

THE SUPERIORITY CONTEST BETWEEN LEGISLATION AND JUDICIAL PRECEDENT AS SOURCES OF NIGERIAN 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 it serves the cause of justice and makes predictability of the outcome of legal suits possible. Legislation are laws made by law making bodies. Overtime, there has been debate about the superiority of legislation over judicial precedent and the other way round. This article aims at analyzing the superiority contest between legislation and judicial precedent as sources of Nigerian laws. The doctrinal research method was adopted, and the data collected were both primary and secondary comprising of both hard copies and online source materials. It was discovered that the superiority of legislation over judicial precedent or vice versa is based on which of them is recent in time about the subject matter in question. Where legislation is made subsequently to override a judicial precedent, then it is assumed that the legislators intended it to be superior, but where the courts make a pronouncement to be contrary to the position of a statute to remedy a lacuna, then it is assumed that the courts intended the precedent to be superior. It is recommended that there should be a synergy between the legislators and judges to ensure that judicial precedents made to remedy a lacuna are incorporated and enacted as part of the law and vice versa.

Keywords: Judicial Precedent, Legislation, Sources of Nigerian Law, Legislature, Courts.

1. 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.¹Precedents are that which precedes; a past instance that may serve as an example.²Legislation is the process or product of enrolling, enacting, or promulgating law by a legislature, parliament, or analogous governing body.³There has been series of debate overtime as to whether legislation is superior to judicial precedent or otherwise as sources of Nigerian laws. Some authors considered legislation to be superior to judicial precedent while others considered the latter to be superior to the former. This treatise shall consider the concept and nature of legislation and judicial precedents and the superiority contest existing between legislation and judicial precedents as sources of Nigerian law, that is, which amongst the two is regarded as being superior to the other under Nigerian legal system. This discussion shall also consider how legislation influences judicial precedent on one hand, and how judicial precedent influences legislation on the other hand. The former shall encompass issues such as abrogation of laws, embodiment of case laws, and judicial powers, while the latter shall encompass interpretation of statutes and making of new principles or laws to fill in gaps in the existing laws or legislation. This treatise shall then proceed to investigate the distinction between legislation and judicial precedent and conclude with a succinct and brief summary of the points inter alia discussed.

2. Local Legislation

Legislation is a law made deliberately in a set form by an authority which the courts have accepted as competent to exercise that function.⁴ Legislation forms the bulk of the sources of Nigerian laws. Nigerian laws and all other sources of law are valid to the extent that there is no Nigerian legislation on that subject matter, and to the contrary. Local legislation can be considered in three folds, parent legislation, subsidiary legislation and international law. Parent legislation includes the Constitution⁵ (ground norm), Ordinances,⁶decrees⁷, edicts,⁸ acts,⁹ and laws.¹⁰ The court in *Adegbenro v AG Federation* defined subsidiary or delegated legislation as a law made by an administrative body or authority, to which the constitution or the enabling statutes have given such power to make such laws. It is subordinate to the principal law; thus,

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¹JA Akande, *Miscellany at Law and Gender Relations* (MIJ Professional Publishers Limited, 1999) 1.

²PU Umoh, *Precedent in Nigerian Courts* (Fourth Dimension, 1984) 3.

³ Wikipedia, Legislation (Wikipedia.com, 2019) <<https://en.wikipedia.org/wiki/Legislation>> Accessed on 20th August 2021.

⁴PM Lere, *Nigerian Legal System: Sources of Nigerian Law* (Tonad Publishers, 2013).

⁵Section 1 (3) of the Constitution of the Federal Republic of Nigeria, 1999 provides that any other law that is inconsistent with the provision of the Constitution shall be declared null and void to the extent of its inconsistency.

⁶Laws enacted by the National/Nigerian Legislative Council before the year 1954.

⁷Laws made by the Federal Military Government at the federal level during military regimes.

⁸Laws made by the Federal Military Government at the state level during military regimes.

⁹Laws made by the Parliament at the federal level during civilian regimes.

