APPLICATION OF THE DOCTRINE OF STARE DECISIS IN THE COURT OF APPEAL AND SUPREME COURT OF NIGERIA: PROBLEMS AND PROSPECTS

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ABSTRACT
The importance of stare decisis in the legal system of Nigeria is obvious. That stare decisis properly applied contributes to certainty in the law (amongst other benefits) as an indispensable attribute of justice is also not in dispute. However, the application of the doctrine of stare decisis by Nigerian courts, particularly the Court of Appeal and the Supreme Court is fraught with uncertainties arising from conflict in principles. This is a very serious impediment in the use of stare decisis to attain an egalitarian society. The Supreme Court thus needs take the lead in ensuring consistency in its decisions generally and laying down clearly, principles applicable in the area of stare decisis. Prevention is, definitely and indisputably better than cure.

1.0 Introduction.

Stare decisis means[29] to abide by, or adhere to decided cases. Under this policy of courts, the rule is *"Stare decisis et non quietamovere"* meaning to adhere to precedents, and not to unsettle things which are established.[30] Under the doctrine, when points of law have been settled by court decisions, they form precedents, which are not afterward to be departed from unless in defined circumstances. Precedent in this context may be defined as an adjudged case or authority for an identical or similar case afterwards arising or a similar question of law.[31] By the time honoured doctrine of precedent as it operates in Nigeria and all common law countries, the decision on a given issue of law handed down by the apex court (which for Nigeria is the Supreme Court) is superior and binds all subordinate courts, including all courts exercising appellate jurisdiction[32] General Sani Abacha& Others V. Chief Gani Fawehinmi (2000)2 SCNQR (part 1)489 at p. 542 per.

It is the law that a decision of a court of competent jurisdiction, no matter that it seems palpable, null, and void, unattractive or insupportable, remains good law and uncompromisingly binding until set aside by a superior court of competent jurisdiction[33] The situation is so serious that the Supreme Court of Nigeria has held that refusal by a judge of the court below to be bound by a Supreme Court decision is gross insubordination; and that such a judicial officer is a misfit in the Judiciary.[34] Under the Federal Civil Service rules for instance, insubordination is a serious misconduct attracting disciplinary measures[35], such as reduction in rank, withholding or

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[29] *H.C. Black et al, Black's Law Dictionary (1991) West Publishing Co. 1406*
[30] *Ijalaye, D.A "Precedents in the Nigerian Courts" (1965), Nigerian Law Journal 284; Ezejiofor G "Stare Decisis in Nigeria: Some Random Thoughts" (1965). Nigerian Bar Journal 74*
[31] *H.C. Black, et al. op. cit p. 1406*
[32] *General Sani Abacha& Others V. Chief Gani Fawehinmi (2000)2 SCNQR (part 1) 489 at P.542 per Okay Achike, JSC.*
[33] *Ibid*
[34] *Bashir Mohammed Dalhatu V. Ibrahim Saminu Turaki& 5 others (2003) 7 SCNJ 1 at 12 per Katsina-AluJSC*
[35] *Federal Civil Service Rules (Nigeria) chapter 4, section 4 Rule 04401 (xix)*

deferment in increment or otherwise.[36] A conclusion deducible from the foregoing is that a judge of a court below the Supreme Court of Nigeria who refuses (or fails?) to apply or be bound by a decision of the Supreme Court of Nigeria is subject to b relieved of his appointment or disciplined by withholding or deferment of increment, or reduction in rank, or otherwise.

This makes it topical and relevant to re-evaluate the application of
the doctrine of stare decisis in Nigerian jurisprudence. In this paper, emphasis is laid on the Court of Appeal and the Supreme Court of Nigeria. These courts no doubt occupy strategic positions in the hierarchy of courts in Nigeria, the Supreme Court being the apex court and the Court of Appeal
being immediately below the Supreme Court in the hierarchy of courts.
The attitude of the Supreme Court and the Court of Appeal no doubt will heavily impact on the doctrine of stare decisis, advancing or impeding the gains of stare decisis, as the case may be.

