

PRECEDENT AS A BINDING SOURCE OF LAW UNDER RWANDAN LEGAL SYSTEM: Applicability of *Stare Decisis* under Rwandan Law

By MUTABAZI Célestin¹

ABSTRACT

Decisions and judgments of the Supreme Court have been and still are being referred to as binding precedents on all courts of the country.² This binding character was, by law, given only to Supreme Court decisions and judgments, but those of lower courts are not binding regardless of their superior ruling or their publication in Law reports commonly referred to as “Ibyegeranyo”. On this note, lower courts would be advised to refer to the recent and specific precedent to harmonize the practice of lower courts. Either way, for the sake of justice once the precedent and the law seem to be unfair, the judge can apply the principle of equity and fairness commonly known in a Latin maxim as *Juris est ars boni et aequi*.³

One may wonder whether there are certain criteria to be met for a court decision to serve as case law, and as a consequence examine the binding nature of contradicting decisions, since they are supposed to be referred to by other courts. It should be noted here that contradictory court decisions shall lead to a fragile legal environment wherein lower courts may doubt the relevant decision to be referred to. Can lower courts depart from referring to case law irrespective of the fact that it may, in the eyes of lower courts judges, be deemed unfair? There is a need to harmonize the practice of lower courts rather than waiting for the instructions of the Chief Justice or any other administrative decision that may be taken to correct some errors. This will also prevent the effects of such contradictions towards the rights of the parties.

In addition to this, the binding character of Supreme Court decisions may sometimes lead judges to refrain from referring to a legal text which can also solve the problem at hand. In this case, one may question this and wonder if such decisions outweigh the law. This work seeks to give a paradigm for the use of case law in the sense that it will give a firm harmony to their use

¹ The Author is an Advocate Member of Rwanda Bar Association and East Africa Law Society [suspended the practice], and a FIDIC Contracts Fellow. He holds an LLB Degree obtained from the University of Rwanda-School of Law, a Post-graduate Diploma in Legal Practice obtained from the Institute of Legal Practice and Development. He is now an LLM Candidate in Business Law in the University of Rwanda-School of Law. He is currently a Legal Manager at Access Bank Rwanda Plc.

² See *infra* note 7.

³ See *infra* note 52, para 37. “Le droit est l’art du bon et de l’équitable.” C’est le principe supérieur de justice.

by courts. Otherwise, precedents will be full of imperfections, and sometimes lead to inconsistencies. This article shall be looking at the harmonization of the practice of lower courts in the use of Supreme Court decisions in their daily adjudication of cases. On this note, we shall scrutinize the guiding rules and principle to be followed when the Supreme Court decisions are unjust or contradictory.

1. INTRODUCTION

In early eighteenth century, *stare decisis* began gaining authority as an important legal principle in England. The great legal scholar William Blackstone contributed to the growing legitimacy of *stare decisis* writing in his famous commentaries. “It is an established rule to abide by former precedents, where the same points come again in litigation.”⁴ By end of the eighteenth century, *stare decisis* had become firmly entrenched in English law. The huge dichotomy between the common law and civil law systems is tailored to the degree of consideration for the use of precedent. In fact the reliance on codes and laws is a central characteristic of the civil law. At the heart of the civil law lies a belief in codification as a mean to ensure a logical approach to law. Many civil law proponents believe that a code can address all circumstances that might need legal regulation, without the need for judicial interpretation.⁵

Judges generally interpret codes and laws very strictly; the kind of expansive readings of existing legal provisions to create new interpretations is not done. This phenomenon is seen in many common law countries where lawyers creatively argue for a new interpretation of a law, even if that was not envisaged by the drafters. The judge would decide on cases based on codes or legislation and would refer to other cases for guidance even if the facts were identical. This was premised on the belief that the code contains all the information necessary to decide upon the case. More recently, the role of case law has been changing. Settled lines of cases are now considered to have authority and are accepted due to the fact that they ensure consistency or stability in the application of the law.⁶

⁴W. BLACKSTONE, *Commentaries*, p. 69. See also T. R. Lee, *Stare Decisis in Historical Perspective: From the*

Founding Era to the Rehnquist Court, 52 VAND. L. REV. 647, 650 n.14, 1999. Cited by DAVID L. BERLAND, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*, See *infra* note 9, p. 700.

⁵ Dr. V. O'Connor, *Common Law and Civil Law Traditions: PRACTITIONER'S GUIDE*, 2012, *International Network to Promote the Rule of Law*, p. 11, online: <<http://www2.fjc.gov/sites/default/files/2018/Common%20and%20Civil%20Law%20Traditions.pdf>>, accessed on 14 June, 2018.

⁶C. Warren, *Introduction to the Major Legal Systems* (unpublished, 2005) (on file with the US Institute of Peace), 20. Cited by Dr. Vivienne O'Connor, *Common Law and Civil Law Traditions*, *Supra* note 18.

It has been identified that precedent emboldens the source of law in the Rwandan legal system since all courts of the country are bound to respect the decisions and judgments of the Supreme Court; this is commonly known as vertical *stare decisis*.⁷ It is questionable to know what will happen in case of contradictions between Supreme Court decisions and judgments, and assess if referring to such decisions would not create a fragile legal environment.

Equally important, *stare decisis* is a judicially created doctrine that helps ensure the law to develop in an upright and comprehensible fashion. It promotes the consistent development of legal principles and it fosters reliance on judicial decisions and contributes to the actual and apparent reliability of the judicial process.⁸ The Supreme Court of Rwanda noted that *stare decisis* is of great importance when we see some of its cases, such as the *Kabalisa Case*, the *Mutebwa Case*, and the *HARERIMANA Case*.⁹

This paper will have to examine the relevance of the binding character of Supreme Court decisions to lower courts, since Justices¹⁰ may take contradictory decisions. Judges of lower courts can sometimes be challenged in choosing the case to apply due to those contradictions. On this note, one may question which decision will be referred to in case there are contradictions in decisions taken by the Supreme Court, yet judgments and decisions of the Supreme Court shall be binding on all other courts of the country. This goes with the mere fact of knowing whether the pre and post 2012 law court decisions are all binding. One will question if this organic law n°03/2012/OL of 13/06/2012, determining the organization, functioning, and jurisdiction of the Supreme Court, is amongst procedural laws to the extent that they will have immediate application.

