

Eva Mappy Morgan, SCL
Chief Judge, Commercial Court of Liberia,
Associate Professor, Louis Arthur Grimes School of Law, Liberia
& President, National Association of Trial Judges, Liberia

The 2020 Virtual Conference of the African National Bar
9th to 12th November 2020

Presentation: The Doctrine of Judicial Precedent as an Effective Tool for Unifying African Legal Systems: Role of Judges

Background

There is valid argument to be made that the multi-layered African Legal Systems is a challenge for the consolidation of these systems. The continent of African with 56 nations, is said to be home to around three distinct legal traditions; traditional or customary African law, Islamic law and the legal systems of Western Europe.¹ Following independence of several African countries in the 1900s, they encounter the complexity of trying to build legal systems that supported the needs of their emerging cultures, and peoples now attuned to a traditional way of life.² Though several of these new nations were quick to adopt many of the western systems of law, these systems were then interlinked with African Customary law; save that most of states north of the Continent, established their system on Islamic law.³ Against this backdrop, it is no surprise that African Legal Systems is sometimes referred to as a legal pluralism; also evolving into the establishment of the common and civil law legal systems across the continent.

That being said, unifying African Legal Systems is not so far-fetched after all. Here is why. At a 2003 meeting in Montreal, it was resolved that there be free access to legal information under the Declaration of Free Access to Law – Legal Information Institutions of the World.⁴ A major principle under the Declaration of Free Access states that “Public legal information from all countries and international institutions is part of the common heritage of humanity.”⁵

¹ www.geography.nan/laws-and-legal-systems

² *ibid*

³ *ibid*

⁴ <https://africanlii.org/og/fala/declaration-en>

⁵ *ibid*

Further, that unfettered access to public legal information advances justice and the rule of law⁶. Additionally, the several pieces of legislations by African states to bring commonality to the complex African Legal Systems is inter alia evident in bodies such as a) African Commission on Human and Peoples Rights; b) Ecowas Community Court of Justice; c) East African Court of Justice; d) Court of Appeal of East African Decision; e) COMESA Court of Justice and; f) State legislations on Covid19. ⁷ Still building on merging and inclusion of its laws and legal systems, various organizations have begun to complied and index decisions from courts across Africa. For example, there is an African Commercial Law Foundation, with a Commercial Law Index, an index on African Environmental Law; the African Court Decisions and many others seeking to catalogued and preserve these decisions made by divers courts all over the continent of Africa. It is reasonable to conclude that a seminal point of these efforts is not only to merge laws or develop harmony, but also to establish judicial precedent.

Judicial Precedent

So, what is Judicial Precedent? Judicial Precedent is Stare Decisis (stand by decided matters); it is a source of law whose past decisions create law for judges to refer back to for guidance in future cases⁸ Recognizing the law on judicial precedent, a lower court of Eswatini, held in Simelane v. CJ of Eswatini & Others, as follows “The decision of the Supreme Court that (he) is guilty of contempt...is binding upon this court until such time that (he) demonstrates that he has... purged his contempt. Further, once the Supreme Court finds Simelane in contempt, it automatically meant that his hand “were dirty” in approaching the courts. To allow him to approach this court without demonstrating he has purged his contempt would be tantamount to setting aside the decision of the Supreme Court and this court has not authority to do that. It is bound by the decision of the Supreme Court.”⁹ The above illustrates a definitive example of judicial precedent. However, the Supreme Courts, or Courts of last recourse in many instance may set aside judicial precedent in the face of manifest injustice or what it might consider changing circumstances. It is only the lower courts in such jurisdictions that are often bound by judicial precedent.

⁶ ibid

⁷ Ibid (COMESA –Common Market for Eastern & Southern Africa)

⁸ <http://www.reference.com/worldview/definition>

⁹ Attorney loses battle with CJ over dirty hands; Similane v. CJ of Estwatini & others (1508/2020 [2020]SZHC 221

Understanding however the intricacies of African Legal Systems, the Protocol of the African Court of Justice and Human Rights while attempting to unify the multi-faceted African Legal Systems, empowers state courts to decide cases ‘ex aequo et bono (according to the right and good or from equity and conscience), as agreed by the parties or on the basis of judicial precedent.¹⁰ Further, the Protocol provides that “Courts shall have regard to “Any other law...”¹¹. Although Member States work between, and within these multifactorial systems, African Union citizens under Article 21 of the Protocol are eligible to file cases for adjudication before the aforementioned African Court.

The doctrine of judicial precedent as an effective tool for unifying African Legal Systems is also a tool for improving the investment climate due to consistency and predictability of decisions handed down by these courts. Although, judicial precedent has its shortcomings, there are also many advantages of this process especially for harmonization of some of the common issues on cross-border commerce, immigration, agriculture, public health and education, amongst others.

The Role of Judges

I submit to you that Judges are the only ones poised to carry or drop the torch on judicial precedent. And, this is supported by the Irish Jurist, Sir William Blackstone, who observed that the doctrine of English common law precedent established a strong presumption that judges would “abide by former precedents, where the same points come again in litigation” unless such precedents were “flatly absurd or unjust” in order to promote stability in the law¹². Put simply, the above jurist furthered that, “precedents and rules must be followed, unless flatly absurd or unjust”¹³ Accordingly, complete adherence to judicial precedents without the desired effect of promoting justice has been set aside by courts with such authority.

