



THE AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW

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Offprint – Tiré à part

Reproduced From

The African Journal of International and Comparative Law

Tiré de

La Revue Africaine de Droit International et Comparé

RADIC Volume 12 Pt. 1 (2000)

RADIC Tome 12 No. 1 (2000)

CONFLICTING *RATIONES DECIDENDI*: THE DILEMMA OF THE LOWER COURTS IN NIGERIA

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I. INTRODUCTION

In the recent case of *Oshinowo v. National Bank of Nigeria Ltd.*,¹ the Court of Appeal held:²

The doctrine of *stare decisis* dictates that a trial judge, even if he finds the decisions of the Supreme Court to be contradictory, should not refuse to apply them and is bound to follow them ... *Even if the Supreme Court's decisions on a doctrine (on a point?) are found to be conflicting ... the High Court being a lower court in the judicial hierarchy cannot depart from or refuse to apply them.*³

This dictum by the Court of Appeal was absolutely unnecessary for the determination of that particular case because there were no conflicting decisions or precedents of the Supreme Court on any point which fell for decision or adoption at the Court of Appeal. The worry of the Court of Appeal was that the trial court chose to pick and apply a part of the Supreme Court decision, which it found favourable instead of considering the decision as a whole. It was clearly not a question of choosing between two conflicting *rationes decidendi* in two separate decisions of the Supreme Court. Be that as it may, the statement by the Court of Appeal illustrates the point that the vexing question of choosing which of two or more conflicting judicial precedents (or *rationes*, to be more exact) of the Supreme Court, and indeed, of the Court of appeal, should be followed by the lower courts, is still far from resolved.

This paper examines what options are open to the lower courts in Nigeria when faced with conflicting precedents of the Supreme Court or of the Court of Appeal. It shall be argued, on the one hand, that contrary to the dictum in the *Oshinowo* case, in such situation of conflict the lower court may be at liberty to pick and choose which of the Supreme Court or Court of Appeal decisions to follow. In this connection, it shall as well be demonstrated that the option of simply following the latter of the conflicting decisions, though an easy way out of the quandary, is in most cases arbitrary and largely unsupportable. On the other

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1 (1998) 11 NWLR (Pt. 574) 408.

2 At p.417.

3 Emphasis and parenthesis are mine.

hand, and still contrary to the impression of finality conveyed in the *Oshinowo* case, it shall be concluded that it is more probable than not that the last word has not yet been said on the point.

II. JUDICIAL PRECEDENT

In this paper, the phrases “(judicial) precedent”, “decision” and “*ratio decidendi*” shall be used interchangeably except where the context suggests that a different meaning is intended. On a global perspective, the birth of judicial precedent generally goes back to the reign of Hammurabi (*circa* 2000 BC) when priestly scribes reportedly recorded judicial decisions for the sole purpose of thereby guiding parties to future legal transaction. By the time of Shakespeare the doctrine of judicial precedent had already become crystallised and widespread. This is clear from the statement of Portia:

It must not be; there is no power in Venice
Can alter a decree established:
'Twill be recorded for a precedent,
And many an error, by the same example,
Will rush into the State: it cannot be:⁴

The practice of judicial precedent sprang from the belief that “whatever hath been done before may be done again”,⁵ and so where the facts of a case are the same as or similar to those of an earlier case decided by a superior court higher up in the judicial hierarchy, that earlier decision should be followed in the latter case. Judicial precedent thus requires that we stand by decided matters and not disturb settled points. This is often expressed in the laconic latin maxim as *stare decisis* or, more fully, *stare decisis et non quieta movere*. The application of the doctrine of *stare decisis* achieves the merit of certainty, uniformity and predictability, as it ensures that all the courts would arrive at the same decision given a particular set of facts.⁶ Like cases are thus treated alike. In that way, rather than look for case-by-case perfection, which may well be a run after a will-o’-the wisp, the courts tilt in favour of certainty and predictability in the law, which is a much more easily realisable quest.