Moreover, one will also question whether all Supreme Court decisions are at the level of making precedents in the sense that there are some judgments that do not deserve to be case laws. The researcher will also examine whether there might not be a fragile legal environment (*insécurité juridique*) if the

⁷ Organic law no. 03/2012 of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, Official Gazette, No. 28 of 09 July 2012, article 47 paragraph 6 (Hereinafter 'Org. Law governing the Supreme Court').

⁸ DAVID L. BERLAND, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*, Vol. 2011, *UNIVERSITY OF ILLINOIS LAW REVIEW*, p. 699, online: <<http://illinoislawreview.org/wpcontent/ilrcontent/articles/2011/2/Berland.pdf>>, accessed on 7 June 2018.

⁹ Supreme Court Kigali, 11 Jan 2008, MUTEBWA case, case law RS/Inconst/Pén.0001/07/CS. Case no RS/Inconst/Pén.0003/10/CS, Gatera Johnson V Kabalisa Teddy. Case N° RCAA 0018/13/CS, HARERIMANA V SEBUKAYIRE (Sebukayire case).

¹⁰ Supreme Court Judges

Supreme Court can rule against what the law stated.¹¹

- Are all Supreme Court decisions at the level of making precedents? If not, what are the criteria for them to become precedents?
- Which decision will be referred to in cases where there are

contradictions? Shall the lower courts apply the rules of *posteriori* and specificity in such a case?

- Can't the contradictory court decisions lead to a fragile legal environment?
- Is the current practice on the interpretation of the law effective to make precedents?
- How can the Supreme Court correct its mistakes in its previous precedents if any? Will the court wait for similar cases or can it issue instructions to lower courts?
- To what extent does the Supreme Court harmonize the practice of lower courts?

Various definitions are used to define what a 'precedent or a leading case' is. For example, for West's Encyclopedia, a leading case is an "important legal decision that is frequently regarded as having settled or determined the law upon all points involved in such controversies and thereby serves as a guide for subsequent decisions".¹² The Black's Law Dictionary defines it as "a case that has been demanded more than usual attention from the judges, and from this circumstance are frequently looked upon as having settled or determined the law upon all points involved in such cases, and as guides for subsequent decisions".¹³ One may argue that it is a court case that results in a decision which sets a precedent in that it establishes a new legal concept or interprets the law in an innovative way. In this sense, a binding precedent is supposed to contribute to the body of law and is referred to by legal practitioners in future instances when addressing similar matters.

This article shall answer the mentioned questions or suggest a way forward to address them as far as the applicability of precedents is concerned. The

¹¹ *Supra* note 6.

¹² West's Encyclopedia of American Law (2nd Edition) Volume 12 (Primary Documents) Hardcover – 2004, available at: < <https://www.amazon.com/Wests-Encyclopedia-American-Primary-Documents/dp/0787663794>>, accessed on 31st July 2019.

¹³ Law Dictionary: *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* available at: < <https://thelawdictionary.org/>>, accessed on 31st July 2019.

methodology shall be exegetic and casuistic, and the documentary method is preferable. The scope of the study covers the Rwandan jurisdiction, and the work is comprised of two major parts:

- Part I: Case law as a binding source of law in general and in Rwanda,
- Part II: The doctrine of Precedents under the Rwandan legal system. This shall include challenges to the application of case law in Rwanda.
- The conclusion. This shall also encompass proposed solutions in application of case law in Rwanda.

2. CASE LAW AS A BINDING SOURCE OF LAW IN GENERAL AND IN RWANDA

The decision of the court is a touchstone in examining whether justice has been granted or not. In regard to the legal systems, the way court decisions are perceived in the civil law system is different from the way they are perceived in the common law tradition. Legal systems use judicial precedents as a practice of the human mind. This practice may be referred to as accepting the same model in similar cases.¹⁴

Therefore, cases will be treated alike. In this context, those decided cases will possess a binding character depending on the legal system they are referred to. They play a key role in the judiciary in the sense that they deliver credible information to judges about the application of law on particular facts, and by defining legal consequences to those facts.¹⁵ They can also give the legal parameters to be followed for certain legal issues. The following section will discuss some important concepts that must be understood so as to apprehend the applicability of court decisions in the Rwandan legal system.

2.1. Understanding Major Concepts

In regard to the topic, there are important concepts that need to be defined and elaborated on. There are main concepts that need to be discussed, such as case law, jurisprudence, and precedent. These terms can be used interchangeably, but the civil law system in general uses the concept of jurisprudence when referring to decided cases.

¹⁴ A. Goodhart, "Precedent in English and Continental Law", [1934] 50 *Law Quarterly Review*, pp. 40, 41

¹⁵ J. H. Fowler, et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, Oxford University Press, 2007, p. 325.

2.1.1. Definition of case law

Case law refers to the legal principles embodied in judicial decisions resulting from the application of particular domains of law to the facts of a given case. Actually, under common-law doctrine, past decisions or decided cases of a court are cited as an authority to significantly decide similar current cases, and the decision taken will serve as case law to other similar case that will come. In the civil law system, court decisions are referred to as jurisprudence. Judges have discretion on how to apply past legal rules to new factual circumstances in deciding a given case, specifically when that case involves new legal and factual circumstances. In this context, precedent suggests that judges use rules from past cases when settling current disputes. Thus, one of the scholars called precedent a “subordinate legislation and judge-made law or judiciary law”.¹⁶

2.1.2. Jurisprudence

The word jurisprudence is derived from Latin word *jurisprudentia* and it implies the knowledge or skill in law. Courts' decisions, as well as legislation, may have lots of authority and a strong influence on the way law is perceived and interpreted. The jurisprudence may be pointed to as the way a given legal issue has been addressed or solved by the court, and this legal question is habitually addressed in a certain way by courts. Jurisprudence serves in the interpretation of substantive law because it grants the knowledge that may be referred to so as to have convincing arguments and to understand the fundamentals of the law.¹⁷

2.1.3 Precedent

This term is mainly used in common law systems to mean judicial decisions, and it is one of the ingredients of the evolution of the law.¹⁸ They are compiled and published in law reports so that judges or legal practitioners may refer to them in preparing their legal argumentation. In the Rwandan judicial system, there are law reports commonly referred as *Ibyegeranyo* where decisions of the Supreme Courts and other selected cases from other courts are published. One may wonder if lower courts' decisions and other unpublished Supreme Court decisions inherit the character of precedence.

