CHAPTER 20

STARE DECISIS IN SYARIAH[1]

20.1 INTRODUCTION

As noted in preceding chapter, the doctrine of judicial precedent or *stare decisis* is concerned with the fundamental importance of case law. If a judicial precedent articulates with authority, the principle which it embodies would be binding in future cases. In this fashion, judicial precedents become one of the pragmatic sources of law. It is an essential principle of judicial practice in Common Law System, quite apart from its intrinsic merit, should have binding force on judicial tribunals. Judicial decisions become binding precedents for the determination of like cases in the future and so contribute to the material content of the legal system.[2] It should be noted that in a hierarchical courts structure, inferior courts are bound by the decisions of superior courts in cases of same or similar facts and/or issues and situations. However, in a non-hierarchical courts structure, precedents could only be persuasive. In Islamic law, it has been held that precedent is non-existent as a judicial mechanism in the administration of justice[3] because proceedings in Syariah courts are predicated on a single and final adjudicator.[4]

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1 This chapter is contributed by Muhamad Hassan Ahmad, Sa'id Adekunle Mikail, Ashgar Ali Ali Mohamed and Abdul Haseeb Ansari. The previous version of this chapter was published as an article in Malaysian Court Practice (MCP) Bulletin, LexisNexis, Issue 2 of 2013 as '*Application of the Doctrine of Judicial Precedent in Shariah Courts*'.

2 See Subbarao, G. C. Venkata, *Jurisprudence and Legal Theory*, 9th edn, (Eastern Book Company, 2002), p. 124.

3 See Yadudu, A. H., *Colonialism and the transformation of Islamic law in the northern States of Nigeria*, Journal of Legal Pluralism and Unofficial Law, 1992, no 32 nr 35, pp. 131-134.

4 See Gans, Jeremy, *The Faces of Islamic Criminal Justice*, p. 5. Available at SSRN: http://ssrn.com/abstract=1030476.

It can be seen obviously from the directives issued by Caliph Umar ibn al-Khattab, the second rightly-guided caliph of Islam, to Abu Musa al-Ashari. According to this letter, it is not necessary in Syariah to apply the doctrine of judicial precedent in deciding cases, and *qadhis* (judges) are supposed to decide all cases based on their own merits. Therefore, in Syariah the doctrine of judicial precedent is not acceptable as binding. However, judges are allowed to take guidance from previous decisions and, thus, the earlier decisions may merely be considered as guidance for future decisions. This position is still being maintained by some countries such as Malaysia and Saudi Arabia among others. In Pakistan, however, it is quite the opposite as the doctrine of judicial precedent is followed.[5] In Nigeria, the Syariah Court of Appeal is competent in deciding cases before it and its eventual decision becomes binding on all courts below. This has significantly impacted the country's legal system. Due to this conflicting subject under the Syariah legal system in various countries as noted above, a question arises relating to the feasibility of the application of the doctrine of judicial precedent in Syariah Courts. Hence, this chapter discusses the feasibility of the application of the doctrine of judicial precedent in Islamic legal system.

20.2 STATUS OF JUDICIAL PRECEDENT IN SYARIAH

A judge (*Qadhi*) plays an essential role in the judiciary of an Islamic state. The role of the judiciary in any given society is to adjudicate cases, settle disputes, and administer justice in order to ascertain the truth. In the Quran, Allah (s.w.t.) says: "... [They like to] listen to falsehood, to devour anything forbidden. So if they come to you [Oh Muhammad], either judge between them, or turn away from them. If you turn away from them, they cannot hurt you in the least. And if you judge, judge with justice between them. Verily, Allah loves those who act justly."[6] To achieve this, the judge must thoroughly elucidate the reality of the case in hand until a decision therein attains a reasonable degree of certainty. The judge must ascertain the reality and truth by observing the evidential rules contained in Islamic adjective law.

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5 *Ibid.*

6 Al-Quran, *Al Maidah* (5): 42.

Therefore, judges are entrusted to render justice. Initially, the judicial functions were exercised by the Prophet (s.a.w.) and the task was subsequently done by rightly guided Caliphs (*Khulafaa-u-Rashidun*).[7] During that time, there was no appeal against their decisions. Ibn Hazm[8] gave reasons for non-existence of appellate courts in that period as decisions in accordance with Syariah are declaratory in nature. According to Fathih Uthman, this is not conclusive because some evidences show that there may be possibility of appellate review and reversal of opinion on lower courts.[9] This view is also clear from the message sent by Umar (r.a.) to Abu Musa al-Ashari as has been mentioned by some classical scholars.[10] However, the later view seemed to be preferred because it is closer to justice which is the main objective of adjudication.[11]

In Islam, *qadhi* is tasked with disputes settlement through an explanation of the rights of genuine claimant, and by exposing the falsehood based on the proof, and to end up with issuing the *hukum* (Islamic legal rule) under the mandatory Syariah provisions.[12] Hence, judgment of *qadhi*

7 *Khulafaa-u-Rashidun* or 'the well-directed *Khalifahs*.' It is a title given to the first four successors of the Prophet Muhammad (s.a.w.) namely, Abu Bakar, Umar (Omar) al Khattab, Usman bin Affan, and Ali Abi Talib.

