, as aptly postulated by Ogbu that, "**Magistrate's and District's Courts are bound by the decisions of the High Courts of their respective states and also by the decisions of the Court of Appeal and the Supreme Court. They are however not bound by the decisions of High Courts of other states, except where the High Courts exercise Federal**

[43] S.235, the Constitution, FRN, 1999 as amended.
[44] Sections 240,244,245 and 246 of the constitution, FRN, 1999 as amended provide copiously for that.
[45] Per, section 6(5) (j) and (k) of the constitution, FRN, 1999 as amended.

jurisdiction."[46] It is also true, as observed by Philips, that the judgment of inferior courts are not regarded as precedents.[47] The apparent reason for this state of affairs is that large number of cases (mostly question of facts) tried by these courts, and the circumstances in which they are heard, make it undesirable that they should be reported as to be duly referred to.[48] The legal reasoning explains why Magistrate's and district courts, as well as Sharia, Area and Customary Courts are not necessarily bound by their own decisions but are bound to follow decisions of other superior Courts of Records, perhaps to be properly guided.

Are Sharia and Customary Courts Exempted from judicial Precedent?

It is controversial and not finally settled that the doctrine of judicial precedent applies to Customary, Area and Sharia Courts in Nigeria. Amongst text writers, opinion is divided on the matter.

Obilade,[49] Park,[50] Okonkwo,[51] are of the opinion that the Common Law concept of binding precedent applies to those courts which are empowered to administer adjective common law. Their reason is that the doctrine of judicial precedent is an integral part of received common law through which case law brings out issues in common law as decisions are taken and reviewed by the courts. Conversely, this line of opinion implies that the doctrine does not apply to Customary and Sharia Courts for the simple reason that they do not entertain common law cases and thus not regulated by common law principles and doctrines of equity.

[46] Ogbu, O.N, P.168.
[47] Philips, O.H, Op.cit, p.194.
[48] Philips, O.H, op.cit, p.194
[49] Obilade, op.cit, p.114
[50] Park, AEW, Sources of Nigerian Law, (London: Sweet & Maxwell, 1966)p.56
[51] Okonkwo, C.O and Nash, Criminal Law in Nigeria (London: Sweet & Maxwell, 1980)p.116

On the other side of the opinion divide is the view of Elias that judicial precedent is equally applicable to native and customary courts.[52] This view is obviously preferable. This has to be so because, given the foregoing elucidations on the operational realities of the hierarchy of courts in Nigeria, it is clear that since the judicial system in its entirety comes within the purview of the hierarchical organogram, judicial precedent should regulate all courts. The doctrine may have started with the common law, but it has grown above it and can no longer be limited by it.

The appellate jurisdiction conferred on the Customary Court of Appeal and Sharia Court of Appeal makes this position very glaring. By the provisions of sections 262 and 277 respectively of the constitution,[53] the Sharia Court of Appeal of the Federal Capital Territory and of the various states in the Nigerian Federation have jurisdiction to hear appeals from Sharia Courts subordinated to them.

In the same vein, by sections 267 and 282 respectively of the same constitution,[54] Customary Courts of Appeal of the Federal Capital Territory and of the various states of the federation are empowered to hear appeals from various Customary Courts under their supervision.

As already discussed above, both the Sharia Courts of Appeal and the Customary Courts of Appeal in the federation are subject to have their decisions tested at the Court of Appeal and further (if need be) at the Supreme Court. That being the case, it goes without saying that decisions of the Sharia and Customary Courts of Appeal should mandatorily bind Sharia and Customary Courts as they have been made surbodinate courts to the former. It is therefore more by constitutional

[52] See, T.O. Elias, "British Colonial Law…" quoted in Ogbu, O.N, op.cit. p.168, equally culled from Ezejiofor, G, Sources of Nigerian Law" in Okonkwo, C.O. ed. Introduction to Nigerian Law (London Sweet & Maxwell, 1980)9.17
[53] FRN, 1999 as amended
[54] FRN, 1999 as amended

mandate than by common law precepts that judicial precedent is made applicable to Sharia and Customary Courts. The same considerations apply to Area Courts whose decisions can be appealed against to the High Court of the State concerned and further to Court of Appeal and Supreme Court.

In the recent Supreme Court decision in **Customary Court of Appeal, Edo State v. Aguele,**[55] the apex court held **interalia** that the Customary Court of Appeal of a State can competently exercise appellate/supervisory jurisdiction over decisions of customary courts, either under section 282(1) or section 282(2) of the Constitution. Section 282(1) limits the jurisdiction of the Customary Court of Appeal to exercise appellate and supervisory jurisdiction in civil proceedings involving questions of customary law. On the other hand, section 282(2) is a window created by the constitution to allow for the possibility of expansion of the jurisdiction of the said court beyond questions of customary law.

Enugu state took full advantage of that window of opportunity when in 2005, it enacted the Customary Court of Appeal Law of the state. In the said law are sections 8 and 9 whereof the court is conferred with exclusive jurisdiction to hear and determine appeals from all the Customary Courts of the State. Also, specifically by section 9 of the law, the State Customary Court of Appeal is given wide and far-reading powers to re-hear cases already heard by a Customary Court so as to arrive at substantial justice in such cases.

These are the ways the House of Assembly of Enugu State has, pursuant to the powers donated to it by section 282(2) of the constitution, expanded the jurisdiction of the State Customary Court of Appeal beyond the limited scope of "questions of Customary law."

[55] (2018)3 NWLR (pt.1607)369

Any other state can take a cue from the Enugu state model and systematically expand the jurisdictions of their Sharia and Customary Courts of Appeal as constitutionally permitted. That appeals lie further from Customary or Sharia Courts of Appeal to Court of Appeal and even beyond has been made most unequivocal by yet another decisive judgment of the Supreme Court in **Ozoemena v. Nwokoro**.[56] There, the apex court held that virtually all appeals can lie to the Court of Appeal from decisions of Customary Court of Appeal, either as of right on issues of Customary law or with the leave of the court on questions outside issues of customary law.

Analogically speaking, similar decisions are expected in relation to Sharia Court of Appeal hearing cases from Sharia Courts. This is because sections 262 and 277 of the Constitution on the jurisdictions of Sharia Courts of Appeal in the federation have similar provisions for expansion of jurisdiction as does section 282(2) of the constitution in relation to Customary Courts of Appeal of the state.

Conclusion:

From all the foregoings, it needs to be reiterated conclusively that Sharia, Area and Customary Courts are bound by the doctrine of judicial precedent. They are therefore enjoined to pay attention to decisions coming from superior courts of record which bind them so that they follow them regularly and by so doing attain substantial justice in their proceedings.

Barring the circumstances of distinguishing as already explained, these courts are enjoined to be docile to judicial precedent because the constitution itself has allowed it.

Finally, I thank you all for your esteemed audience!

[56] (2018)17 NWLR (pt.1648)203