Regrettably, the judicial attitude on some aspects of stare decisis, especially from the Court of Appeal vis-à-vis the Supreme Court of Nigeria does not disclose a settled principle or approach. For instance, on one hand, one finds the Supreme Court dishing out inconsistent decisions on some legal principles; and on another hand is the Court of Appeal wallowing in mirth of unsettled principles as to what to do when faced with conflicting decisions of the Supreme Court. The ensuing confusion poses a threat to the doctrine of stare decisis achieving its major tasks and need be examined, with a view to removing the impediments to case law assuming its proper place as a source of law in Nigeria.

2.0 Basic Principles and Rationale of Stare Decisis

The doctrine of stare decisis involves the idea that a court is bound to follow the previous decision of a higher court on the subject matter provided, the facts of the cases are not distinguishable.[37] The order of precedent follows the hierarchical set up of the court system. In Nigeria, the highest or apex court is the Supreme Court. As aptly stated by Niki Tobi[38]:

"Accordingly, decisions of that court are binding on all other courts... the decisions of the Court of Appeal are binding on all other courts other than the Supreme Court. The decisions of the Federal High Court are not binding on State High Courts. This is because the two courts are courts of concurrent and coordinate jurisdiction. But the decisions of both the Federal High Court and the State High Courts are binding on the Magistrates and District Courts. Decisions of a State High Court are not binding on other State High Court... Decisions of Magistrates and District Courts do not seem to be binding on any other court."[39]

Generally, a court is bound by its own decision". Thus, the Supreme Court is bound by its own decision, just like the Court of Appeal is bound by its own decisions. However, the Supreme Court may review its decision and depart from it if the decision was reached per incuriam or the decision is

[36] *Federal Civil Service Rules (Nigeria) chapter 4, section 3 Rule 04305 and 04306*

[37] *Oyewo, The Doctrine of Stare Decisis and Conflicting decisions of the Supreme Court (1990)v12 Journal of Private and Property Law (Uni-Lag) 33 at p.39*

[38] *Niki Tobi, **Sources of Nigerian Law (1996)**MIJ Professional Publisher Ltd, Lagos p.81-82*

[39] *Niki Tobi, op.cit p.86*

found to be erroneous or that it has become an instrument of injustice.[40]

According to the Supreme Court of Nigeria[41], the question as to whether the Supreme Court should reconsider a previous decision and if so, in what circumstances, is in the final analysis, a question of judicial policy rather than a question of law. It involves a balancing of the need for certainty in the law with the need for the judges to see that they faithfully apply the law as it is and not the law as they would like it to be or as it was wrongly conceived to be in a previous case. The court observed further that:

One cannot in the interest of or the plea of certainty persist in error… before a decision of this court can be reconsidered and overruled, the court has to be satisfied that the decision is erroneous otherwise the bes

policy is stare decisis et non quieta movere (to stand by the decision and not to disturb settled points); otherwise again, little respect will be paid to our judgment if we overthrow that one day which we resolved the day before.[42]

In taking a decision whether to depart from its earlier decision, the court is faced with two competing situations[43]: (1) The situation where the stability of the law in vindication of the doctrine of stare decisis is a desideratum (2) The situation where rigid adherence to the doctrine of stare decisis will ruin or impede the development of law and the amicable administration of justice. In order to sway to the position of departure, the

court must be convinced that taking the position in (2) above will meet the ends of justice and development of law and where there is any doubt as to the reasonability to follow (2) above, the doubts must be exercised in favour of (1) above.[44] Previous decisions of the Supreme Court are thus binding on it until overruled or departed from. The rationales of judicial precedent or stare decisis are said to be[45] need for guidance to eliminate or reduce tendency to error; to save time; orthodoxy; and, search for perfection. Put in other words, standing by a previous decision which has not been proved to be perverse or to have been decided per incuriam or proved to be faulty legally or procedurally has advantages such as[46]: foster stability and enhance the development of a consistent and coherent body of law; preserve continuity and manifest respect for the past; assure equality of treatment for litigants similarly situated; spare the judges the task of re-examining rules of law or principles, with each succeeding case; and it affords the law a desirable neasure of predictability. Judicial precedents have thus been described as an insurance against inconsistent judgments.[47] Precedent is expected to produce certainty in the law hence engender equilibrium in the