¹⁶ R. Cross, *From Precedent in English Law*, 2nd, Oxford University Press, Oxford, 1968, pp. 148-150.

¹⁷ P. Wahlgren, 'The Purpose and Usefulness of Jurisprudence' [2010], *Stockholm Institute for Scandinavian Law*, online: <www.scandinavianlaw.se/pdf/48-30.pdf>, accessed on 5th May 2018.

¹⁸ V. Fon and F. Parisi, 'Judicial precedents in civil law systems: A dynamic analysis, [2006], *International Review of Law and Economics*, George Washington University and the University of Minnesota, pp. 519-535, online: <<http://EconPapers.repec.org/RePEc:eee:irlae->

2.2. Precedents in common Law versus civil law system

As far as the use of precedents in common law system is concerned, they are amongst the milestone features where they are used in the determination of later cases.¹⁹ The culture of using precedents originates from the English law commonly known as common law, and those precedents are capable of possessing the quality of a proper source of law. In fact, precedents may be used as a concrete example to resolve a given legal issue, and therefore become binding legal authorities for later cases, as long as the court finds them relevant and similar.²⁰ In most civil law countries, judges base their adjudication on the law and in so doing, they do not create law, but rather use the legal text to adjudicate the case. It should however be noted that in common law the value of the doctrine of precedent does not only purport the respect for past decisions, but merely to certify or ensure that bad decisions shall not be repeated.²¹

2.2.1. Civil law perspectives on precedents

Currently, civil law jurisdictions do not agree with the applicability of *stare decisis* or the precedent principle in settling a case at hand. In regard to such, they will serve as persuasive sources, because civil law courts only refer to past decisions as long as there is high conviction of consistency in the case law. This means that there is a sufficient level of relevance to address a given legal issue.²² Thus, the development of uniformity in precedents pushes courts to consider them when they want to decide a case. This is different from common law, where past decisions are taken into account in reaching a decision. Civil law judges rely on the law, or they seem to be a slave of the law in the decision making process.

The common law system is described to a rule of *stare decisis* whereas civil law is also called civil code regimes.²³ Common law judges seem to have a

c:v:26:y:2006:i:4:p:519-535>, accessed on 02nd May 2018.

¹⁹ A. J. RUGGERO, *The Judicial Process: Text, Materials and Cases*, American Case Law Series, 2nd ed., Washington, West publishing Co., 1996, p. 83.

²⁰ Y. Koo Che and J. Goo Yi, "The Role of Precedents in Repeated Litigation", University of Wisconsin, *The Journal of Law, Economics & Organization*, V9 N2, p. 2, online: <www.columbia.edu/~yc2271/files/papers/precedents.pdf>, accessed on 20/ January/2016. Certain conditions must be satisfied before the doctrine applies: (i) the issue of the second period must be identical with the issue decided in the prior proceeding; (ii) the issue was necessarily decided in the prior proceeding; (iii) the litigant had a full and fair opportunity to litigate the issue in the prior proceeding.

²¹ Hershovitz (ed), *Exploring Law's Empire*, Oxford, Oxford University Press, 2006, p. 14.

²² See *Supra* note 23.

²³ G. K. Hadfield, *The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law*, University of Southern California, Law School, 2006, p. 2, online: <https://www.law.yale.edu/.../pdf/The_Quality_of_Law_in_

de facto law-making power compared to civil law judges, where they see legislations as better effective enough to respond to the wishes of the people. In common law, the doctrine of precedent is referred to so as to provide better ‘guidance, predictability, and efficiency’.²⁴ The consistent application of precedent provides the fairness and equality.

2.3. The authoritative nature of superior courts decisions to lower courts

As it has been discussed above, the decision of the higher court is highly considered vis a vis the previous one that was decided by the lower court. The principle is that the superior courts’ decisions are binding on lower courts. For the Rwandan jurisdiction, it is only the Supreme Court decisions that are binding over all courts of the country. One may even argue that they are followed to show the quality of their decision-making development though they may reverse or overrule previous decisions.²⁵ A court decision is reversed when the court changes its habitual position towards a given legal question. Then, this will be articulated when the higher court overturns the judgment of a lower court on appeal in the same case.²⁶

2.4. The status of case law as source of law in Rwandan law

The concept of *stare decisis* had been adopted in other jurisdictions; *stare decisis et non quieta movere* implies to stand on decided cases. Decisions and judgments of the Supreme Court of Rwanda are binding, as are the Supreme Court of India.²⁷ However, even though the law is the primary source of law in the Rwandan legal system, case law has been observed and usefully referred to for the better interpretation of the law since one may state that the Rwandan legal system is transitioning to the common law system. In this system, judges cannot depart from it because it has a binding force as they are precedents. However, this may cause a fragile legal environment as long as they do not have a considerable level of fairness.

Civil_Code.pdf...), accessed on 20/January/2018.

²⁴ J. Hardisty, *Reflections on Stare Decisis*, Ind LJ, 1980, p. 41. See also T. prime and G. Scanlon, *Stare Decisis under Court of Appeal Judicial confusion and Judicial Reform*, Civil Justice Quarterly, 2004, pp. 212-215. Where these English authors describe the doctrine of precedent as a mechanism for promoting certainty and predictability in the law.

²⁵ X., ‘The effectiveness of the appeal system in ensuring the quality of decision-making system’, online: < <http://www.mdtfjss.org.rs/sjfr/en/external-performance/3-3f-effectiveness-of-the-appeal-system-in-ensuring-quality-of-decision-making> >, accessed on 28th April, 2018.

²⁶ X., “Reversing and overruling decisions”, online: <<http://www.lawmentor.co.uk/glossary/R/reversing/>>, accessed on 4th March 2018.