¹⁰Laws made by the respective Houses of Assembly at the State level during civilian regimes.

it can be altered by the main law-making body. The essence of delegated legislation is that the National Assembly makes laws in respect to the general aspect and the minor details of such laws are made by the delegated bodies. However, where a delegated legislation contradicts the provision of the main legislation, the main legislation shall prevail. A cardinal principle governing delegated legislation is expressed in the Latin maxim, *delegatus non potes delegare*, that is, a person to whom something has been delegated cannot further delegate. However, the rule does not apply where there is expressed or implied authority to delegate. International laws are not expressly Nigerian laws but are considered under its sources of legislation by virtue of its enactment and ratification which then becomes Nigerian legislation.¹¹ It is essentially comprised of treaties and customs. The power to make treaties in Nigeria is vested on the executive. In terms of ratification and implementation, the power vests with both the executive and the legislature. *Section 12 CFRN 1999* provides that for a treaty validly concluded between Nigeria and any other country to have the force of law; it must be enacted into law by the National Assembly, ratified by the majority of all the Houses of Assembly in the Federation and given assent by the President. The interpretation of treaties in Nigeria follows the same pattern with interpretation of municipal statutes.

3. Judicial Precedents

Judicial precedents is a body of principles and rule of law developed or formulated and pronounced by the court over the years to govern specific legal situations or circumstances, which lower courts are bound to apply same when confronted with a case in which its facts is in all fours, similar, alike, like, identical or analogous to the initial case upon which the principle or rule of law was formulated.¹² In the case of *Thejumade A Clement v Bridget J Iwuanyawu*,¹³ the court held that, 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 concept of judicial precedents is well executed when there is well-established hierarchy of courts and well-gazetted and published law reports. Judicial precedent is basically upon the concept of *stare decisis*, that is, stand by your decision. Thus, lower courts are bound to stand by the decision of the superior courts and not disturb that which is settled. However, lower courts are bound only by the *ratio decidendi* and not the *obiter dictum* of a case.¹⁴ The *ratio decidendi* is the reason for the decision established from the majority decision, while the *obiter dictum* is a statement in passing given at the cause of reaching a decision, seeking to illustrate or create a hypothetical circumstance of fact and possible decisions not directly touching the questions before the court. Where the material facts in a previous case and that of the present case are different, the courts are expected to distinguish between them. Hence, distinguishing is a process by which a court rejects an earlier case as authority either on ground that the facts of the earlier case are different from the case at hand, or that the decision is too wide, considering the issue before the court. Distinguishing can be restrictive or non-restrictive. The former occurs when the court applying a previous decision limits the expressed *ratio decidendi* of the earlier case, while the latter occurs ordinarily where the court, without tempering with the *ratio decidendi* of the earlier case, finds that there is a significant and material difference in the facts of both cases.¹⁵

Judicial precedents are categorised into two. The first category is based on the involvement of the court in its formulation and application which includes, original,¹⁶ derivative,¹⁷ and declaratory¹⁸ precedents, and the second category is based on the weight attached to the pronouncement, which includes binding¹⁹ and persuasive²⁰ precedents. Judicial precedents are treated as follows: decisions of superior courts are binding on lower courts while decisions of lower courts are only persuasive on superior courts; decisions of courts of coordinate jurisdiction are only persuasive on each other; foreign decisions are only persuasive on Nigerian courts; where there are two conflicting decisions of a court on the same subject matter, the most recent shall prevail; a court can only depart from its previous decision if it was erroneously made, or made

¹¹T Ngufwan, *Jurisprudence: Sources of Nigerian Law* (Broadband Publishers, 2017).

¹²PM Lere, (n-4).

¹³(1989) 3 NWLR [Pt 107] P 39 at 54.

¹⁴*Osakwe v FCE Asaba* (2010) 10 NWLR (Pt 1201) 1.

¹⁵PM Lere, (n-4).

¹⁶Pronouncements on issues that no statute or law has provided for. It establishes a new rule of law and usually occurs in cases of first impression.

¹⁷Mere extension of the frontiers of an existing law to accommodate similar or novel cases where there is no direct authority on the point under consideration.

¹⁸Pronouncement on an existing precedent.

¹⁹When the court in which it is being advanced is bound to follow it, that is, superior court decisions.

²⁰When it is within the powers of the lower courts in which it is being urged to choose to follow or depart from it, for instance, decisions of lower courts, decisions of courts of coordinate jurisdiction, and foreign decisions.

per incuriam, or the facts are distinguishable, or in special circumstances for the interest of substantial justice.

4. Superiority Contest between Legislation and Judicial Precedents

Whether precedent is superior to legislation or legislation is superior to precedent is a controversial question. It depends on how one defines law – whether he puts the legislature or the courts in the centre of legal system.