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[40] *M.E. Eperokun & 2 others V. University of Lagos (1986) 4 NWLR (pt 180) 162*

[41] *M.E. Eperokun & 2 others. University of Lagos (supra) 162 at p.193 per Oputa JSC, adopting the guiding principles in the Supreme Court of Nigeria overruling itself in Chief Williams Brief.*

[42] *Ibid*

[43] *Niki Tobi JSC in Awuse V. Odili& Others (2003) 16 NSCQR 218 at 262*

[44] *Ibid*

[45] *P.UUmoh, Precedent in Nigeria Courts (1984) Fourth Dimension Publishing Co. Ltd. Enugu, Nigeria p.5-6*

[46] *Peter Kalgo, JSC in Global Transport Oceanico S.A. & Another V. Free Enterprises Nig. Ltd. (2001) 5 NWLLR (pt 706) p. 426 at 442*

[47] *Francis Asanya V. The State (1991) (pt 180) 422 at 475 per Olatawura, JSC.*

society. Eso JSÇ underscored this point thus.[48] "The whole essence of law is that for it to be just, it must be certain. No one can acclaim a society to be just if the society lives under a law which blows hot and cold".

3.0 The Status of Obiter Dicta in the Application of Stare Decisis in Nigeria

An Obiter dictum is a remark or opinion expressed by a judge by the way in the sense that it is merely incidental or collateral and not directly focused or hinged upon the question to be determined. It can be said to wear the garb of illustration or analogy but essentially it is not binding as precedent, but may however be used in academic circles to help in engineering development of law.[49] Niki Tobi JSC, puts the matter thus[50]:

An Obiter is a judge's passing remarks, which have nothing to do with the live issues for determination in the matter. It is the statement of the judge by the way. In the principles of stare decisis, an Obiter is not binding. Unlike ratio it has no binding force but it has a persuasive force. It is however good law that an Obiter of the Supreme Court, could with time, and repeated a number of times; assume the status of a ratio decidendi.

The question here however is, how many times an Obiter is to be repeated to satisfy the requirement of "repeated a number of timed" in order for it to assume the status of ratio decidendi? No guidance is provided in this respect.

Obiter dicta are statements by the way, and arise when a judge thinks it is desirable to express opinion on some points, though not in issue or necessary to the case before him.[51] What is binding in a decision of a superior court is the ratio decidendi; an Obiter of a superior court is generally not binding on inferior court.[52] An Obiter of the Supreme Court is not binding on that court. But pats — Acholonu J.S.C. stated thus.[53]

"This does not mean that an Obiter has no strength or teeth. Indeed, no lower court may treat an Obiter of the Supreme Court with careless abandon or disrespect but the Supreme Court could ignore it... Sometimes, an Obiter may have the ungainly characteristic of unguided missile and counsel appearing in the apex court should exercise due care in allowing it to form or be the bulwark of their case."

There are however authorities for the proposition that obiter dictum of the ultimate court (in this case, the Supreme Court) on an important point of law is binding on and followed by all the lower courts.[54] There is equally authority for the diametrically opposing proposition that obiter dicta of the Supreme Court are not binding as precedents.[55] The crucial issue in view of the conflicting positions on the effect of obiter dicta in the scheme of stare decisis is whether or not obiter dicta constitute binding precedent.

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[48] *In this case of Abaye V. Ofili (1986) 1 NWLR (pt 15) 134 at 153*

[49] *S.M.ABelgoreJSC in Muhammadu Buhari& 2 other V. Chief Olusegun Aremu Obasanjo Aremu Obasanjo & 266 others (2003) 16 NSCQR 68 at p.88 (delivering lead judgment of the court)*

[50] *EmekaNwana V. Federal Capital Development Authority & others (2004) 19 NSCQR 142 at 153*

[51] *Muhammadu Buhari& 2 others V. Chief Olusegun AremuObasanjo& 266 others (supra)*

[52] *Muhammadu Buhari& 2 others V. Chief Olusegun AremuObasanjo& 266 others (supra)*

[53] *Ibid*

[54] *Ifediorah V. Ume (1988) 2 NWLR (pt 74) at 13 followed and applied by the Court of Appeal in Jerry O. Nwosu& Another V. The State (1990) 7 NWLR (part 162) 322 at 334 – 335*

[55] *Olagbemiro V. Ajagungbade III (1990) 3 NWLR (p.136) 37.*

The conflicting answer or decisions of courts on the above issue breed uncertainty in the scope of binding precedents, hampering the doctrine of Stare decisis from achieving its desired objectives.