²⁷ The Constitution of India, article, 141, online: < <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm> >, accessed on 28th April, 2018.

2.4.1. Supreme Court decisions as an authoritative source of law

There are a number of cases that are landmark enough to be used in cases similar to them. As illustration, one may mention the *Kabalisa case*²⁸, the *Sebunguri case*²⁹, and the *Sebukayire case*³⁰, among others. In this vein, it is clear that case law brings more clarifications in adjudicating a given case at hand. Then, amongst the sources of law under Rwandan law, Supreme Court decisions have the authority over lower courts. It goes without saying that Supreme Court decisions are either by virtue of their merit or their status more authoritative than other courts' by considering the expertise and high reasoning of its justices.

It is worthwhile to note, by virtue of the law, that lower courts must follow the decisions of the Supreme Court on an identical matter. For this reason, it will be very difficult for the lower court to divert the decision rendered by the Supreme Court as long as it ruled on an identical matter.³¹ If it happens, and when the case is appealed, that lower court decision will be overturned or overruled. In the Rwandan context, it is practically respected that lower courts refer to Supreme Court decisions and they abide by them.³² This practice had been developed by other foreign jurisdictions specifically for common law countries such as Canada and New Zealand among others.³³ For instance, in the United States constitutional court decisions of a higher court are binding on lower courts.³⁴ Therefore, not following the higher court decision will not be considered a matter of power, but rather the matter of the law. In the Rwandan jurisdiction, higher court's decisions and

²⁸ Supreme Court Kigali, 11 Jan 2008, MUTEBWA case, case law RS/Inconst/Pén.0001/07/ CS, online: <http://www.judiciary.gov.rw/uploads/tx_publications/constfev2008mutebwaalfred.pdf>, accessed on 11 June 2018.

²⁹ Supreme Court, Kigali, 27/02/2009, Mgr SEBUNUNGURI V. *Eglise Episcopale au Rwanda* (E.E.R), case law no R.Soc.A.A 0001/08/CS.

³⁰ Supreme Court, Kigali, 24/12/2014, *HARERIMANA V. SEBUKAYIRE*, case law no RCAA 0018/13/CS, online :< http://www.judiciary.gov.rw/uploads/tx_publications/law_5125298703cf51ccf35408683be9055c1426154480.pdf>, accessed on 11 March 2018.

³¹ P. N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 2006.

³² Supreme court, Kigali, RSOCAA/0014/12/CS, MUSONI WARWIHIMBA V Bank de Kigali(BK). Unpublished.

³³ X., "Decisions of courts in other countries", online: <<http://www.lawmentor.co.uk/glossary/P/persuasive-precedent/>>, accessed on 5th March 2018. It goes without saying that in Common law countries where decisions of the higher court is more considered by lower court. The latter that does not follow the decision of a higher court on a similar matter will virtually guarantee that its decision will be overturned on appeal in case it is appealed.

³⁴ C. FLANDERS, TOWARD A THEORY OF PERSUASIVE AUTHORITY, *OKLAHOMA LAW REVIEW*, Vol. 62:55, p. 59, online:<<http://adams.law.ou.edu/olr/articles/vol62/621-2%20flanders%20article%20blu2.pdf>>, accessed on 06 March 2018.

judgments that are binding are those rendered by the Supreme Court.

From the above point of view, one may question whether there are other cases from other courts, save the Supreme Court, that may be fit to be used as precedents and to be referred to as case laws in their midst. There are persuasive precedents. This will lead us to know the criteria for a decision to be considered case law, and to see whether some persuasive cases may inherit the binding character. It is commonplace that lower courts' decisions serve as persuasive irrespective of the nature of that decision. In this respect it is vital to question this: what if the Supreme Court decision creates confusion and uncertainty? Can the lower court be obliged to follow them, or can it depart from such decision?

3. THE DOCTRINE OF PRECEDENTS UNDER THE RWANDAN LEGAL SYSTEM

Rwanda was purely a civil law country, but it is transitioning to common law as far as the use of precedents is concerned. The Rwandan legal system is now accustomed to referring to precedents in handling cases at hand. For a reminder, the term judicial precedent has at least two meanings. First, it may mean the process whereby judges follow the principles in previously decided cases.³⁵ Secondly, it may refer to the decision in the previous case itself, which may be relied upon in the future. Judges interpret the law and apply it to a given legal issue, as long as its facts are similar, which is helpful for the better adjudicating of the case.

On the above note, precedents play an outstanding role in the Rwandan legal system. If a statutory provision is ambiguous, the judge must interpret it before he/she can apply it. When a decision made encompasses the legal reasoning of the judge, and more importantly, when it provides legal solutions on legal issues at hand, a precedent is set. Such decisions should contribute to the harmonization of court decisions as a step on the road to building an authentic Rwandan jurisprudence. This part shall focus on the authority of the Supreme Court's decisions, and their binding nature, and assess the criteria that are/should be taken into account, so that such decisions become PRECEDENT. What would happen in cases of contradicting decisions? Quid?

3.1. The authority of the Supreme Court decisions: Criteria to be referred to serve as a precedent

Courts' decisions play a considerable role in the applicability of the law to facts, and they are referred to to provide arguments that are convincing and

³⁵ School of the Built environment, 'Judicial precedent', online: http://nuweb2.northumbria.ac.uk/bedemo/sources_of_english_law/page_10.htm, accessed on 24th May, 2018

authoritative to other courts. In this context, it is crucial to assess the criteria which the Supreme Court's decisions should fulfill for them to be binding. It is within this particular note that the researcher should scrutinize the vertical and horizontal dimensions of *stare decisis* as well as the value of unreported cases.

The organic law governing the Supreme Court of the Republic of Rwanda provides that, in the organic law governing it, "*Judgments and decisions of the Supreme Court shall be binding on all other courts of the country*". It is apprehended that Supreme Court decisions are binding and they are neither declaratory nor persuasive. It is clear that its judgments and decisions become a law vis a vis lower courts. Moreover, in some countries, such as Italy and Poland, where there is even a constitutional court, its decisions shall also bind all courts of the country, including the Supreme Court.³⁶ In France, the *Cour de Cassation* is the Supreme Court, but the highest court is the *Conseil constitutionnel*; it provides a clear interpretation of law for cases that were rendered by other courts, including the Court of Appeals.³⁷

As a matter of fact, it is clear that court decisions can shape a precedent by restricting or broadening its applicability. The Supreme Court interpretation of precedent represents a meaningful legal framework in the sense that it can influence the vitality of a legal rule and justices understanding it, as well as its application.