Superiority of Legislation over Judicial Precedents

Proposition/Argument

Analytical jurists such as Austin and Bentham contend that legislation is always superior to precedent.²¹ A statute is made after due deliberation and not in the haste in which a judge disposes of his cases. Other grounds have also been given in support of the superiority of statute. It is certain, clear, comprehensive, and easily accessible. It passes through the scrutiny of the great number of men before it become law. The case law is the result of the whim of certain individuals. A planned progress of society is possible only through statute law.²² According to *Tobias Ngufwan*,²³ where there is conflict between legislation and precedent, legislation prevails where the legislation is made after the judicial decision has been made. In this instance, it clearly shows that the legislators intended that the legislation should stand superior to the precedent. For instance, in the case of *Rotimi Ameachi v INEC*²⁴ where the principle enunciated by the court in the case was later abrogated by the amendment of the Electoral Act to set aside such principle that allows a person who did not participate in the electoral process to be declared as winner of the election.

Merits of Legislation over Judicial Precedents

Some reasons why legislation is regarded as having superiority or relative merit over precedents are as follows:

- a. Legislation has its source in the law-making will of the state, while precedent has its source in judicial decisions.
- b. Legislation is imposed on courts by the legislature while precedents are created by the courts themselves.
- c. Legislation denotes formal declaration of law by the legislature while precedents are recognition and application of new principles of law by courts in the administration of justice.
- d. Legislation is enacted before a case arises, but the precedent comes into existence only after the case has arisen and taken for decision of the court.
- e. Legislation is expressed in comprehensive form, but the scope of judicial precedent is limited to similar cases only.
- f. Legislation is generally prospective while precedent is retrospective in nature.
- g. Legislation is declared or published before it is brought into force, but precedent comes into force at once, that is, as soon as decision is pronounced.
- h. Legislation is done with the intention of law-making, but it is not so in the case of the precedent. The precedent is intended to settle a specific dispute on point of law once and for all.
- i. It is not difficult for the public to know the law enacted by legislature, but the precedent based on case law is not easily known to the public. At times lawyers who deal with law are ignorant about the existing case law.
- j. Legislation involves law-making by deductive method while case law is created by resort to inductive method.²⁵
- k. Statute law is definite, brief, clear and easily understandable. To know principles and rules one will have to investigate the details of the case.²⁶

²¹P Bhardwaj, "Legal Positivism: An Analysis of Austin and Bentham", *International Journal of Law and Legal Jurisprudence Studies* [2010] (1)(6).

²²--, *A Comparison between Legislation and Precedent* (Legal Bites, 2016) <<https://www.legalbites.in/law-notes-administrative-law-comparison-legislation-precedent-case-laws/>> Accessed on 20thAugust, 2021.

²³T Ngufwan (n-11).

²⁴(2008) 1 SCNJ, 1.

²⁵A Goel, *Relative Importance of Legislation with Custom and Precedent* (Infipark.com, 2016) <www.infipark.com/articles/importance-legislation-custom-precedent-advantages-disadvantages-legislation/> Accessed on 20thAugust, 2021.

²⁶--, *A Comparison between Legislation and Precedent* (Legal Bites, 2016) <<https://www.legalbites.in/law-notes-administrative-law-comparison-legislation-precedent-case-laws/>> Accessed on 20thAugust, 2021.

- l. Legislation increases efficiency as it allows an advantageous division of labour by dividing the two functions of making the law and administering it, while precedent unites those two functions in the same hands.
- m. Legislation can make rules in anticipation for cases that have not yet arisen, whereas precedent must wait for the occurrence of some dispute before the court can create any definite rule of law.
- n. Precedent is dependent on, and legislation is independent of, the accidental course of legislation.²⁷

Superiority of Judicial Precedents over Legislation

Proposition/Argument

The supporters of case law such as Salmond and Grey have also presented weighty grounds in support of their contention about the superiority of precedents to legislation. They say that it causes an organic development of law and can easily adapt law to changing conditions.²⁸ The matters which receive so much calm and patient consideration in court cannot receive the same by busy legislators. Case law is more practical because it is laid down after a careful study of facts and the various circumstances whereas the statute law is of an abstract and rigid nature. Salmond posited that, "case law, with all its imperfections, has at least this merit that it remains in leaving contact with the reason and justice of the matters and draws from this source flexibility and power of growth and adaptation which are too much wanting in the *litera scripta* of enacted law."²⁹ According to Grey, case law is not only superior to statute law, but all the law is judge made law.³⁰ The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. The courts put life into the dead words of the statute.³¹ According to Tobias Ngufwan,³² where there is a conflict between judicial precedent and legislation, judicial precedent prevails where the precedent was formulated after the legislation has already been enacted. In this instance, it clearly shows that the courts intended that the precedent should stand superior to the legislation. For instance, where the court departs from the strict wordings of a legislation and gives it a liberal meaning, the liberal interpretation will suffice over the literal wordings of the legislation whenever a similar case is brought before the court.