However, the smooth operation of judicial precedent requires the existence of two things: a settled and accepted hierarchy of courts and accurate, regular law reporting. The law reports should be easily accessible in the sense of being affordable. This will keep it within easy reach of all lawyers, particularly the younger ones, and also within the reach of magistrates and judges who would thereby be in a good position to continually update their knowledge of the law in terms of awareness of the latest decisions. This way, instances of decisions being

4 Shakespeare, *The Merchant of Venice*, Act iv Scene 1 (1596-1597).

5 Jonathan Swift, *Gulliver’s Travels*, 1726.

6 In the words of Lord Eldon, LC.: “It is better the law should be certain than that every judge speculate upon improvements in it”: *Sheldon v. Goodrich* (1803) 8 Ves. Jr. 481, 497.

reached *per incuriam*, e.g. in ignorance of the latest applicable superior court decision, will be a thing of the past.

Since the doctrine of judicial precedent requires that a lower court follows the decision or, more precisely, the reason for the decision (i.e. the *ratio decidendi*) of courts higher up in the judicial hierarchy, it is fundamental that there is a hierarchical judicial structure. In Nigeria this required structure is provided by the 1999 Constitution which by Section 6(1) vests judicial powers in the Federation in the following courts:⁷

- (a) the Supreme Court
- (b) the Court of Appeal
- (c) the Federal High Court
- (d) the High Court of the Federal Capital Territory, Abuja
- (e) a High Court of a State
- (f) the Sharia Court of Appeal of the Federal Capital Territory, Abuja
- (g) a Sharia Court of Appeal of a State
- (h) the Customary Court of Appeal of the Federal Capital Territory, Abuja
- (i) a Customary Court of Appeal of a State
- (j) such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws, and
- (k) Such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.

While the courts specifically enumerated in clauses (a) to (i) are thus a direct creation of the Constitution and therefore are superior courts of record, Magistrates Courts, Customary Courts and Area Courts are not a direct constitutional creation and are inferior courts of record; they are established by the States under Section 6(5)(k) which is reproduced above. Our present concern is with the examination of what course to take where the Supreme Court or the Court of Appeal hands down two (or more) conflicting *rationes decidendi*. This is a problem particularly for the Court of Appeal, the Federal High Court, States High Courts and Magistrates Courts, which observe the doctrine of judicial precedent. Customary Courts are not bound by precedent because they are presided over by laymen who administer native law and custom rather than common law principles.⁸

A *ratio decidendi* of one high court is not binding on other high courts nor even on the particular judge who passed the judgement. The ratio is merely persuasive on the high courts but is binding on all the magistrates' courts within the territorial jurisdiction of the particular high court (i.e. within the State where the high court is located). However, where the high court decision is on a federal statute, it is binding on all magistrates' courts in the country. Where a magistrate

⁷ Section 6(5).

⁸ See for instance, Section 18 of the Customary Courts Law of Cross River State, Cap. 34 Laws of Cross River State, as applicable in Akwa Ibom State, which states: "The procedure and practice of District (or Customary) Courts shall be regulated in accordance with customary law". See also Section 53 of the same Law.

is faced with two (or more) conflicting *rationes* of the high court on a particular point, it is probable that the magistrate would take the same approach as would the high court when faced with conflicting *rationes* of the Court of Appeal. As will be shown shortly, the approach to take in the case of conflicting Court of Appeal decisions is not exactly clear.