It is most humbly submitted that the correct and reasonable position is that obiter dictum even of the Supreme Court is not binding on that court nor on lower courts. Looking at the nature of obiter dictum, it is further submitted that whenever a court embarks on an obiter dictum, the court is thereby abandoning its judicial duty of deciding only the issues before it. It is settled law that a court must confine itself to issues placed before it hence when an issue is not placed before a court, it has no business whatsoever to deal with it.[56] Obiter dicta entails a court engaging on a frolic of its own or on unnecessary talkativeness, that is, by way of passing remarks on matters not in issue, or not necessary for resolution of the case. These will be curtailed if obiter dicta have no binding force on any court. After all; it is logical expectation that whenever a court comments on issues not before it, the court would not have properly, adequately or exhaustively focused on or considered such issues, being not the main thrust of the case before it but merely something by the way. It thus seems unfair to consider obiter dicta as binding. For in the circumstances, there is no certainty whether the same court when particularly faced with the issues it had considered by the way will tow the same line of its obiter dicta.

Another example of the obscurity or uncertainty regarding the status of obiter dicta in Nigerian jurisprudence, it is submitted (with due respect) may be found in the observation that[57]

> No doubt, an obiter dictum may be very weighty taking into consideration the judicial esteem and respectability in which the maker is held. If the judge is a luminary of high standing, his obiter dictum may in due course crystallize to good law. However, if it is the contrary, the dictum will sooner than later be ignored contemptibly.

Two complications may be noted from above pronouncement.

Firstly, how is 'judicial esteem and respectability' of the maker of obiter dictum to be measured or determined so as to accord weight to the obiter dictum or to ignore it "contemptibly"? Secondly, assuming it is possible to determine the first issue above, the next question is how weighty is 'very weighty' in the observation? Does this mean the obiter dictum will become binding? It is submitted that the complications pointed out above also make the status of obiter dictum of the Supreme Court of Nigeria obscure. Obiter dictum of the Supreme Court of Nigeria, it is respectfully submitted, ought to have only persuasive (not binding) force notwithstanding "judicial esteem and respectability" of the maker: that is emphasis be placed on the status of the court in the hierarchy of courts rather than individual justices that constitute the court. It is also submitted that it is not necessary to qualify the weight which obiter dictum of the Supreme Court will have. Obiter dictum is simply "persuasive" without necessity of adding the word "very" to the weight to be attached to it.

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[56] *Kraus Thompson Organization Ltd. V. University of Calabar (2004) 18 NSCQR (pt 1) 262 at 277 Per Dahiru Musdapher, JSC.*

[57] *Oshodi & Others V. Eyifunmi & Another (2000) 3 NSCQR 320 at 377-387*

4.0 Guiding Principles to Lower Courts where faced with conflicting decisions of the Supreme Court

When the ratio decidendi of the Supreme Court of Nigeria on any aspect of law in two or more cases are in conflict and are not distinguishable, the question arises as to which of these constitutes binding precedent or stare decisis to be applied by lower courts. Is a lower court faced with such conflicting decisions to pick and choose which of the conflicting decisions to apply? Is the lower court to apply the latter of the Supreme Court decisions in view of the conflict in the decisions? Is the lower court bound to make a reference or case to the Supreme Court and await the specific guidance of the Supreme Court before deciding the matter before it? The questions that one may ask here are indeed endless. It is regrettable that feelers from the decisions of the Supreme Court of Nigeria and of the Court of Appeal (Nigeria) do not show any consistent or clear or systematic development of law on this aspect of the problems of stare decisis in Nigeria.

