

# Dissenting Judgment And Judicial Law Making

*This paper was presented by Justice George Oguntade, JSC of the Supreme Court at the Maiden Honourable Justice Adolphus Godwin Karibi-Whyte Convocation Lecture of the Nigerian Institute of Advanced Legal Studies recently.*

## **Constitutional Provisions**

Let me start by stating that the authority to write dissenting judgments is derived from section 294 (2) and (3) of the 1999 Constitution of Nigeria which provides:

(2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion.

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when the judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.

(3) A decision of a Court consisting of more than one Judge shall be determined by the opinion of the majority of its members.

It is not in doubt that our 1999 Constitution as evident in the above provision contemplates that in the nature of judicial work, an appellate court could not always be unanimous in its reasoning on its judgments. Our constitution clearly endorses the necessity to write dissenting judgments. A judge or judges driven into writing dissenting judgments is/are acting to the letter of the grundnorm of Nigeria.

In "words and phrases legally defined," the learned authors define 'judgment' thus:

Judgments and orders are usually determinations of rights in the actual circumstance of which the court has cognizance and give some particular relief capable of being enforced.

There are different ways of classifying a judgment depending on the nature of the dispute before the court and the relief sought. These are:

(a) Declaratory judgment when a party claims a court decision upon a state of facts which has not yet arisen. This is a convenient way of getting the rights of parties considered and declared lest there be a dispute in the future as to such rights.

(b) Final Judgments;

(c) Interlocutory judgments;

(d) Judgments in personam; and

(e) Judgments in rem.

The necessity to write a dissenting judgment in any of the above variants of judgments does arise. The duty to render the different types of judgments stated above arises in the exercise of the judicial power vested in the Superior Courts in

Nigeria by section 6 of the Nigerian Constitution, 1999. Section 6 of the Constitution provides:

4 (1) The judicial powers of the Federation shall be vested in the courts to Which this section relates, being courts established for the Federation.

(2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.

(3) The courts to which this section relates, established by this Constitution for the Federation and for the States specified in subsection (5)(a) to (i) of this section shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State each court shall have all the powers of a superior court of record.

(4) Nothing in the foregoing provisions of this section shall be Construed as precluding:

(a) The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court;

(b) the National Assembly or nay House of Assembly, which does not require it, from abolishing any court which it has brought into being.

(5) This section relates to:

(a) the Supreme Court of Nigeria;

(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;

(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 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 House of Assembly may make laws;

(6) The judicial powers vested in accordance with the foregoing provisions of this section:

(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law;

(b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;

(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution; and

(d) shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law.

Constitutional democracies practice separation of powers. The doctrine and practice of separation means that the three arms of government, that is, the Legislature, Executive and Judiciary have their appointed roles to play in the governance of Nigeria. Thus, while the Legislature is saddled with making laws, the Executive performs executive duties and the judiciary exercise the judicial powers stated above under section 6 of the 1999 Constitution.

There are many obvious advantages attached to this practice of separation of powers under a constitutional democracy rooted in the rule of law. But the very essence of separation of powers is to provide a balanced system of divided or shared powers in order to prevent arbitrariness and lawlessness on the part of those who exercise governmental powers.

As I observed earlier, the judicial powers vested in the judiciary are exercised by the Courts recognised by the Constitution of Nigeria, and the judicial power they exercise in a broad sense is defined as “the ascertainment of existing rights or abilities by which the determination, the issues of facts or law or both, is adjudicated upon in accordance with pre-existing legal standards”. In a nutshell, the basic function of a Court of Law is adjudication over or settlement of disputes. The court does this by the method of interpretation of the law or application of the law as the case demand. Judges are generally circumspect in stating the outer ambit of the powers they exercise and are loathe to admit that they make the laws in the course of their work. The conventional assumption is that the judges apply the law as it is and not as it ought to be. But in practice, the duty of a judge in the adjudicatory system is expansive and not always so narrow as judges themselves are want to proclaim. Being one of their number, I am familiar with the many ways by which judges extend the frontiers of the law. Sometimes, judges mould the law and occasionally change the law. But even when judges change the law, they tell all of us that they are only interpreting it.

A useful discussion of Dissenting Judgments and Judicial Law Making must begin with an insight into judgments generally. As I observed earlier, the function of a judge is primarily to settle disputes between all manner of men without favour or ill will. Modern civilisation has ensured that we now practice civilised ways of settling disputes through the courts. Settlement of disputes in the traditional African Society had been beneficial and simple. That we resort to the modern court system does not convey that the quality of the

judgments through the modern court is better or superior to what obtained in the times of our ancestors. Indeed, there is reason to believe that adjudicatory process in the traditional African Societies was simpler, faster and fair.