III. CONFLICTING *RATIONES* OF THE COURT OF APPEAL

The decision of the Court of Appeal binds all the courts below it. This includes the Federal High Courts, High Court of the Federal Capital Territory, High Courts of the States and, indeed, all the courts from which appeals lie to the Court of Appeal.⁹

It also binds the Magistrates Courts, which are established by the States pursuant to Section 6(5)(k) of the 1999 Constitution. Significantly, the Court of Appeal is itself bound by its own decisions until overruled by a higher court,¹⁰ in this case the Supreme Court.¹¹ This is particularly so in civil matters,¹² except where it is clear that the previous decision was reached *per incuriam*¹³ or secondly, where the previous decision cannot stand with a decision of the Supreme Court on the same point.¹⁴

The third exception is where the Court of Appeal is confronted with two conflicting decisions of its own. In such case it would be clearly illogical to insist that the Court of Appeal must be bound by the two conflicting decisions. The options in that case are that the court is free either to choose which of the two conflicting decisions to follow or to follow the latter decision. Curiously, the Court of Appeal has itself subscribed to both views. In *Egbo v. Laguna*¹⁵ the court held, following *Young v. Bristol Aeroplane Co.*,¹⁶ that it is bound to decide which of two conflicting decisions of its own it will follow. However, in the recent case of *Ojugbele v. Lamidi & Ors.*,¹⁷ the appeal court took a radically different stand by striving to justify that in such event of conflict it is the latter decision that should be followed. According to the court:

9 See the courts listed in Section 240 of the 1999 Constitution.

10 *African Newspapers of Nigeria Ltd & 2ors. v. The Federal Republic of Nigeria* (1985) 2 NWLR (Pt. 6) 137; *Fatola v. Mustapha & Ors.* (1985) 2 NWLR (Pt. 7) 438 at 448, which follows the English Court of Appeal decision in *Young v. Bristol Aeroplane Co.* [1944] KB 718, (1944) 2 All ER 293.

11 *Usman v. Umaru* (1992) 7 NWLR (Pt. 254) 377 which considered and applied *Young v. Bristol Aeroplane Co. Ltd.* (1944) 2 All ER 293, 300; *Sea Trucks (Nig.) Ltd. v. Pyne* (1999) 6 NWLR (Pt. 607) 514, 541.

12 The Court of Appeal does not feel itself bound by its previous decisions in criminal matters, though it feels reluctant to depart from them: *Motayo v. COP* (1950) 13 WACA 114, following the practice of the English Court of Appeal as stated in *R. v. Taylor* (1950) 2 KB 368.

13 For instance, in ignorance of a relevant statute or rule having the force of a statute or (earlier) decision of the Supreme Court on the point.

14 Following the criteria laid down in *Young v. Bristol, op.cit.*

15 (1988) 3 NWLR (Pt.80) 109.

16 *Op.cit.* It is immaterial for the present purpose that the decision in this case was reversed by the House of Lords on the substantive point involved.

17 (1999) 10 NWLR (Pt. 621) 167.

By Canon of Interpretation *via* the doctrine of *Stare Decisis* where two decisions of the Court of Appeal conflict the later in time prevails. Thus, the decisions of this court delivered yesterday and today to mention but a few take priority over *Ikuomola* and so hold.¹⁸

There is admittedly something to be said for both views. It may be said, probably at the risk of sounding hackneyed, that all humans err. Or, to use a now clichéd phrase, “to err is human”. All judges and justices are human no matter how reputedly “learned” or “lordly”; they are therefore prone to make mistakes. After all, “even Homer nods”. Courts cannot therefore be said to be always right – which, anyway, is why successful appeals abound. For this reason, there may be wisdom in giving the Court of Appeal the freedom to pick and choose between two (or more) conflicting decisions of its own. Granted that the rule of interpretation enjoins the court to follow the later decision, such a rule appears to be very arbitrary in this instance particularly when applied generally. The rule is apparently premised on the presumption that the court may have had a re-think in the latter of the conflicting decisions. What happens then where this underlying premise is shown to be wrong, i.e. where it is manifestly clear that the previous decision was not considered at all or even referred to in reaching the later decision? Certainly it cannot be said that there was a re-think about a decision the existence of which the later court knew nothing or had forgotten or over-sighted. It is for this reason that the soundness of the Court of Appeal decision in *Ojugbele v. Lamidi* is suspect. Apart from going against the time honoured decision in *Young v. Bristol Aeroplane Co.* and all subsequent cases following it, the decision is against reason and logic.

