



**NATIONAL OPEN UNIVERSITY OF
NGERIA**

SCHOOL OF LAW

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There are three fundamental liberties:

- freedom of the person;
- freedom of property; and
- freedom of opinion.

If all of the notions referred to above were in fact present in our system then it would be said that the rule of law exists. In fact, however, there are a number of shortcomings, viz:

1. The constraints on legislature are often quite weak. While legislature is a representative House the use of the party system does give the executive government at least control in the short term, i.e. between elections.
2. The concepts of equality and liberty are vague. They are not bolstered by a written constitution.

However, the Court has found a number of Federal or State laws to be invalid, as being in conflict with the fundamental civil and political rights enshrined in the Constitution. Examples include: freedom of expression, at least in relation to public affairs and political discussion and of association which are indispensable to the efficacy of the system of representative government, for which the Constitution makes provision.

While the fundamental human rights are entrenched in the Constitution of Nigeria, suggestion has been made that there is still a need for a Bill of Rights. The cases for and against such a Bill are concisely set out in Evans et al. (1988, pp 36-8) as follows:

3.4 Bill of Rights

3.4.1 The Case for a Bill of Rights

Those favouring a Bill of Rights believe it to be the only way to protect fully civil liberties. In summary, the claims are:

- i. A Bill of Rights would provide the means for preventing abuses of power by governments, agencies and the police.
- ii. As a signatory of several international pacts, such as the Declaration of Human Rights (United Nations), and the African Charter, Nigeria has a moral obligation to pass a Bill of Rights

that applies to our own domestic situation as evidence of our support for the international agreements.

- iii. Several other Commonwealth countries have passed a Bill of Rights and we should follow the pattern and support their direction.
- iv. A Bill of Rights would provide the means for some judges to defend better, the civil rights of individuals and could bring about changes in the law as a result of successful legal actions against unfair practices.
- v. As a tool for educating society about the attitudes and values held, a Bill of Rights would be most valuable. Particularly, the Bill would challenge issues of religious, sex, or race discrimination and other violations of basic human rights and freedoms.

3.4.2 The Case against a Bill of Rights

- i. A major argument put forward against the Bill centred on the belief that such a Bill was not necessary. Nigeria has adequate protections already because of the right we hold to elect our representatives who govern and because of our legal heritage. It was argued that the common law, the constitution and other indigenous laws have, over the centuries, developed a sufficient body of protections for civil liberties.
- ii. The problems of drafting an adequate Bill of Rights are great. The statements from another country cannot be simply grafted on to Nigeria. What should be included is one aspect of the problem; what it should declare as a liberty is another. For example, can the right of workers to be organized into unions co-exist with the rights of an individual worker not to join a union?
- iii. Minority groups could hold up the process of government by unreasonably enforcing their civil rights to the detriment of the wellbeing of the majority of citizens.
- iv. Critics point to other countries where the most violent abuses of civil liberties often occur as those countries with the best-sounding Bill of Rights. The substance of this argument is that civil liberties declared in an Act can be manipulated in practice, either by being ignored by sections of the community or overruled by governments in the interests of national security.

4.0 CONCLUSION

The organs of government are Legislatives, Executive and Judicial. Each is required to be separate from one another in terms of functions and personnel in order to safe-guard the liberty of the citizens. Rule of law also deals with the relationship of the government subjects to the observance of the law and equality of access to courts.

5.0 SUMMARY

You have learnt about the separation of powers of government to which, according to Montesquieu, the people owe their liberty. You also have learnt the very important concept of rule of law, equity and liberty. You are reminded always that “the Law Rules”.

6.0 TUTOR-MARKED ASSIGNMENT

From time to time, it is asserted that Nigeria should have a Bill of Rights. One of the arguments to counter this is that there are enough protections of individual rights provided for in the Constitution and in statute books.

How far have these rights been protected in the Constitution and statutes in Nigeria?

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MODULE 2 COURT PROCESS

Unit 1	Judicial Precedent
Unit 2	Statutory Interpretation
Unit 3	Criminal and Civil Procedure
Unit 4	Law of Evidence: Adjudicative and Non-Adjudicative Processes

UNIT 1 JUDICIAL PRECEDENT

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1.0 INTRODUCTION

You have learnt about judicial precedent as a source of law. Our present concern is Judicial Precedent in actual operation.

2.0 OBJECTIVES

On Successful completion of this unit, you should be able to:

- describe, explain, illustrate and critique the Nigerian legal system
- describe, interpret, explain, demonstrates and assess the role and application of precedent in the administration of justice in Nigeria.