8 (384-456/994-1064 CE), or his full name is Abu Muhammad 'Ali ibn Ahmad ibn Sa`id ibn Hazm. He was a Muslim theologian and a man of letters.

9 See also Azad, Ghulam Murtaza, *Judicial System of Islam*, (Islamic Research Institute, Pakistan, 1987), p. 100.

10 See Al-Ramali, Abu Talib Az-Zaydu, Al-Qarafi, Ibn Farhun, al-Khalif al-Hanafi and others. See also Zaydin, Abdul Keram, *Nizam al-qadhi fi As-Shari'ah Al-Islamiyyah* (3rd edn), (Resalah Publishers, Beirut, 2002), pp. 233-237.

11 See Ansari, Abdul Haseeb, *Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System*, (Vol 3) Journal of Islamic Law Review, 2007, p. 152.

12 The ultimate reliance for the decision of the case will depend on the presentation of the evidence. Caliph Umar (r.a.), in a letter to Abu Musa al-Asha'ri wrote: 'The burden of proof is on the claimant and the defendant may be put on oath. If a claimant brings proof within the prescribe time, his claim should be allowed otherwise judgment should be given against him. All Muslims are acceptable as witnesses against each other except those who have been punished with *hadd* of *Qazf* (accusation of adultery), those who have tendered false evidence, and those who are suspected (of partiality) on the ground of the accuser's status or relationship.'

should not be based on personal interests. The *qadhi* should function with full qualifications required in Syariah to realise the justice. As the Islamic judicial system combines adversarial and inquisitorial system, he is obliged to search for the truth in order to impart justice.[13] The comprehensive functional and jurisdictional obligations of a *qadhi* have been clearly identified from the message sent by Umar (r.a.) to Abu Musa al-Ashari. The relevant part to judicial precedent is: "... [I]f you gave judgment yesterday and today, upon reconsideration, come to a fresh opinion, you should not feel prevented by your first judgment from retracting: for justice is primeval, and it is better to retract than to persist on worthlessness ... use your brain about matters that perplex you and to which neither the Quran nor *Sunnah* seems to apply, study similar cases and evaluate the situation through analogy with those similar cases."[14]

It can be seen evidently that this letter is contrary to the doctrine of judicial precedent. Thus, *qadhis* must give their own decisions based on their personal interpretations. They are neither prevented nor bound by their previous decisions. However, the first decision may be taken as guidance. In short, the system of hierarchy of courts is still acceptable but the doctrine of binding precedents is neither permitted nor prohibited.

The clear disagreement of the incorporation of the doctrine of judicial precedent is evident from Umar's letter as above, consensus of the companions (*ijma'*) and *maslahah*. The previous decisions made by judges of the superior courts are based on *ijtihad* (intellectual reasoning) and, thus, the subsequent decisions made by judges of the lower courts

13 The concept of judicial evidence in Islam is not totally different from that prevailing in the common law system. Many of the sections of the Syariah Court Evidence (Federal Territories) Act 1997 ('the Act') are clearly identical to those of the Evidence Act 1950 (Revised 1971) (Act 56), which came into force on 23 May 1950 in West Malaysia, and on 1 November 1971 in East Malaysia. The fact that many sections of the Evidence Act 1950 have been included in this Act may lead to the conclusion that the 1950 Act is in some ways compatible with the Syariah.

14 See Bassiouni, M. Cherif, & Badr, Gamal M., *The Shari'ah: Sources, Interpretation, and Rule-Making*, (Vol 1) UCLA Journal of Islamic and Near Eastern Law, 2002, p. 155.

of Syariah should not be revoked because these are also done on the basis of *ijtihad*. A legal maxim states that: '*ijtihad* cannot be revoked by another *ijtihad*'. This legal maxim is of essence in relation to judicial system.