Merits of Judicial Precedents over Legislation

Some reasons why case law is regarded as having superiority or relative merit over legislation are as follows:

- a. Precedent is certain and predictable because the courts follow previous decision. People therefore know what the law is and what it is on and how it will be applied in their case; lawyers can then inform their clients of the likely outcome of the case. Legislation on the other hand lacks this merit.
- b. Precedent is flexible as there is room for the law to be changed easily as the Supreme Court can overrule cases and the courts have some freedom to avoid past decisions and develop the law. Legislation on the other hand is rigid in terms of its amendment.
- c. There is consistency and uniformity in precedents as similar cases are decided in similar ways, while legislation lacks such consistency.
- d. As the principle of law is set out in cases, the law therefore becomes very precise and reliable.
- e. Precedent is seen to be a useful time saving device as principles are applied in similar cases, while legislation lacks that merit.³³
- f. Precedent sets practical rules for future circumstances while legislation does not do that.
- g. Precedents free the law or legislation from arbitrariness.³⁴

²⁷S Karleh, Five Chief Advantages of Legislation over Precedent as Sources of Law (Shareyouressays.com) <<http://www.shareyouressays.com/knowledge/5-chief-advantages-of-legislation-over-precedent-as-sources-of-law/114710>> Accessed on 20th August, 2021.

²⁸Salmond and Grey, Meaning, Nature and Scope of Jurisprudence (Law.uok.edu.in, 1992) <<http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/6.%20jurisprudence%20final.pdf>> Accessed on 20th August 2021.

²⁹*Ibid.*

³⁰*Ibid.*

³¹ --, A Comparison between Legislation and Precedent (Legal Bites, 2016) <<https://www.legalbites.in/law-notes-administrative-law-comparison-legislation-precedent-case-laws/>> Accessed on 20th August, 2021.

³²T Ngufwan (n-11).

³³Han, Judicial Precedents: Advantages (Get Revising, 2014) <https://getrevising.co.uk/grids/judicial_precedents> Accessed on 20th August 2021.

³⁴T Ngufwan (n-11).

- h. Precedents by keeping the legislation or the law in view, the doctrine largely succeeds in keeping justice and fairness, ensuring within reasonable bounds, that citizens are treated as equals before the law.³⁵

5. Influence of Legislation on Judicial Precedents and Vice Versa

Influence of Legislation on Judicial Precedents

Legislation has influence on judicial precedents in the following manner:

Abrogation

Legislation is constitutive and has abrogative power on precedents. It does not only create law but can abrogate or annul an existing law (statute, precedent or custom). Precedent is constitutive. A judge is bound by the precedent of the higher courts and the enacted law. If a precedent checks the operation of a rule, it is only on the ground that it is not law. But, when a rule is established as law, a precedent cannot abrogate it. Thus, precedents can work successfully only for any legal growth and not for any legal reform which can be done only by legislation.³⁶

Embodiment of Judicial Precedents

Another way legislation influences precedents is through embodiment. Most principles and rules formulated in judicial decisions are later embodied into written laws via legislation, which then becomes easy for the public to know about such principle as embodied into written laws.

Judicial Powers

Legislation also influences judicial precedent in the sense that, the judicial powers vested in courts that enable the courts to even formulate precedents is as provided under legislation. *Section 6 of the CFRN 1999*, which is a parent legislation, makes provision for the judicial powers of the federation vested in courts. Thus, without the judicial powers provided under the legislation, precedents will have not been in existence. Legislation influences precedents in this sense by giving it right to existence; the legislation can at any time amend or abrogate the judicial powers vested in the courts.