For instance, the Supreme Court on this theme held in the case of **Ojibah V. Ojibah**[58] that where there is conflict between the decisions of the Supreme Court, it is for the Supreme Court to resolve such conflict, and the Court of Appeal cannot pick and choose. The court held further thus:

> The Court of Appeal is only entitled to decide which of two conflicting decisions of its own it will follow. All that the Court of Appeal can do if it is satisfied that there are two conflicting decisions of the Supreme Court is perhaps to state a case to the Supreme Court thus giving that court the Opportunity to resolve the conflict.

But the Supreme Court of Nigeria is also of the view that where two decisions of the Supreme Court are irreconcilably in conflict, the later decision should be followed.[59] While the Supreme Court contradicts itself as for instance, seen above, the Court of Appeal decisions on the same matter demonstrate more confusion as to what the guiding principles are. One wonders what is responsible for this attitude of the Court of Appeal.

Is this in furtherance of the confusion "initiated" by the Supreme Court itself on the appropriate guiding principles in the event of conflicting Supreme Court decisions? Is the attitude of the Court of Appeal (Nigeria) due to want of clear guidance as to what to do in the circumstances of conflicting decisions? Or is this attitude of the Court of Appeal indicative of a desire to independently lay down the guiding considerations? More questions may be asked, and one may go on and on with questions on this, but the answers seem not forthcoming.

In the case of Alhaji V. Egbe[60], the Court of Appeal held inter alia that if there is a conflict between decisions of the Supreme Court, it is for the Supreme Court to resolve it and not for the court of Appeal to pick and choose which of these to follow. But in the case of Ebiteh V. Obiki[61] the Court of Appeal held that where there are two conflicting decisions of a higher court.(the Supreme Court in this case) on the same point, the lower court is free to pick and choose which of the two conflicting decisions it is to follow. Another proposition of the Court of Appeal is

[58] *(1991) 5 NWLR (pt. 191) 296.*

[59] *Oni Amudipe V. Arijodi (1978) 9-10 Sc 27 at 33.*

[60] *(1986) 1 NWLR (p.16) 361.*

[61] *(1992) 5 NWLR (p.243) 599 at 618.*

that[62] where there is conflict in two previous decisions of the Supreme Court on the same point or issue, the Court of Appeal is bound by the later decision and must follow and apply it. In this vein the Court of Appeal, Lagos Division per Galadima, J.C.A. held in the case of Aihaja Morufa Disu V. Aihaja Silifat Ajilowura[63] that where there are conflicting decisions of the Supreme Court, the conflict ought to be resolved in favour of the decision which is later in time.

To buttress its above conclusion, the court gave an example of how this conclusion was utilized earlier that[64] the Ibadan Division of the Court of Appeal per Okunola, J.C.A. upheld a. later decision of the Supreme Court (which conflicted with another Supreme Court decision) in Akinade V. NASU (1999)2 NWLR (pt 592) 570. Similarly, the Court of Appeal Calabar Division held in the case of Chief Sampson Akpan Mkpedem V.Sunday Otung Udo and 4 others[65] that where there are conflicting decisions of courts of equal jurisdiction the rule is that the decision later in time prevails. The court said[66] In the instance case, in the face of the apparent conflict in the decision of the Supreme Court in Momoh V. Okewale (1977)6 SC 81, and Ibrahim V.Judicial Service Commission (1990)14 NWLR 548, the majority decision in the latter being later in time represents the correct position of the law.

A variant of the above proposition for resolving conflicts in decisions of the Supreme Court of Nigeria is that, where the early decision was specifically referred to in the later decision but not specially overruled, the earlier decision by reason of the departure of the later decision would be taken to have been impliedly overruled.[67] In the case of Ndili V. Akinsumade,[68] the Court of Appeal held on the permissible principle on which a lower court may refuse to follow a relevant previous decision that a lower court may refuse to follow a relevant prior decision of a higher court where there is in existence two conflicting relevant decisions of the higher court one of which was held in ignorance or forgetfulness of a relevant prior decision or appropriate legislation or rule of court. The court held in the case that[69]

> When a relevant prior decision was not cited or referred to before the court or mentioned in judgment of the court, it must be taken that the court acted in ignorance or forgetfulness of that prior decision. If the new decision is in conflict with the old decision, it is given per incuriam and in effect without binding force on a later court.