Judicial precedents as examined, or overruled in some instances set the tone, amongst others, for predictability, continuity, and dependability in the law. This

¹⁰ Protocol on the Statute of the African Court of Justice and Human Rights, Article 31 (2)

¹¹ Ibid Article 31 (1) (f)

¹² https://web2.uvic.ca/courses/lawdemo/DOCS/BLACKSTN/B6367_73.HTM

¹³ ibid

principle also protects and respects the legitimate expectations of individuals who reside under the laws of the certain jurisdiction, and advances a system of justice that is unbiased.¹⁴ Further to the above, a precedent-based system aids efficiency, expedites the working of courts by avoiding the constant reassessment of settled queries; and adherence to judicial precedent ensures the legitimacy of the legal process by permitting society to presume that core principles are founded in law rather than the predispositions of individuals.¹⁵

Although, judicial precedent is perceived to be the tool for unifying African Legal Systems, the complex and varied construct of this system creates new sets of issues for judges who must apply the law. Assuming precedents on similar sets of questions brought before courts are settled; how might a judge in a common law or civil law regime adhere to this precedent? It is observed that judges in the civil law jurisdictions relied of specific principles as found in their codes. This system is described as having Codes and other Statutes with an extensive number of legal tenets forming the entire body of laws to be applied by the courts. It said that the civil law system is independent and creates less or no room for “external” contributions, leaving the courts without possibility of moving beyond the reach of these predetermined substantives rules¹⁶ Let’s assume arguendo that this is precedent; after all these are ready made rules on which judges must rely to determine cases. Might judges in common law jurisdictions find this useful or reasoned that many of such Codes & Statutes, are, in the words of Blackstone ‘flatly absurd or unjust’ and their application might not promote stability in the law?

There is no dispute that judges in civil law jurisdictions are boxed-in into a certain pattern, more ‘strict-forward’ method in order to arrive at a determination than judges in common law jurisdictions. Evidently, common law jurisdictions are known for limited number of statutes and legislatives act; creating extensive independence for courts to determine the law applicable to a specific case which might later serve as precedent for future courts.¹⁷

Unlike common law jurisdictions, it is observed that judicial precedent is not valid in most civil law jurisdiction, being challenged as interfering with the right of judges to interpret the law and right of the legislature to make law. Rather, the civil law

¹⁴ <https://cgc.law.stanford.edu/commentaries/15-john-walker/>

¹⁵ *ibid*

¹⁶ <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1120&context=annlsurvey>

¹⁷*ibid*

system recognizes the concept of 'jurisprudence constant' which contend that while judges are independent, they should rule in a predictable and non-chaotic manner.¹⁸

Once more, despite the multifaceted legal systems of Africa; and despite the difference in the civil law and common law jurisdiction, it seems clear that each of these systems clearly rely on judicial precedent to conclude matters. Let me suggest to you that there is not a dissenting, but a concurring opinion on judicial precedent by the two systems. That is to say, civil law jurisdictions have well-established Codes and Statutes on which their judges can look-back and determined cases. Similarly, in common law jurisdictions, judge also have precedent in which they may refer in order to reach a decision. It could be argue that while judicial precedent is not a strange creature to these two distinct systems, the difference simply lies in the application of this principle. Whereas, the civil law system seems rigid, the common law system lends some degree of flexibility; all systems however respecting and acting within law, and relying on established codes, statutes and/or established decisions from past cases to more or less determine current matters before them.

Now, the key function of judges in both civil and common law jurisdictions is to fairly, and with deliberate speed administer justice. The goal here is how judges in these diverse systems some unbending, and others bendable navigate a unifying system of law based on judicial precedent. Challenging as unifying Africa legal systems may seem, it can be done, and is being done. Mentioned earlier in this paper are the several entities set-up towards unifying our laws and setting precedents for issues common to Africa. For Judges, this type of trading of information, enables the development of the law in many areas, quickly develops and/or improves the expertise of judges in their field of specialization or another thereby giving such judges a comparative advantage and better tools to preside and decide matters¹⁹.

Recognizing that decisions made by these judges can be shared with other colleagues, makes it imperative for them to be more conscientious in providing the law and rationale as to how the conclude matters over which they preside. Judicial precedent, statutes and codes permitting, judges still have to write and give

¹⁸ Doctrine of Stares Decisis in Nigeria: A Step to Conclusion, Peter Ademu Anyebe

¹⁹ <https://scholarship.dentlaw.iit.edu/cgi/viewcontent.cgi/article=27487context=cclawreview>

reasons why specific provisions of the codes, statutes or precedent seemed more applicable than the others available to them. This means, judges whether in civil or common law jurisdictions, must base their interpretation, their use of specific codes or statutes on some degree of reasoning. This is why the famous jurist and dean of Harvard Law School, 1916 to 1936, Roscoe Pound once noted “The law must be stable, and yet it cannot stand still.”

As we study, and work purposefully towards unifying the legal systems in Africa, some of Islamic inclinations, others of African Customary law, or of civil and common law derivatives, we are encouraged by the courageous individuals who will drive this process by making use of shared decisions made by their colleagues on the continent of Africa. It is judges, who in the words of the famed jurist, Roscoe Pound, who understand that though stable must be the law, yet the opinions made in other jurisdictions, to which they can refer, makes judicial precedent, the judge’s tool for unifying the multifaceted legal systems in Africa a vibrant opportunity.