Influence of Judicial Precedents on Legislation

Judicial precedent has influence on legislation in the following manner:

Interpretation of Statutes

Judicial precedent influences legislation in terms of interpretation of statutes and the Constitution. One of the primary functions of the courts is to interpret legislations. Legislation has full legal effect after it has been tested before the court. The courts can interpret legislations either literally by giving it the ordinary meaning; or liberally by departing from the ordinary meaning and giving a deeper meaning to actualise the intention of the law makers. The courts can also interpret legislation to correct a mischief not contemplated by the legislation and provide remedy for such mischief. By interpretation of legislation, the courts through judicial precedents influence the application and enforcement of legislation. Invariably, judicial precedents free legislation from arbitrariness. Where the strict application of the provision of legislation will create manifest absurdity or hardship, the courts can depart from the literal meaning of such provision and give it a liberal meaning to mitigate the hardship or absurdity.

Formulation of New Laws to fill in Gaps in Existing Legislations

There are instances where at the time of making legislation, the law makers did not contemplate or foresaw a future situation and thus, did not make provision for how it should be handled whenever it arises. According to the Latin maxim, *ubi jus ibi remedium*, (wherever there is a wrong, there must be a remedy) the courts are enjoyed in such circumstance to formulate a new principle to cater for such circumstance not contemplated by legislation. In and so far, the circumstance is one recognised by the law, the courts are to provide remedy for such circumstance. For instance, when President Umaru Musa Yar'Adua died in 2010, the Constitution did not provide for what should happen in such circumstance. Thus, there was a lacuna in the legislation which the courts had to invoke the doctrine of necessity to cater for such situation. The form of precedent

³⁵ B Ayorinde & Co, Judicial Precedent, Law Reporting and the Need for Regulation (Mondaq, 2014) <<http://www.mondaq.com/Nigeria/x/293622/court+oricedure/JUDICIAL+PRECEDENT+LAW+REPORTING+AND+THE+NEED+FOR+REGULATION>> Accessed on 21st August, 2021.

³⁶-, A Comparison between Legislation and Precedent (Legal Bites, 2016) <<https://www.legalbites.in/law-notes-administrative-law-comparison-legislation-precedent-case-laws/>>Accessed on 21st August, 2021.

formulated in this circumstance is known as original precedent, which is a pronouncement on issues that no statute or law has provided for. It establishes a new rule of law and usually occurs in cases of first impression.³⁷

6. Distinction between Legislation and Judicial Precedents

The differences between legislation and judicial precedents are as follows:

1. Legislation is generally brief, clear, easily accessible and knowable, while case law is very minute, complex and not easy to understand.
2. Legislation can be understood by an ordinary person, while case law can only be understood by lawyers, judges and jurists.
3. Legislation is a new source of law. At the same time, it has a unique feature, that it can abolish any law or laws which are outdated. On the other hand, precedent has only constitutive efficiency. It produces a very good law, and its operation is irreversible.
4. Legislation allows division of labour and therefore increases its efficiency, while precedents interpret the minutest points of man's thoughts and applies it.
5. Legislation only makes the law, while precedent makes the law and enforces it.
6. Legislations can be made by a separate branch of Executives on the instructions of Cabinet of Ministers at centre and states, while precedents can only be made by judges.
7. Legislations declare certain acts as wrongs and punishable before the commission of the acts to which it applies, while precedents operate retrospectively.
8. Field of legislation is vast; it can fill up the vacancy, while under precedent there must be an unsettled problem.
9. Legislation is complete, certain and systematic, while precedent is incomplete, uncertain and unsystematic.
10. Legislation assumes the form of actual propositions, while precedent is merged in the concrete details of the actual cases.
11. Legislation is coin of the realm ready for use, while precedent is gold in the mine – a few grains of the precious metal to the ton of useless matter.
12. Legislation is embodied in an authoritative form of written words, while precedent interprets the "letter of the law", because it has no letter of the law itself.
13. Legislations are codified, while precedents are compiled in journals only.³⁸

7. Conclusion

As observed earlier, the superiority contest between legislation and judicial precedent as source of Nigeria law is due to the differences of proponents about the definition of law. They have spoken of the superiority of one or the other on that basis. In the present age both are equally important, and one cannot attain its end without the other. The aim of the law is the protection and progress of the society and the individual. For a planned progress, legislation is very necessary, thus they both contribute equally to the development of law and have weighty influence on each other.

³⁷PM Lere, (n-4).

³⁸S Kumar, 15 Differences between Legislation and Precedent (Publish Your Article, 2015) <<http://www.publishyourarticles.net/knowledge-hub/law/15-differences-between-legislation-and-precedent/3967/>> Accessed on 21st August, 2021.