It may well be that the life of the law has not been logic: it has been experience,¹⁹ as embodied in judicial decisions; it is however to be admitted that logic in this sense can never be entirely disregarded in the judicial process.²⁰ The rule in *Young v. Bristol Aeroplane* still applies in England today: the Court of Appeal is still left with the unfettered liberty to choose which of its conflicting decisions to follow. It is recommended that this should be the unanimous approach of the Nigerian Court of Appeal as well. A situation where different divisions of the same Court of Appeal give divergent answers to the self-same question of conflicting *rationes decidendi* merely makes a Homeric question of a very serious issue which is pivotal to the common law system which Nigeria operates

IV. CONFLICTING *RATIONES* OF THE SUPREME COURT

You find yourself in the same quandary in respect of conflicting *rationes decidendi* of the Supreme Court. The case of the Supreme Court is especially worrying because as the apex court its *rationes*, particularly in cases of *casus*

18 At p.171.

19 Holmes, *The Common Law*, p.1.

20 Guest, A.G.: “Logic in the Law”, in Guest, A.G. (ed.), *Oxford Essays in Jurisprudence*, first series, Oxford: Clarendon Press, 1961, 176 at 197.

omissus, afford the best example of judicial legislation. No doubt one often-asked examination question asks students to consider whether judges make law or just apply it and, if the former, whether this is desirable. Even in fairly recent Anglo-Nigerian legal history it was still widely accepted that judges did not make law but simply interpreted it: they construed difficult phrases in legislation, and they applied old common law principles to novel situations but they never substantially changed the law. Today the naivete of that view is surprising and most commentators think that judges do play a creative part in fleshing out and shaping the law. In England today the position is not different.²¹ In fact the key questions now are *when* should the judges become inventive, and *how far* should they go? Because of this, the *rationes* of the Nigerian Supreme Court are of especial significance in view of their law-creating effect on all other courts in Nigeria particularly in cases of first impression. This makes it all the more necessary that we have a clear and definite statement on what course the lower courts should take when confronted with two (or more) conflicting decisions of the apex court.

The statement by the Court of Appeal, reproduced *in extenso* at the beginning of this paper, to the effect that even when the decisions of the Supreme Court are contradictory the lower court is bound to follow them, is really no signpost on what to do. If anything, the statement only magnifies and accentuates the problem. It is difficult to imagine how a lower court, or indeed any court for that matter, can at the same time and in the same case apply and follow two “contradictory” or “conflicting” decisions of the Supreme Court. Obviously, a choice must be made between the conflicting decisions, and some definite criteria must be worked out for making that choice. So far, there does not appear to be any clear guide on the matter. What we have is one court asserting one and another court (or sometimes the same court) asserting the other.

In *Ukegbu v. The State*,²² the Supreme Court itself considered the issue of its own conflicting decisions. The view of the court, per Idigbe JSC, was that:

Where there are two conflicting decisions (of the House of Lords) the House of Lords cannot of necessity be bound by both, and though nothing has been laid down by the House itself, the position must be analogous to that of the Court of Appeal which is free to choose between the two.

It is submitted that if the Supreme Court is at liberty to pick and choose which of its conflicting decisions to follow, the lower courts should similarly be free to choose which of the conflicting Supreme Court decisions to follow. The lower court cannot be simultaneously bound by the two conflicting decisions. This point was made in *Adegoke Motors Ltd. v. Adesanya*²³ by Ademola, JCA when he said:²⁴

21 Recent law-creating judicial decisions (or cases of judicial legislation) in England include: *R. v. R.* (1991) 4 All ER 481; *C (a Minor) v. DPP* (1996) 1 AC 1; *Pepper v. Hart* (1993) 1 All ER 42; *R. v. Clegg* (1995) 1 AC 482.