Today, we have better judgment enforcement procedures and coercive ways to punish recalcitrant persons against whom judgments have been given and who fail to comply with such judgments. In the earlier days, oath taking, societal ostracisations were used to get the same result. It is apparent therefore that even before the emergence of the modern courts, our ancestors had their informal ways of settling disputes and enforcing their decisions. Today, the customary courts exist in the land and what has been done is to modernise their practice and procedure.

In considering the nature of the court system and court judgments, it is useful to bear in mind an important principle on the adjudicatory process, which must guide a judge. No Dispute is Truly Settled Until it is Well Settled. This has been my unwavering guide in all my years on the Judicial Bench. You have various types of dispute coming before a judge. You have land and property disputes; disputes between master and servant; bank and customer; and disputes on family succession and matrimonial matters. Standing in a class of its own are political disputes and public Law disputes which in recent times have multiplied and seriously tested the resolve and doggedness of the Judiciary in Nigeria. For many years after its independence, Nigeria has been under the governance of the military. However, since 1999, the nation has been under democratic governance. This development has come with unusual adjudicatory challenges, which impose on the court the necessity to interpret the provision of the Nigerian 1999 Constitution. The courts are therefore nowadays confronted with an unusual or new situation. But as Lord Denning M.R. stated in *Gouriet v. Union of Post Office workers* (1982) A C 435: whenever a new situation arises which has not been considered before, the judges have to say what the law is. In so doing, we do not change the law. We declare it. We consider it on principle and then pronounce upon it. As the old writers quaintly put it, the law is in the breast of judges.

The first duty of a judge is to ascertain from the pleadings of parties or affidavits in a case commenced by originating summons the issues in dispute between the parties before him. When the issues in dispute have been isolated, a judge then proceeds to consider and weigh the evidence called by each of the parties on these issues in dispute. This is done with a view to making findings of facts thereupon. When findings of facts have been made, the judge then applies the law to the facts as found. On the basis of such exercise, the judge makes his pronouncements on the claim before him. Behold the judgment emerges!

A judgment is either good or bad depending on the manner it is written. A judgment, which does not evenly treat the case made by each of the contending parties or is unfairly skewed against one of the parties or does not correctly interpret or apply the applicable law is considered a bad judgment. A good judgment must on its face reflect clear understanding of the issues in dispute, a dispassionate consideration of the contending standpoints of the parties and finally it must reflect a fair application of the applicable laws. The primary duty of the judge therefore is to do justice according to law between all manner of men. A judge owes a duty to the large society in which he operates as a judge. The judgment given by a judge in each case must often be in the overall interest of the larger society.

A judicial system thrives when by its judgment, it instills confidence in the larger society that is fair, impartial and corruption-free in the adjudicatory process. A judiciary that is weak, corrupt and unreflective of the people's aspiration is irrelevant to the people and doomed to collapse with time.

It is also important to bear in mind that the world we live today has become one global village. We live in a world of Internet and advanced modern technology in which the judgments given in a national court are in a question of minutes being disseminated all over the world. A fair and sound judgment which is free from corruptive influence edifies a country and its global standing. On the other hand, a weak and unsound judgment reflects the state of the maturity of the judicial process in a country. A country identified as home to a weak and corrupt judiciary soon loses international respect and becomes an anathema to the international business community.

### **Do Judges Make Law?**

The question is, Do Judges Make Law? The simple answer to this seemingly rhetorical question is No. But it is neither a resounding no nor an unqualified answer in the negative. Admittedly by the provision of section 4 of the 1999 Constitution, the function of law making is vested in the legislature, while that of judicial adjudication is conferred on the courts by section 6 of the 1999 Constitution. This sharing of powers or functions, as I said earlier, accords with the hallowed practice of separation of powers. See *Tende & Ors. v. Attorney-General of the Federation* (1988) 1 NWLR (Pt. 71) 506. However, we know that judges do more than just apply the law as it is. They sometimes extend it and at other times create new laws that remain binding on all until reversed or overrules by courts competent to do so. According to Lord Denning:

...judges have the power to fill the necessary gaps in law. Hence it was observed that the proper role of a judge is to do justice between parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule or even change it so as to do justice in the instant case before him.

In a published paper by Aderemi J. S. C., CON, he writes:

let me say that the absence of precedent does not mean that there is no principle to be applied. The law abhors a vacuum. There is somewhere a principle on which every case can be disposed of, and the duty of the judge is to find out that principle and apply it. Arguably, the performance of that duty may be said to involve a law-making function. It is a function which has been exercised on some occasions with great caution or trepidation and on others with considerable audacity; depending on the person of the judex.