There are two most significant criteria to be considered for the case to become a precedent. The first is that the concerned decision must have "settled or determined the law upon all points" on a controversial issue. This criterion is related to the quality of the decision's motivation and the dexterity with which the judge applied the law or the relevant general principle of law. The second criterion which is also a logical consequence of the first is that the decision must have "demanded more than usual attention from the judges". This implies a frequent reference by judges in subsequent judgments.³⁸

It should be noted that a clear interpretation of the law, a solution given to a legal issue at hand, as well as the nature of the petitions the court examines, should be on lead for the decision to become a precedent. It is unfortunate that, sometimes, the Supreme Court's decisions do not remain static and may create a fragile legal environment. However, there are plenty

³⁶ L. Garlicki, 'Constitutional courts versus supreme courts', Oxford Journals, pp. 44-68, online: < <http://icon.oxfordjournals.org/content/5/1/44.full> >, accessed on 24 May 2018.

³⁷ X., 'Courts and cases' online: < <http://www.lexadin.nl/wlg/courts/nofr/eur/lxctfra.htm> >, accessed on 24th May, 2018.

³⁸ Supreme Court of Rwanda, *Leading cases arising from civil courts in Rwanda*, Vol. I., September 2016, p. 2.

of opportunities that some judges may divert from the law and base on facts that go in the line of justice and avoid legal formalism in which we have been locked since colonization.

3.1.1. Horizontal stare decisis vis a vis vertical stare decisis

In addition to this, one may question whether other justices are bound by court decisions rendered by their colleagues? Judges within the Supreme Court are also aware of decisions pronounced by their colleagues. This is commonly known as the horizontal dimension of stare decisis. This is underpinned by Justice Dr. MUYOBOKE K. Aimé³⁹ who asserted that judges within the Supreme Court are aware of decisions pronounced by their colleagues. They often go in the same way and therefore the Supreme Court judges are also bound by Supreme Court's past decisions since they may even refer to them. This is different in a pure common law country, like England, whereby decisions of the Supreme Court, commonly known as the House of Lords, are binding on all courts in the country except the Supreme Court itself.

Therefore, its judges are not bound by decisions taken by their colleagues since they may be wrong in regard with their *ratio decidendi*. When a judge delivers judgment in a case, they outline the facts which the parties had proved with the pieces of evidence. Then they apply the law to those facts and arrive at a decision, for which they give reasoning; this is referred to as the *ratio decidendi*. In a nutshell, the decision of the case is tailored as the *ratio decidendi*.

As far as the vertical *stare decisis* is concerned, one may question whether judgments rendered by the High Court cannot be authoritative, having considered criteria to make a precedent. In this regard, there are many court decisions that satisfy all criteria of making a precedent, though the law does not make them precedents; they serve as persuasive decisions. It is worth noting that, considering the criteria for a precedent, there are judgments rendered by the Primary Court, intermediate courts, high courts, and the High Commercial Court that are embodied in law reports commonly known as "*Ibyegeranyo*". As illustration, there is a court decision that was rendered by the Court of *Kacyiru*, the judgment no RC 0223/08/TB/KCY⁴⁰ which triggered the court's legal position, which came up with 'Divorce as a Remedy' (Divorce remède) and this case is a landmark one in claims of divorce.

³⁹ Former Supreme Court Judge who is currently the President of the Court of Appeals.

⁴⁰ Primary Court, *Kacyiru*, 06/11/2009, *KACHELEWA V. NYIRARUKUNDO*, RC 0223/08/ TB/KCY,

On the above view, it is evident that there may be lower courts' decisions in which the law should have granted them the binding character of precedent in consideration of that which they provide. For this reason, some lower courts' decisions should be selected and inherit the authoritative nature of court decisions to the extent that they can divert from unfair Supreme Court decisions which lie in the vertical effects of precedents. This is backed by the judgment rendered by the Commercial High Court to which this court diverted to comply with the Supreme Court decisions.⁴¹ One can say that the decision of the Supreme Court can be unfair enough not to bind lower courts in cases where it is not in the line of justice.

3.1.2. The value of the unreported Supreme Court judgments

Normally, the Rwanda Law Report is published by the Supreme Court of Rwanda in collaboration with *Lexum* which is a software company specializing in the management and dissemination of legal information. Published judgments are selected among decisions rendered by Rwandan Courts.⁴² This implies that there are some which are not in the Law Report that is published each judicial year. There are a number of court decisions, from lower courts, that are not reported in the Law Report (LR) and others rendered by the Supreme Court, yet the latter's decisions are binding. One may wonder if unreported decisions shall be a part of case laws. Actually, the binding nature results from the law not in the LR. In this case, it should be noted that all Supreme Court decisions are precedent even when they are not published in the LR. Thus, the mere fact of not being published in the LR does not lift the binding nature of its judgments.

3.2. Retroactivity of a case law

Normally, some legal practitioners are accustomed to knowing that only legal texts may be retroactive. It should be conceived that even case law is also subjected to the retroactivity principle. The latter shall be applied to overruling decisions. The Supreme Court decision is a law until it is overruled. One may question the validity of such overruled decision. In this paradigm, the rejected or overruled decision will be considered invalid, and then the overruling one will be applied retroactively with a view to filling the loophole found in the rejected one.⁴³ If it is clear that the former decision

⁴¹ Commercial High Court, Kigali, 01/10/2013, MUKAKABANDA and MUGEREKA Vs BPR Ltd, R.COMA 0112/13/HCC, paragraph 9.

⁴² The Supreme Court of the Republic of Rwanda, 'Rwanda Law report', online: < <https://decisia.lexum.com/rlr/en/nav.do> >, accessed on 29th March 2018. Rwanda Law Reports contains full text of reported judgments, catchwords, the summary of facts and holdings. This provides easy, quick and professional access to court decisions in Rwanda.