3.0 MAIN CONTENT

3.1 Definition of Terms

Before examining the operation of precedent it is important that you understand the following terms:

Res Judicata: a decision handed down by the court is conclusive as between the parties to a case unless it is reversed on appeal. The decision binds the parties and the case and the case cannot be re-opened. The policy behind this rule is that there should be finality in litigation. *Res Judicata* applies even if fresh and relevant evidence comes to light after the case has been decided. One exception to this rule is that certain criminal matters may be re-opened by the way of appeal by the accused if that person can produce new evidence.

Ratio Decidendi: means ‘the reason for deciding’ or the principle or statement of law (not statement of fact) upon which the decision in a particular case is based. We shall look in greater detail in this concept later in this unit.

Obiter Dictum: means a saying by the way. It is a principle or statement of law (not statement of fact) said in a judgment, which statement of law is not necessary to decide any issue of fact or to decide any question presented for decision in the case. (*Obiter dictum* singular, *obiter dicta* plural.)

Reversing: occurs when a higher court on appeal reverses the decision of a lower court. Reversing affects the *res judicata*, ie the order or judgment of the lower court.

Overruling: occurs when a higher court decides that a proposition of law expounded by a lower court was wrong. The higher court overrules the lower court and thereby affects the *ratio decidendi* of the lower court decision. The higher court may send the case back to the lower court for the case to be re-tried in light of the new ruling on law.

3.2 The Operation of Precedent

You have already been introduced to precedent and to its place in the common law. You will recall that as a principle of law, courts are in some circumstances bound to follow the decision of other courts. This principle is often referred to as *stare decisis* which means **let the decision stand**.

You will no doubt realize that the use of precedent is not confined to the courts. There is pressure to use precedent in our day to day existence to ensure fairness and equality: ‘if John Smith was treated in a certain way yesterday then Jill Jones in a similar case ought to be treated in the same way’.

The fact that the notion of precedent affects our daily decisions is borne out by the expression: ‘we would like to grant your application but that would be creating a precedent’.

The need for certainty is another pressure in support the use of precedent. As Lord Justice Scrutton stated:

[I]n my view, liberty to decide each case as you think right without any regard to principles laid down in previous similar cases would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what judge his case would come and could guess what view that judge would take on a consideration of the matter without any regard to previous decisions.

3.2.1 How to Approach the Study of Precedent

There are two central enquiries:

- i. Which decisions of which courts in a legal system bind other courts?
- ii. What part of the decision is binding? What part of a particular decision is the *ratio decidendi* (called the ‘ratio’) and which part is *obiter dictum* (if any)? How is a precedent case applied?

3.2.2 Court Practices Regarding Precedent

To deal with the first of these enquiries you need to know in some detail the Federal and State court structure (see unit 3). In particular you need to know how courts rank in relation to each other.

You then need to know what practices the courts have adopted regarding precedent. The most important of these practices are:

- i. each court is bound by decisions of courts higher in the same hierarchy, eg the Supreme Court of Nigeria binds the the Court of Appeal, High Courts – that is, a **binding precedent**;
- ii. most courts (including the High Court and the Supreme Court) are **not** bound to follow their own decisions;
- iii. courts are **not** bound to follow decisions of courts outside their own hierarchy but they may find the decision of the other court quite persuasive. For example a judge in the High Court would treat a decision of the House of Lords (the highest court in England) or of the PCJC as very persuasive in reaching a decision on a case before him or her. These are examples of **non-binding precedent** or **persuasive precedents**;
- iv. a court even if it is not strictly bound by its own previous will refuse to follow its own decisions in clear cases of error; and
- v. the fact that a precedent is old does not necessarily weaken its authority. Courts frequently rely on early 19th century cases. Obviously, though, in some circumstances because of changed social conditions the effect of a precedent may be weakened.

3.3 Finding the Ratio

As noted in the introduction to this unit, the process of finding the ratio of a case can be quite elusive. It is a skill acquired over many years of practice and is greatly assisted by having a good knowledge of substantive law. Space does not permit such a study in this course and you are only expected to gain a basic understanding of the process. In reality it is unlikely that a non-lawyer will be confronted with a court decision afresh and will have to decide what is the ratio. Instead you will usually be able to draw on the views of legal authors and possibly later court decisions to assist you.

To try to illustrate the operation of precedent let us consider the famous case of *Donoghue v Stevenson* [1932] AC 562.

3.3.1 Facts

The plaintiff was with a friend who purchased a bottle of ginger beer for her. The shop keeper opened the bottle of beer and poured a tumbler of ginger beer for the plaintiff. When she had drunk some of this her friend poured the remainder of the contents of the ginger beer into the tumbler and a decomposed snail floated out of the bottle. The result of this, and of the impurities in the ginger beer which she had already drunk, was that the plaintiff suffered shock and severe gastro-enteritis (Vermeesch & Lindgren 1992, p 77).