20.3 LEGAL MAXIM '*IJTIHAD* CANNOT BE REVOKED BY ANOTHER *IJTIHAD*': THE MEANING OF

The legal maxim '*ijtihad* cannot be revoked by another *ijtihad*' relates to validation and invalidation of *ijtihad*. It does not matter whether the revocation has been pronounced by the *mujtahid* (Muslim jurist) who initiates the *ijtihad*. The general meaning of this legal maxim is that if a *mujtahid* exercises *ijtihad* in conformity to the textual authority with a valid outcome and subsequently the similar issue occurs regardless whether it appears to the same *mujtahid* or another *mujtahid*, when he gives an opinion which is different from the first one based on the textual authority, then the second opinion cannot revoke the first opinion even though there are similarities between the first and second issue. It is immaterial whether the second *ijtihad* is exercised by the same *mujtahid* or otherwise.[15]

20.4 THE ORIGIN AND PROOF OF THE LEGAL MAXIM

Scholars have traced back the pronunciation of this legal maxim (*qaa'idah*) to Imam al-Kharkhi's book entitled *Usul al-Kharkhi*, where the author said that the norm is that any rule concluded based on *ijtihad* cannot be revoked by another *ijtihad* except by *nas* (text).[16] The evidence

15 See Ahmed, Md Hassan, Mikail, Sa'id Adekunle, & Arifin, Mahamad, *Application of the Doctrine of Judicial Precedent in Shariah Courts*, (Issue 2) Malaysian Court Practice MCP Bulletin 2013, p. 2.

16 See Mughal, Munir Ahmad, *Islamic Legal Maxims, Based on Al-Karkhi's Al Usul Al-Nasafi*, (Kazi Publications, Lahore, 2008), pp. 1-20.

of this legal maxim comes from the consensus of the Companions, the act of the second rightly guided Caliph, Umar ibn al-Khatab, and reasons. The first evidence is a consensus of the companions, as reported by Ibn Abbas, saying that the first Caliph Abu Bakar (r.a.), after the demise of the Prophet (s.a.w.), gave some rules which Umar (r.a.) did not agree with. However, when Umar (r.a.) became the Caliph, he did not revoke it. One can infer from this statement the understanding of the companions towards rules decided based on *ijtihad*, that such rules cannot be revoked by another *ijtihad* except with clear and decisive *nas*.

Secondly, it can be seen from the act of Umar (r.a.) when he decided that the biological brother (from the same father and mother) could not participate with his step brother in inheritance.

A similar issue came before him at a later stage and he associated the biological brother with the step brother in inheritance. He was questioned on why he had given different decisions in two cases where the facts were similar. His response was that: "The former decision was the past and this is the present judgment." It is reasonable that the second *ijtihad* is not superior to the former *ijtihad* and *vice versa*. If we agree that the first *ijtihad* could be revoked by the second *ijtihad*, it will result in instability of transactions and rules. The revocation of the first rule based on *ijtihad* might cause chaos to some transactions which have been established on that *ijtihad*. This would also result to a loss of trust and the authoritative interest in *mujtahid*, *qadhi* and even *mufti*.[17]

17 See Shubayyir, Mohammad '*Uthman, Al-Qawunidal-Fiqhiyyah and Öawubilal-Fiqhiyyah-fi-as-Shari'ah al-Islumiyyah*, Mak-tabat Duran-Nafuis, 2006-1426, pp. 367-368.

20.5 THE SCOPE OF THE LEGAL MAXIM

Generally, the scope of this legal maxim includes three types. The first type is the exercise of *ijtihad* (intellectual reasoning) by *mujtahid idhis* on hypothetical issues that has no direct textual ruling.

The second is the judgment of the *qadhis* on a case based on *ijtihad*.[18] It is impermissible to revoke such judgment by another judgment based on *ijtihad*. The latter may be given by the same *qadhi* or another *qadhi* on the basis of the legal maxim: 'A cause settled according to Syariah principles cannot be revoked, repeated or redone.'[19]

20.6 THE GENERAL RULE OF THE LEGAL MAXIM

The general rule is that *ijtihad* is a valid evidence in Syariah. When the *ijtihad* is correctly exercised, it would not be revoked or altered even when the view of the *mujtahid* who passes the ruling changes on the same matter. The Hanafi School has validated the evidentiary value of *ijtihad*. They state that: "Indeed, the view of *mujtahid* is evidence and the change of *mujtahid*'s view will be applied on novel issues not on previous issue."[20] For the application of this rule, the following conditions must be fulfilled:

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18 Islam urges the scholars to exercise the function of *ijtihad* (exertion of individual reasoning) and to investigate every issue within the framework of Islamic legislation. Such a practice was first recognised during the lifetime of the Prophet (s.a.w.) when he appointed Muadh Ibn Jabal as a judge in Yemen. On the eve of his departure to assume his office there, the Prophet (s.a.w.) asked him: "According to what shalt thou judge? He replied: According to the Book of God. The Prophet asked again: And if thou findest nought therein? He replied: According to the *Sunnah* of the Prophet of God. The Prophet (s.a.w.) asked again: And if thou findest naught therein? He replied: Then I will exert myself to form my own judgment." Thereupon the Prophet (s.a.w.) said; "Praise be to God who has guided the messenger of His Prophet to that which pleases His Prophet": see *Said Ramadan Islamic Law: Its Scope and Equity*, 2nd edn, (Muslim Youth Movement of Malaysia, 1992), p. 74.