⁴³ X., "Retroactive Effect of an Overruling Decision" [1933], Vol. 42, No. 5, *Yale Law Jour-*

is manifestly absurd or unjust, it is declared not to serve as a law.⁴⁴

It must be underlined that the court should consider overruled precedents abandoned. Hence, the new ruling will bear prospective application.⁴⁵ However,

contracts made or property acquired through overruled decisions will not be affected by the overruling decision, and they will therefore remain valid.⁴⁶ Those overruling decisions should not be applied retrospectively (not used to change the past things). In this vein, the organic law that governs the Supreme Court was enacted in 2012, and it governs future decisions since the legislator did not make it retroactive.

A precedent set in 2011 can be applicable for the year of 2015 as it is supported by the judgment rendered by the High Court of Kigali that referred to the case no RPAA 0054/09/CS, that regarded paternity establishment (DNA test as evidence). Then, the High Court of Kigali referred to this judgment, yet it was rendered in 2011 prior to the organic law that governs the competence and jurisdiction of the Supreme Court.⁴⁷ Therefore, it is understandable that judgments rendered before the organic law mentioned above governing the Supreme Court, are binding to all courts of the country, though the legislator did not make it retroactive.

3.3. The case of contradictions in the Supreme Court's decisions

As it has been tackled *supra*, the Supreme Court's judgments have a binding nature to lower courts when it comes to similar cases at hand. This will cause a serious problem when there are contradictions in its judgments, yet they should be binding to other courts of the country. It is unfortunate that this can bring controversies to know the applicable case law, and whether the court will apply the rule of *posteriori* and specificity in such a case.

The organic law states that the Supreme Court shall resolve contradictions that arise amongst judgment decisions at the last instance.⁴⁸ In the UK Court

nal Company, Inc., pp. 779-782, online: <<http://www.jstor.org/stable/pdf/791373.pdf?ac-ceptTC=true>>, accessed on 6th March 2018.

⁴⁴ X., "Retroactive Effect of Judicial Decisions," [1948], *Indiana Law Journal*: Vol. 24: Issue 1, p. 104, online: <<http://www.repository.law.indiana.edu/ilj/vol24/iss1/6>>, accessed on 6th March 2018.

⁴⁵ Gray, *The Nature and Sources of Law*, 2nd ed., 1921, p. 222.

⁴⁶ Although the courts have required that there be reliance upon the overruled decision, as a practical matter there is very little substance to this part of the rule. If the contracts were made or the property acquired during the time when the overruled decision was still "good law" the courts have assumed an element of reliance.

⁴⁷ The High Court, Kigali, 20/11/2015, KAMANZI François Vs NYIRANSENGIMANA Jean- nette, RCAA 0096/14/HC/KIG, paragraph 10, online: <www.judiciary.gov.rw/.../law_167cacf-79c851c2fb628a3706bcbc9911450074693.pdf>, accessed on 30th May, 2018.

⁴⁸ The Organic Law governing the Supreme Court, article 29 (12o)

of Appeals, in *Young v. Bristol Aeroplane Co. Ltd.* [1944] KB 718,⁴⁹ the court decided that there is an exception through which the House of Lords cannot be bound by its decisions. The Court of Appeals need not follow a decision of its own if satisfied that it was given *per incuriam* (when a judge is ignorant of a legal provision). This practice should have been adopted by the Rwandan system, and decisions that contradict each other should be refuted.

The Supreme Court should behave in this line and overcome any decision that can be contradicting and notify other courts, but so far, there is no caselaw that has resolved this issue. However, the former Supreme Court's justices said that lower courts are informed through the Rwanda Law Reporting or administratively, and this means instructions from the Chief Justice with a view to correcting some errors that occur.⁵⁰

From the above point of view, it is very difficult to scrutinize the precedent to be referred to in case there are contradictions in its adjudication. As illustration, the judgment number RCAA 0075/11/CS⁵¹ contradicts RCOMA 0002/13/CS⁵² in regard with the contract of sale of an immovable property. In RCAA 0075/11/CS, the court ordered the person who bought the property from the person who is not the owner to pay for damages and compensation to the rightful owner and lose the property, though it was acquired in good faith. In stark contrast, in the case RCOMA 0002/13/CS the Supreme Court ruled that the person who bought the property in good faith,⁵³ even if the seller is not the rightful owner, shall retain the property.⁵⁴ Therefore, the precedents that should bind lower courts contradict themselves. It would be much more appreciated to use the recent one simply as binding because the Supreme Court is expected to have corrected some errors in the previous case, and issue instructions to lower courts.

⁴⁹ *Young v. Bristol Aeroplane Co. Ltd.* [1944] KB 718, online: < <http://swarb.co.uk/young-v-the-bristol-aeroplane-co-ltd-ca-28-jul-1944-2/>, accessed on 05th April 2018.

⁵⁰ See *Supra* note 33.

⁵¹ Supreme Court, Kigali, 15/02/2016, UMUTONI M. B. Concilie Vs GAKUBARUBOJO Egede and NYIRINKINDI L. Marie, RCAA 0075/11/CS, Paragraph 22-23.

⁵² Supreme Court, Kigali, 23/10/2015, KOBIL PETROLEUM RWANDA SARL Vs GARAGE AUTO IMPERIAL SARL and MUKAREMERA Francine, n° RCOM 0002/13/CS, paragraph 25-26.

⁵³ La vente de la chose d'autrui n'est pas annulée lorsque le vendeur était pour l'acheteur, le propriétaire apparent de la chose (Cour de cassation, 1ère chambre civile, 18/11/1997, Bull. civ. 1997, I, n° 316; < <http://www.legavox.fr/blog/maitre-joan-dray/vente-chose-autrui-action-nul-lite>>, consulté ce 23/10/2015).

⁵⁴ A. BENABENT, *Droit civil: Les contrats spéciaux civils et commerciaux*, 8e éd., Paris, Montchrestien, 2008, p. 102). L'acquisition d'un immeuble en connaissance de sa précédente cession à un tiers est constitutive d'une faute qui ne permet pas au second acquéreur d'invoquer à son profit les règles de la publicité foncière. cité par (Civ. 3e, 30 janvier 1974, D., 1975, 427, note J. PENNEAU.