In *Obaji v. State* the Supreme Court of Nigeria, employing a creative mode of interpretation, expounded on the law of provocation under section 318 of the criminal Code of Eastern Nigeria. It is the same in *ADMAS v. D. P.P.* in interpreting section 229 of the Criminal Procedure Act of the Southern States of Nigeria. Interestingly, based on the court's judgments in these two cases, amending legislation, the Criminal Justice (miscellaneous provision) Decree 1966 (No.84 of 1966) was enacted for Lagos State.

In *Council of the University of Ibadan v. Adamolekun*, the Supreme Court disregarded an absolute provision prohibiting courts from inquiring into or deciding on the validity of an

Edict, and went ahead, to interpret s.6 of the Constitution (Suspension and Modification) Decree 1966 (No. 1 of 1966). Again, in the case of Attorney-General of Bendel State v. Attorney General of The Federation And Others, the Supreme Court held that the Allocation of Revenue (Federation Account, etc) Act 1980 which has been passed into law and signed by the President was null and void, and of no effect, because there were major deficiencies in its enactment process at the National Assembly.

The judiciary as we have argued earlier can, and do change the law. A clear instance to support this assertion is to be found in the Common Law doctrine of frustration. The doctrine of frustration as it applies to Nigeria, as well as Common Law countries, is to the effect that a contract is discharged (by frustration) where after it has been formed a change in circumstances makes it impossible for parties thereto to perform it. But this has not always been so, because for centuries, it has been established principle of law that once parties voluntarily enter into contracts, they remain absolutely bound to perform them, no matter how impossible that turns out to be. The doctrine of frustration was ushered in (and has since become the law) by the case of Taylor v. Caldwell, where the defendants had agreed to let the plaintiffs a facility on four series of concerts and day and night fetes. However, before the date of the first concert, the Hall which was part of the facility was gutted by fire. Although there was no provision in the contract covering this unforeseen circumstance, the court held that since the Hall had ceased to exist without the fault of either party, they were thereby relieved of their obligations under the agreement. Thus we see from the decision in the above case a definite change in the law affected by the judiciary, which remains the law till today.

Judicial precedent or case-law is, in our opinion, the clearest form of judicial law-making. Simply put, it is the law laid down by courts in their judgments. The decision of superior courts of law, are not only binding on the parties in the particular case, but is treated with respect and regarded as a statement of the law and as precedents which subsequent courts must follow whenever cases with same or similar facts and/or issues come before them. An original precedent creates or lays down a new rule of law for the first time. A declaratory precedent on the other hand declares the position of an already existing law, and does not create a new law, while a derivative precedent extends an existing rule of law to new facts or issues.

An indispensable corollary to judicial precedent is the doctrine of 'stare decisis', which means courts must follow what has been decided previously in a case. Accordingly, it has been stated by the Supreme Court of Nigeria that stare decisis is a basic principle of the administration of justice which stipulates that like cases should be decided alike. In the recent case of Oladeji (Nig) Ltd. v. N.B. C. Plc. The Supreme Court stated that in reality there can hardly be any two cases where the facts are exactly the same, but that the doctrine of stare decisis does not stipulate that the facts must exactly be same. It agreed that there may be differences, but that these may be minute and so will not necessarily prevent the application of the doctrine, and that a major criterion in resolving the matter before the court is that the facts of the previous case are major, substantial and material to the facts of the present case begging for the application of the previously decided case.

In the practical application of the doctrine of judicial precedent, the Court of Appeal is absolutely bound by the judgments of the Supreme Court which is the final court in Nigeria. The Court of Appeal is also bound by its own (previous) decisions. The Federal and State High Courts (including those of the Federal Capital Territory, Abuja), the Sharia and Customary Courts of Appeal (including those of the Federal Capital Territory, Abuja), the National Industrial Court and the Investment and Securities Tribunal, are courts of co-ordinate jurisdiction and are absolutely bound by the judgments of the Supreme Court and the Court of Appeal. They are also bound by their own previous decisions.

The Magistrate Courts in the Northern and Southern parts of Nigeria, and the District Courts in the North, as well as the Area Courts in the North, and the Customary Courts in the South are absolutely bound by the decision of all the superior Courts of record enumerated in the preceding paragraph. They are however not bound to follow their previous decisions.

The Supreme Court of Nigeria is bound by its previous judgments, but not absolutely. This means that it has the power to overrule its previous decision if:

- (i) it was given per incuriam (in ignorance of some statutory provision or other authority hinging on it;
- (ii) in the opinion of the Court the previous case was wrongly decided; and
- (iii) it is satisfied that the continued existence of the previous decision would perpetuate uncertainty in the law or cause hardship and injustice to parties.

The Supreme Court has held in the case of *Oladeji (Nig.) Ltd. v. N.B. Plc* that decision of English courts or any other foreign courts are not binding on Nigerian courts, but that where Nigerian courts have followed a particular principle or rule of law adopted from a foreign decision over the years, such as the one in *Hadley v. Baxendale* Or *Salomon v. Salomon*, then it will be erroneous to say that such principle still remains a foreign decision.