But the position above is also, sharply contradicted by the decision of the Court of Appeal in the case of P.N. Emerah and Sons (Nig) Ltd. and another V. The Attorney-General of Plateau State and others[70] that "...a lower court cannot refuse to be bound by decision of higher courts even if those decisions were reached per incuriam.The implication is that a lower court is bound by the decision of a higher court even when that decision was erroneous".

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[62] *Chief Francis Spanner Okpogo V. Bendel Newspaper Corporation &Another (1990) 5 NWLR*
[63] *(2001) 4 NWLR (pt. 704) p. 76 at p.90*
[64] *Ibid*
[65] *(2001) FWLR (pt.66) p. 827*
[66] *(Supra) at p.842*
[67] *Alhaji GafariV.S. Ajayi Johnson, Suit No. ID/209/76 (Unreported) aslo cited by O. Oyewo*
[68] *(2000) FWLR (pt.5) P. 750 at p.786*
[69] *Ibid*
[70] *(1990) 4 NWLR (pt. 147) p. 788 at 801*

Indeed, a counsel who is aware or is expected to be aware of a decision of a court relevant to the issue before the court has a duty to draw the attention of the court to the case.[71] According to RU.'Umoh, in applying the principle of stare decisis, where there exist two conflicting decisions of a higher tribunal, it will not be improper for a judge to review the points of law involved in the issue and thus select or adopt which line of decision he should follow.[72] Another view however is that when two decisions of the same rank conflict, the last decision should bind as it is deemed to represent a change of front[73] but that the later decision would be binding only if the earlier decision had been considered in the second and either dissented from or distinguished.[74] Thus, the opinion of learned writers also differ.

On the whole it is submitted with due respect that the attitude by the Supreme Court of Nigeria and the Court of Appeal (Nigeria) fails to project any consistent principle in resolving the problem of conflicting decisions of the Supreme Court of Nigeria. Whereas the doctrine of stare decisis requires courts in the lower rung of the hierarchical order of courts in Nigeria to loyally follow and apply the precedents in decisions of superior courts, it has become commonplace 'for lower courts in Nigeria to refuse to apply, or to question the validity of decisions of the Supreme Court 'of Nigeria. For instance, in the case of Mbaihangeve Iorjime V. lorkough Shankura[75] the Customary Court of Appeal Makurdi, observed, referring to the requirement established in a plethora of Supreme Court of Nigeria decisions that to establish customary arbitration, the decision or award must be shown to have been accepted at the time it was made, thus:

> it appears to us that such a condition is liable to lead to problems of traditional adjudication by the elders, because once a party finds an award unfavourable to him, and he there and then disagrees with it, he ceases to be bound thereby... the question of bindingness of an award ought to be conclusive...

In the case of Bashir Mohammed Daihatu V. Ibrahim Samiru Turaki and others[76] in the course of the addresses of counsel before the trial court a previous Supreme Court decision in another case[77] on the issue at stake was cited. The trial judge refused to apply the decision, though did not distinguish the Supreme Court decision from the case under consideration.

The trial judge however expressed the view that the decision of the Supreme Court in the case was wrongly made, then went further to say: "I also with great respect call on the Supreme Court to re-amend its position...". The Supreme Court of Nigeria held inter alia that:

The conduct of the trial judge is most unfortunate. The Supreme Court is the highest and final court in Nigeria. Its decisions bind every court, authority or person in Nigeria. By the doctrine of stare decisis, courts below are bound to follow the decisions of the Supreme Court. The doctrine is a sine qua non for certainty to the practice and application of law.

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[71] *Per Kalgo JSC in Global Transport Oceanico S.A & Another V. Free Enterprises Nig. Ltd (Supra) at p.442*
[72] *Op. cit p. 260*
[73] *Salmond, Jurisprudence, 11th Edition p.181*
[74] *Salmond, op.cit p. 207*
[75] *(2001) 1 QCLRN 1 at 146-147, per Utsaha, PCCA*
[76] *Supra*
[77] *Onuoha V. Okafor& Others (1983) 14 NSCC 494*

A refusal, therefore, by the judge of the court below to be bound by the Supreme Court decision, is gross 'insubordination. Such a judicial officer is a misfit in the judiciary.