3.3.1. Applicability of the rule of posteriority and specificity of the precedent

The rule of posteriority and specificity of a precedent entails that a specific decision will prevail over the previous one whose interpretation or analyzed legal issue seems to be general (i.e. an interpretation that provides legal solutions on some

controversial issues or which specifically corresponds to the facts). In law, it is known that *lex specialia derogat lex generalis/speciali generalibus derogant*; this goes also directly to the application of precedent. The specificity shall be assessed in the lack of ambiguity in case law. It is the duty of the Supreme Court to rectify an error apparent on the record or to clarify a decision which is ambiguous or susceptible to divergent interpretations.⁵⁵ In so doing, the Supreme Court should issue instructions and take decisions on the functioning of all courts in the country.⁵⁶ It would be better when these instructions encompass which decision will be referred as long as there are contradictions with Supreme Court judgments and decisions.

As for the matter of contradicting and unjust decisions, the Supreme Court should correct errors made in the judgment and provide legal guidance to correct such errors.⁵⁷ The judgment in which such errors are corrected will be therefore referred to as the specific one. Besides, the rule of posteriority refers to the fact that the new law repeals the old one, and so it is for precedents. This will be applied in cases of contradicting decisions whereby, according to the rule of posteriority and specificity, the recent case law will serve as a precedent.

3.3.2. The effects of contradictions to the rights of parties

Really, as long as there are contradictions between Supreme Court judgments, there is a high probability that rights of the parties will, to some extent, be violated. One can imagine the scenario where the lower court adjudicates the case and refers to a Supreme Court decision which contradicts another, and on appeal the appellant court refers to the other case law which contradicts the one which was based at the first degree. In this respect, the party which won the case for the first time will probably lose the case on appeal and question the reliance of a contradicting case law. It is understandable that such contradictions affect the rights of the parties in a given case and hence, it should be the task of the Supreme Court to set guidelines that should be used in such situations.

⁵⁵ The organic law governing the Supreme Court, article 48 paragraph 1.

⁵⁶ The organic law governing the Supreme Court, article 13 (6o).

⁵⁷ The organic law governing the Supreme Court, article 83 (6o).

3.3.3. Need for harmonization of the practice of the lower courts

The binding character of Supreme Court decisions and judgments vests the Supreme Court with the power to make the practice of the court on some pressing legal issues to be harmonized. In this context, for any legal issue that can be raised in the proceedings, it would be better when there is a line the court had given so as to settle the issue. For instance, in the case law no RPA 0074/07/CS the State attorney argued that the Supreme Court should have given a line to follow for the issue of knowing whether the State as an employer can be liable for damages caused by its employees who were not at their work place and outside his/her responsibilities, and not in the benefit of their employer.⁵⁸ In this case, the High Court decided that the State should be liable for those damages caused by the soldier. Ultimately, the Supreme Court overruled the decision of the High Court where the Supreme Court decided that the State should not be liable for the acts of its employee who acted beyond the scope of their responsibilities and acts that are not in the benefit of the employee and without permission.

The above had been underpinned by the appeals court of Liège and the *Cour de cassation de Belgique*. From that moment, civil courts have referred to such precedent to waive the employers liability vis à vis their employees who acted out of the scope of their usual duties.⁵⁹ Besides, some cases such as the case RPAA 0054/09/CS, the Supreme Court had given a paradigm to be followed by other courts as a way to harmonize the practice of lower courts in regard to the establishment of paternity.⁶⁰ This practice had been harmonized since it was even referred to by other courts. Therefore, there should be such practice as it will prevent cases from lower courts to be subject to appeal.

This implies that there is an urgent need for judges to know about the decisions taken by other courts, especially the Supreme Court, to ensure that justice is rendered uniformly countrywide by providing similar decisions for similar facts, which is believed to be achieved by reading this article, as well as putting forth efforts to read and to be aware of decided cases embodied in regular published law reports.

⁵⁸ The Supreme Court, Kigali, 25/07/2008, NIYOYITA Vs The Prosecution, RPA 0074/07/CS.

⁵⁹ Primary Court, Kicukiro, 28/03/2019, KBI LTD and Employees, RC 00413/2018/TB/KICU. Unpublished. Intermediate Court, Nyagatare, 26/10/2018, BIZIMANA Leonidas V The State of Rwanda, Gatsibo District, et. al, RC 00005/2016/TGI/ NYG. Unpublished.

⁶⁰ Supreme Court, Kigali, 30/06/2011, KAMBANDA Hussein Vs the prosecution, RPAA 0054/09/CS, online: < www.judiciary.gov.rw/fileadmin/.../Case.../Icyegeranyo_n_11.pdf, accessed on 15th April, 2018. *L'analyse de l'ADN ... permet d'arriver à des réponses particulièrement tranchées : soit elle écarte la filiation, soit elle conclura à une très forte probabilité de filiation supérieure à 90%. Grâce à des calculs statistiques, l'index de paternité est obtenu. Les résultats sont fiables à 99,99%.* Cited by the mentioned SC Case Law. It is a criminal case whereby KAMBANA Hussein defiled NYIRABAHIZI Hawa and she got pregnant.

4. CONCLUSION AND RECOMMENDATIONS

In a nutshell, each source of law in the Rwandan legal system is referred to by courts as a key tool for the decision-making process. This article has encompassed

the common understanding of precedent in civil and common law system and the applicability of *stare decisis* in the Rwandan legal system as far as its binding nature is concerned. Rwanda is predominantly a civil law system, but it has some common law elements. Precedents are used in courts, though it is merely the Supreme Court decisions that only inherit the binding nature towards other courts of the country. Decisions that were rendered by either lower courts or foreign jurisdiction are simply regarded as persuasive. The binding nature of Supreme Court judgments may bring some controversies in their applicability whereby contradictions in its decisions may cause a stern and fragile legal environment, and therefore lower courts would be advised to refer to the recent and specific precedent to harmonize the practice of lower courts.