22 (1979) 11 SC 1.

23 (1988) 2 NWLR (Pt. 74) 108.

24 *Ibid.* at p.121.

I must say that my understanding has always been that where there are two conflicting decisions of a higher court, the lower court is free to choose which of the decisions it is to follow.

The same question arose in the much later case of *Ebiteh v. Obiki*.²⁵ There the Court of Appeal stated thus:²⁶

There is authority for the proposition that an *obiter dictum* by the ultimate court (in this case the Supreme Court) on an important point of law is one which is binding on and followed by all the lower courts. See: *Ifediorah v. Ume* (1988) 2 NWLR (Pt. 74) 5. There is also authority for the proposition that *obiter dicta* of the Supreme Court are not binding as precedents. See: *Olagbemiro v. Ajagunbade III* (1990) 3 NWLR (Pt. 136) 37. ... In the circumstance, it may be said that there are two conflicting decisions of the Supreme Court on the binding effect of *obiter dicta* of the Supreme Court on the lower courts.

In the face of the conflict the Court of Appeal exercised its right to choose which of the two decisions to follow. There is also the case of *Awojugbagbe Light Industries Ltd. v. Chinukwe & 2 ors*,²⁷ where the view was again articulated that a lower court is at liberty to choose which of the conflicting decisions of a superior court it is to follow. In that case the court made it clear that in such event the lower court has no business resolving the existing conflict in the superior court's decisions; its freedom is only to follow one or the other decision.

Against this theory of freedom to pick and choose, there is the theory that the latter decision should prevail. This view draws support from the recent case of *Ojugbele v. Lamidi & Ors* which has already been cited and the relevant part of which has been reproduced above *in extenso*. Further support is provided by the case of *Okpozo v. Bendel Newspaper Corp.*²⁸ where the court held that where there is conflict between two decisions of the Supreme Court the Court of Appeal must follow and apply the latter. In a recent book on judicial precedent a learned author²⁹ also strongly subscribed to this view and cited in support the case of *UTC (Nigeria.) Ltd. v. Pamotei & Ors*.³⁰

In that case the Supreme Court had said,³¹ per Oputa, JSC:

In this case now on appeal, Longe J. followed the principle of this court's decision in *Nishizawa, supra* [*Nishizawa Ltd. v. Jethwani* (1984) 12 SC 234] but the Court of Appeal refused to do the same. It

25 (1992) 5 NWLR (Pt. 243) 599.

26 *Per* Adio, JCA at pp. 618-619.

27 (1993) 1 NWLR (Pt. 270) 485, held no. 10.

28 (1990) 5 NWLR (Pt. 153) 652, held no. 5.

29 Essien, Aquaowo(Dr.): *Precedent in Nigerian Law*, Port Harcourt: Newsfair Communications Ltd., 1999 at p.222.

30 (1989) 2 NWLR (Pt. 103) 244.

31 *Ibid.* at p.293.

chose to pick and choose forgetting that any judgement of the Court should be read as a whole and that the whole theory of our system of judicial precedent is that the decision of a superior court is binding on an inferior court.

It is submitted that the *Pamotei* case does not support the theory that the latter decision should be followed. To start with, no conflicting judicial decisions were at all involved in the case. There was only one Supreme Court decision involved and to be applied. Rather than apply the decision, as it ought to, the lower court split the decision and only applied/followed the part favourable to its argument. This is what the Supreme Court admonished as a “pick and choose” and directed that a decision should be read and applied as a whole and not be split into bits and pieces as it suits the lower court’s argument.

Be that as it may, it is probably correct to say that the persistent resurgence of the question and the sharp divergence of both judicial and academic opinions on it only go to show that the last word is yet to be said on the matter. It is hoped that the Supreme Court will not lose the chance to put an end to this running controversy any time that the occasion presents, or rather, re-presents, itself.