In his concurring judgment in the case, U.A. Kalgo, JSC said:

> Judges of the lower courts have no right under any circumstances to ask or advise the Supreme Court tochange its decision in any case. Their duty is to follow the principles of law enunciated by the Supreme Court in all cases and apply them in similar cases before them[78]

It was the observation of M.E Ogundare JSC in the case that:

> "This to my mind is the height of judicial impertinence ever exhibited by a court lower than the Supreme Court. The doctrine of stare decisis is fully entrenched in our jurisprudence to ensure certainty of the law"[79]

The castigation or rebuke of the trial judge by the Supreme Court justices should by no means be taken as ipso facto meaning the trial judge was punished. A rebuke or castigation of a trial judge for his conduct is a different matter from initiation of disciplinary measures. Disciplinary measures, in the case of a High Court judge (as in the case in point) ought to be by the Governor of the state acting on the recommendation of the National Judicial Council.[80] The National Judicial Council is the body charged by the constitution to investigate any complaint or act of grave misconduct or insubordination against any judge or justice and make recommendations as it deems fit; and the governor has to await the report of the National Judicial Council before taking further actions to remove a judge from office.[81]

Short of any complaint against the judge investigated by the National Judicial Council, the judge cannot be disciplined for not adhering to the principles of judicial precedents. It is submitted that the castigation of the judge by the Supreme Court justices projected their annoyance over the situation. However, the hierarchy of courts in Nigeria is a tacit acknowledgement that courts below the Supreme Court may err.

The channel for appeals provided for is in fact to correct erroneous judgments and even when this is utilized with negative comments on a judge of a lower court, this does not necessarily mean that the judge will thereby be punished Efforts to discover what action was taken against the lower court judge in the case on hand proved abortive as matters of discipline between the judge and his employer are personal to them, and not open to the public.

In the case under consideration, it is submitted that what the trial judge ought to have done is to distinguish the case of Onuoha V. Okafor & others brought to his attention, from the case before him if reasonably feasible, then refuse to apply same on grounds of the distinction; and in the absence of any difference, to loyally follow and apply the decision. There are indeed several distinguishing techniques that lower courts may apply to side step authority they disagree with. As Dias states:

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[78] *Supra at p. 17*

[79] *Supra at p. 16*

[80] *S.292 (1) (b) Constitution of the Federal Republic of Nigeria, 1999*

[81] *Governor, Ebonyi State V. Isuama (2004) 6 NWLR (pt 870) 511*

> All that the doctrine (stare decisis) means is that a judge must follow a precedent except where he may reasonably distinguish it; but the possibilities of the latter are so numerous.[82]

Such distinction ought however to be reasonable else it will not satisfy the desire that justice be done. For, nowadays jurisprudence does not kneel at the altar of form and technicality but on the premise of the living law that guarantees justice that is beholden and understood by the right-thinking members of the society.[83]

5.0 Conclusion

The importance of stare decisis in the legal system of Nigeria is obvious. That stare decisis properly applied contributes to certainty in the law (amongst other benefits) as an indispensable attribute of justice is also not in dispute. However, the application of the doctrine of stare decisis by Nigerian courts, particularly the Court of Appeal and the Supreme Court is fraught with uncertainties arising from conflict in principles. This is a very serious impediment in the use of stare decisis to attain an egalitarian society. The Supreme Court thus needs take the lead in ensuring consistency in its decisions generally and laying down clearly, principles applicable in the area of stare decisis. Prevention is, definitely and indisputably better than cure.

In England from where much of Nigerian laws and judicial culture derive, the doctrine of stare decisis does not apply to an obiter dictum and no court is bound to apply it. That is, the authoritative influence of precedents does not extend to obiter dicta.[84] Thus in England, an obiter dictum is not binding even if it proceeds from the highest court of the land[85] (that is, the House of Lords). The result is that a court that accepts it does so as a matter of volition and in its discretion when it finds that the obiter dictum establishes the point of law it wants.[86]

Reference to the position in England is purely for academic purpose.