The Supreme Court decisions are all thought to be at the level of making a precedent, but unfairness in their adjudication may bring controversy enough to be referred to by lower courts. It is recommended to depart from such judgments and concur, in the eyes of the judge, with lower courts' rulings which may provide a right interpretation that constitutes a vital legal solution to any concerned legal matter. There are numerous lower courts' decisions that can be considered 'landmark' depending on the way specific legal questions were analyzed and handled.

On the above note, there are cases that might have imposed themselves already as leading cases through regular and consistent reference in other judgments rendered by courts at various levels in relation to the concerned domains of law. There are others whose strong potential deserves to be termed 'leading' based on the adequacy of the legal provisions and interpretation applied to the facts of the case by the judge and the motivation/ arguments provided therefor.

In Rwandan courts, the use of precedents brought some controversies specifically when judges refer to them while there is an unfair positive law which might solve the concerned legal issue; the stated *SEBUKAYIRE Case* is a typical illustration. However, such practice of providing the right interpretation is accurate, and it is in the line of justice. It is within this particular note that lower courts should go in the same legal reasoning with the Supreme Court providing that the referred decision gives a thorough and just solution to the moot legal issue. Otherwise, in the author's view, judges should not hesitate to adjudicate the cases based on other courts' decisions if they provide exhaustive and detailed interpretation which are

indeed in the line of justice. This shall also help to the harmonization of court decisions as a step on the road to building an authentic Rwandan jurisprudence.

5. REFERENCES

Case Law

1. Supreme Court Kigali, 11 Jan 2008, MUTEBWA case, case law RS/Inconst/Pén.0001/07/CS. Case no RS/Inconst/Pén.0003/10/CS.
2. Supreme Court, Kigali, 27/02/2009, Mgr SEBUNUNGURI V. *Eglise Episcopale au Rwanda* (E.E.R), case law no R.Soc.A.A 0001/08/CS.
3. Supreme Court, Kigali, 24/12/2014, HARERIMANA V. SEBUKAYIRE, case law no RCAA 0018/13/CS.
4. Supreme Court, Kigali, 23/10/2015, KOBIL PETROLEUM RWANDA SARL Vs GARAGE AUTO IMPERIAL SARL and MUKAREMERA Francine, n° RCOM 0002/13/CS.
5. The Supreme Court, Kigali, 25/07/2008, NIYOYITA Vs the Prosecution, RPA 0074/07/CS.

Other judgments

1. The High Court, Kigali, 20/11/2015, KAMANZI Francois Vs NYIRANSENGIMANA Jeannette, RCAA 0096/14/HC/KIG.
2. Primary Court, Kicukiro, 28/03/2019, KBI LTD and Employees, RC 00413/2018/TB/KICU. Unpublished.
3. Intermediate Court, Nyagatare, 26/10/2018, BIZIMANA Leonidas V The State of Rwanda, Gatsibo District, et. al, RC 00005/2016/TGI/ NYG. Unpublished.
4. Primary Court, Kacyiru, 06/11/2009, KACHELEWA V. NYIRARUKUNDO, RC 0223/08/TB/KCY.

Books

1. Lee T. R., *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 V AND. L. REV. 647, 650 n.14, 1999.
2. RUGGERO A. J., *The Judicial Process: Text, Materials and Cases*, American Case Law Series, 2nd ed., Washington, West publishing Co.,1996.

3. DAVID L. BERLAND, *Stopping the Pendulum: Why Stare Decisis Should Constrain the Court from Further Modification of the Search Incident to Arrest Exception*.
4. Fowler J. H., at al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, Oxford University Press, 2007.
5. Cross R., *From Precedent in English Law*, 2nd, Oxford University Press, Oxford, 1968.
6. Leval P. N., *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U.L. REV. 1249, 2006.

Journal articles and other electronic sources

1. O'Connor Dr. V., *Common Law and Civil Law Traditions: PRACTITIONER'S GUIDE*, 2012, *International Network to Promote the Rule of Law*, online: <<http://www2.fjc.gov/sites/default/files/2018/Common%20and%20Civil%20Law%20Traditions.pdf>>.
2. West's Encyclopedia of American Law (2nd Edition) Volume 12 (Primary Documents) Hardcover – 2004, available at: < <https://www.amazon.com/Wests-Encyclopedia-American-Primary-Documents/dp/0787663794>>.
3. Supreme Court of Rwanda, *Leading cases arising from civil courts in Rwanda*, Vol. I., September 2016.
4. Law Dictionary: *Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* available at: < <https://thelawdictionary.org/>>.
5. Goodhart A., "Precedent in English and Continental Law", [1934] 50 *Law Quarterly Review*.
6. Wahlgren P., 'The Purpose and Usefulness of Jurisprudence' [2010], *Stockholm Institute for Scandianvian Law*, online: <www.scandinavianlaw.se/pdf/48-30.pdf>.
7. Fon V. and Parisi F., 'Judicial precedents in civil law systems: A dynamic analysis, [2006], *International Review of Law and Economics*, George Washington University and the University of Minnesota, pp. 519–535, online: <<http://EconPapers.repec.org/RePEc:eee:irlaec:v:26:y:2006:i:4:p:519-535>>.
8. Koo Che Y. and Goo Yi J., "The Role of Precedents in Repeated Litigation", University of Wisconsin, *The Journal of Law, Economics & Organization*, V9 N2, p. 2, online: <www.columbia.edu/~yc2271/files/papers/precedents.pdf>.

9. Hershovitz (ed), *Exploring Law's Empire*, Oxford, Oxford University Press, 2006.
10. Hadfield G. K., *The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law*, University of Southern California, Law School, 2006, , online:
<[https://www.law.yale.edu/.../pdf/The Quality of Law in Civil Code.pdf...](https://www.law.yale.edu/.../pdf/The_Quality_of_Law_in_Civil_Code.pdf...)>.
11. FLANDERS C., TOWARD A THEORY OF PERSUASIVE AUTHORITY, *OKLAHOMA LAW REVIEW*, Vol. 62:55, p. 59, online:<<http://adams.law.ou.edu/olr/articles/vol62/621-2%20flanders%20article%20blu2.pdf>>.