Finally, it should be stressed that a judicial precedent, through the application of binding precedent or *stare decisis* does not necessarily bind courts indefinitely. This is because circumstances may dictate not following it. These circumstances include:

- (i) when the previous decision has been reversed on appeal;
- (ii) when the previous decision had been overruled by a higher court;
- (iii) where the previous decision have been repealed by statute; and
- (iv) where by the process of distinguishing, a case strives to show that there are material differences between the previous case (decided on) and the case before it (awaiting decision).

A lower court in distinguishing a case from another must:

- (a) state the ratio decidendi of the case;
- (b) state the facts proved in that case, and
- (c) show, by means of judicial reasoning, in the body of the judgment was different from the case before it.

I have discussed above the manner judges make laws through their judgments while loudly disclaiming that they do so. But what about 'Dissenting Judgments' can laws be made through dissenting judgments? In answering the above question, I must raise another subordinate question – when are dissenting judgments written in an appellate court? In deciding to write a dissenting judgment, the first thing a judge considers is whether or not the

conclusion on law or fact as pronounced in the majority judgment is in accord with the law of the land or a binding judicial precedent or does justice to one or the other of the parties on the case made by them. Another case is where the judge concerned persuades himself that a greater justice or fairness will be done in a case by departing from an otherwise binding judicial precedent. Further, in a case which revolves around the interpretation or application of a statutory provision, the dissentient judge may form the opinion that there is a better method to do justice in a case than the adoption of the interpretation adopted in the majority judgment. There are often instances where the necessity to write a dissenting judgment may arise from the inference of fact or law drawn from a primary position.

The necessity to write dissenting judgment arises in all situations where a dissentient judge forms the impression that the ends of justice will be better served by following an approach different from that stated in the lead judgment.

Writing a dissenting judgment does not connote that the judge concerned knows or understands the law better than his colleagues holding the majority view. It only shows a difference of approach to a common issue. This is a situation that regularly recurs in the appellate courts. The occurrence does not weaken the bond of comradery between the appellate judges. Indeed it expands the frontiers of knowledge and shows the vibrancy and development of the judiciary concerned.

The question whether or not a judge writing a dissenting judgment is making the law raises the question of the acceptability of the reasoning espoused in the dissenting judgment by succeeding legal scholars and judges. When you write a dissenting judgment, you are making a contribution to legal learning and thought. The acceptability in the future of such contribution depends on many imponderables. But it is undoubted that legal scholars will have cause to examine and evaluate the depth of the reasoning embedded in a dissenting judgment and may propagate the acceptance of the minority over the majority judgment. Put simply, I would say that the potency of a dissenting judgment is a matter for the future and depends on the direction which legal learning and experience dictate in the future.

Having said the above, it is important to add that the judgment immediately relevant to issues in contest in a case is the majority judgment no matter how well written or commendable the conflicting opinion in the dissenting judgment. I am of the firm view that the growth and progressive development of our Law particularly our public law will be greatly assisted if judges form the habit of practice independence of thought.

An interesting case which highlighted the value of a dissenting judgment is *Liversidge v. Anderson* (1942) A. C. 206. This was a landmark case in English Law which concerned the relationship between the courts and the state and in particular the assistance which the judiciary should give to the executive Arm in times of national emergency. The facts were: Emergency powers in Regulation 18B of the Defence (General) Regulations 1939 permitted the Home Secretary to intern people if he had "reasonable cause" to believe that they had "hostile association". Sir John Anderson exercised this power in respect of a man who used the name Robert Liversidge and committed him to prison but giving no reason. In the majority judgment the House of Lords, Viscount Mangham and Lord Macmillan preferred a construction which will carry into effect the plain intention of those responsible. It was reasoned that "it is right to interpret emergency legislation as to promote rather than defeat its



efficacy." The dissenting judgment on the other hand took the view that an uncontrolled power of imprisonment could not be given to the Minister of State.

Lord Atkin said in his dissenting opinion:

In England, amidst the clash of arms, the laws are not silent. They may be changed but they spell the same Language in war as in peace. It has always been one of Pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments in his liberty by the executive alert to see that any coercive action is justified in law.

The dissenting view of Lord Atkins above has generally been subsequently preferred.

It is thus seen that even a dissenting judgment has Law making potential. A dissenting judgment which relates to the interpretation or application of the provision of the law very often assists the legislature in deciding what amendments are to be made in the law. Further, the students of Law today in the different Universities are the judges of the future. They read the judgments from the courts including dissenting opinions. Their minds in the process are moulded in a manner, which may be manifest in shaping the dissenting judgments of the future.

Concluded

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