3.3.2 Issue

The basic question for determination by the House of Lords was whether the manufacturer, the defendant, who had no contractual relationship with the plaintiff, owed her a duty of care under that branch of the law of tort which deals with liability for negligence.

3.3.3 Decision

The House of Lords (by a majority) held that such a duty was owed. It should be realized that this case was regarded as a significant expansion of the law because up until that time it was practically impossible for a consumer (such as the plaintiff in this case) to recover damages from the maker of defective products unless there was a contract between them. Here the plaintiff did not buy the bottle of beer from the retailer, let alone from the manufacturer.

In allowing the plaintiff to recover, what was critical to the court was the fact that the ginger beer, upon being made by the manufacturer, reached the consumer in exactly the same form as it left the factory. Furthermore, given the opaque nature of the bottle there was no chance of seeing the impurity or defect before it was opened. The circumstances therefore placed the consumer and maker of the beer in quite a close legal relationship. The *ratio* of the case can be taken from the words of Lord Atkin:

...a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care.

We will return to discuss the ratio in some depth later.

SELF ASSESSMENT EXERCISE 1

Without looking at the text, attempt to define the following:

- a. material facts
- b. res judicata
- c. ratio decidendi
- d. obiter dictum
- e. stare decisis
- f. distinguish
- g. persuasive
- h. dissenting judgment
- i. majority judgment

3.3.4 Facts and Law

In the definitions given earlier of ratio decidendi and obiter dictum, statements of law were distinguished from statements of fact. The difference is important. When a judge hears a case the first step is to establish what the facts are. As part of that process the judge will make certain **findings** of fact. To a large extent these findings are conclusive and will be accepted by any higher court.

In *Donoghue v Stevenson* the judge who heard the case for the first time (sometimes called the final or primary judge) would have made findings that the plaintiff did drink ginger beer, that it contained a snail, that the bottle was opaque and that as a result of drinking the contents of the bottle the plaintiff became ill.

Statements of law are not so easy to identify because they will contain reference to facts (for a story) and it may be hard for a novice to determine what 'law' is. Perhaps the best guide is that statements of law indicate legal relationships, rights or duties and possibly also the consequences of failure to comply with those duties. In *Donoghue v Stevenson* the statement of law is clearly indicated by the words of Lord Atkin '...owes a duty to the consumer to take reasonable care'.

3.3.5 From the Particular to the General

While a judge must make findings of fact, the relevance or materiality of those facts will depend upon how the decision is viewed subsequently. The facts which are material to the *res judicata* will be different to the *ratione decidendi*.

Remembering that since the *res judicata* principle binds the parties to the particular case, the very specific facts of the case are most relevant here. Those facts will be the names of the parties, the date the incident in question occurred, the loss or damage sustained and so on. These are all the facts that will be important if either party wanted to re-open the case (which they are not allowed to do under *res judicata*). These are the particular facts which may be unique to that case.

The material facts for the *ratio decidendi* however are quite different. None of the facts referred to above will be relevant. Rather it is the basic story. In *Donoghue v Stevenson* the material facts (so far as the *ratio* is concerned) would be:

- i. manufacturer of a product designed for consumption;
- ii. product reaches consumer in same form as leaves manufacturer;
- iii. no reasonable possibility of inspection before consumption;
- iv. product negligently manufactured; and
- v. causes injury.

You can see here that it is not likely to even be material, that it was ginger beer or that it was a snail that caused the problem. What has been extracted for the *ratio* are the generalized facts which may subsequently apply to another case although it relates to, say for example, a chocolate bar and not a bottle of ginger beer.

3.4 The Ratio as Seen by Later Courts

While one can attempt to decipher the ratio of a case immediately it is handed down, the crucial issue is how is the precedent case treated by later courts. This treatment occurs through the process of **distinguishing or extending the ratio**.

3.5 Distinguishing

Distinguishing happens when a later court refuses to follow the precedent case because it says the precedent case contains relevant facts which are different from the case before it. This is quite a legitimate part of the judicial process. For example, a court in applying *Donoghue v Stevenson* may say that a material fact in that case was that a product was consumed internally and therefore the precedent is different to where, for example, a product is used, such as a power tool, or is worn such as a garment.

If that was the interpretation placed on the *Donoghue v Stevenson* ratio then it quite severely limits its impact. Remember that the pivotal point is identifying the material facts. What a later court might regard as material may be different to what the court deciding the precedent case