For, gone are the days when all things from the older common law jurisdiction were preferred to everything from the younger common law jurisdictions; gone are also the days when differences between judgments of Supreme Court of Nigeria and foreign judgments implied that the judgment of the Supreme Court could be wrong-let those days not comeback and they will not come back.[87] The Supreme Court of Nigeria has reached the stage where it does not regard difference from its judgments and the highest English or other Commonwealth court or other courts of common law jurisdiction as necessarily suggesting that it is wrong.[88]

While Nigerian courts are not bound to adopt the position of English law on the status of obiter datum of the apex court in the scheme of stare decisis, it is submitted that the suggestions made, in this paper (and which incidentally tally with the position in England) are logical and plausible, and capable of breeding more certainty in law. Obiter dicta of the Supreme Court should not be thus binding on any court and notwithstanding the judicial esteem and

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[82] *Dias, "Jurisprudence" (1976) Butterworths, London 4th Edition p.195*

[83] *Governor, Ebonyi State V. Isuama (supra)*

[84] *Salmond, Jurisprudence, 11th edition p. 166*

[85] *C.K. Allen, Law in the Making 7th edition p. 262*

[86] *P.U. Umoh op. cit 148*

[87] *Federal Republic of Nigeria V. Anache& Others (2004) 17 NSCQR 140 at 210*

[88] *Niki Tobi, JSC. Ibid, quoting with approval, Karibi Whyte JSC.*

respectability of the maker of the obiter dicta. Lower courts should have discretion to adopt obiter dicta or refuse to apply same depending on their acceptability or otherwise by the courts.

Whenever a lower court applies obiter dictum of the Supreme Court, such be considered as adoption of same at the lower court's volition, not compulsion. A situation where there are no. clear cut principles laid down by the Supreme Court of Nigeria on the status of its obiter dicta, and what lower courts should do where faced with conflicting decisions of the Supreme Court of Nigeria on a matter smacks of chaos in the temple of justice. The courts of Nigeria thus need to be availed with modern technology as Computers and the Internet to cope with challenges of modern research and information storage and retrieval to enhance consistency in decisions.

The Court of Appeal and other lower courts must also strictly adhere to principles of judicial precedent or stare decisis and make a case stated to the Supreme Court of Nigeria for appropriate guidance where necessary. Alternatively, the lower court may distinguish the Supreme Court decision if reasonably distinguishable, and in the absence of any difference, 'to loyally apply the decision as precedent. This way, the remedy of the aggrieved person will be to appeal against the decision in which case the Supreme Court may overrule its earlier decision and take a new contrary view.

A posture from the lower courts that is riot in line with defined legal principles is undesirable, and is indeed reprehensible. While judicial activism is required to ensure a dynamic and creative judiciary that will enable the real benefits of the law to be advanced its "beneficiaries" to the fullest, judicial activism must also ensure cogent and systematic development of legal principles,' for instance, through proper use of the technique of ' "distinguishing". It is surely not judicial activism for any judge to refuse to apply a case as precedent without justifying his or her refusal to be bound by the precedent. However, it does not lie in the mouth of a judge or judges of lower court to declare the decision of a higher court as wrong, and upon such declaration refuse to apply the precedent. This tantamount to 'judicial rascality", not "judicial activism".

Then, and only then will stare decisis advance the benefits of its application, to wit[89] foster stability 'and enhance development of a consistent and coherent body of law, preserve continuity and manifest respect for the past, assure equality of treatment for litigants similarly situated, spare the judges the task of re-examining rules of law or principles with each succeeding case, and afford the law a desirable measure of predictability.

To ensure that the above is attained, it is necessary that the main problems confronting administration of justice in Nigeria such as inadequate funding, poor and inadequate physical facilities, shortages or obsolete equipment's, staff shortages and inadequate utilization of available staff, inadequate or total lack of training for personnel, poor conditions of service, delay in trials and congestion in courts, dishonest practices, corruption, culturally incompatible laws and procedures, and lack of information to be appropriately tackled.

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[89] *Global Transport OceanicoS.A & Another V. Free Enterprises Nig._Ltd. (supra) p. 426*