19 *Ibid*, p. 368.

20 See Fadel, Mohammad, *On the validity of Ijtihad from the viewpoint of Usul (principles of Islamic jurisprudence)*, available at: http://www.sunnah.org/fiqh/usul/on_the_validity_of_ijtihad.htm.

(a) The previous decision must be based on *ijtihad*.

(b) The previous *ijtihad* should not violate the texts from the Quran or *Sunnah*, decisive *ijma'*, and clear analogy where an effective cause is being clearly mentioned.

(c) The previous *ijtihad* should not depend on clear error, iniquity and/or injustice.

(d) The previous *ijtihad* should not be based on public interests (*moslahah aammah*).

Therefore, the rule of *qaa'idah* seems to be of benefit for the elimination of narrowness and hardship for people due to changes of *ijtihad* on hypothetical issues as the judicial decisions are based on *ijtihad*. The application of changing *ijtihad* by means of revocation will result in instability of the rules and cause severe harm to the people.[21]

20.7 THE APPLICATION OF THE DOCTRINE OF JUDICIAL PRECEDENT IN SYARIAH COURTS

Nowadays, in some Muslim countries, dual judicial systems (i.e., civil and Syariah) come into existence. As a result, many unresolved issues and problems have occurred. Notably, one of them is the applicability of the concept of judicial precedent in Syariah courts. Generally, the judicial decisions of the civil courts are not strictly binding on the Syariah courts. However, in the case of *Hamzah bin Zainuddin v. Noraini bte Abdul Rashid*,[22] the Syariah Appeal Court of Perak stated that so long as the principles of law derived from the judicial decisions of the civil courts which is not contrary to *hukum syarak* is admissible in the Syariah courts. In particular, the court stated: 'We are also of the opinion that [it] is not wrong for Syariah lawyers to refer to authorities in the Civil Courts to substantiate their arguments if it is not against *syarak*'.

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21 *Ibid*, p. 165.

22 [2005] 3 ShLR 94 at 103.

Having said the above, in order to capture the comprehensive understanding of the application of the doctrine of judicial precedent in the Syariah court, it is necessary to refer to the practice in the selected Syariah courts of some Muslim countries.

20.7.1 Malaysia

In Malaysia the Syariah courts are an integral part of the court system and are distinct from the civil courts as to their functions and jurisdiction. These two courts are administered separately and they are independent of each other. The jurisdiction of the Syariah courts applies to Muslims and further, being a State court, its jurisdiction and power lies within the boundaries of the respective State.[23] The Syariah courts are not lower in status than the civil courts. They are of equal standing under the Federal Constitution. The recognition of the Syariah courts is largely due to art. 121(1A) of the Federal Constitution which excludes the jurisdiction of the civil courts on any matter which falls within the jurisdiction of the Syariah courts.[24] The Syariah courts of the States and the Federal Territory have been established under the item 1 of the State List and item 6(e) of the Federal List of the Ninth Schedule of the Federal Constitution, while Native Courts exist in Sabah and Sarawak under item 13 of the State List. In the case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor*,[25] it was observed that where the three courts (i.e., civil courts, Syariah courts and native courts) are explicitly parallel, one court system cannot interfere in the other court system.

All States as well as the Federal Territories have separate sets of the Syariah court system respectively. The hierarchy of Syariah courts in Malaysia consists of the Syariah Appeal Court, Syariah High Court and Syariah

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23 See *Noh bin Atan v. Shakila* (1998) 12 JH (1) 27; *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505.

24 See *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and other appeals* [2008] 2 CLJ 1, [2008] 2 MLJ 147, 170.

25 [1999] 2 CLJ 707, FC.

Subordinate Court.[26] Administratively, Syariah Subordinate Court in every State is bound by order from Syariah High Court. Likewise, the Syariah High Court is bound by the decision of the Syariah Appeal Court. However, in relation to judicial matters, all Syariah courts are independent and the judges decide the cases in hand on a case-to-case basis. Hence, it is submitted that judicial precedent can be applied in the Syariah courts system as a guiding precedents and not as a binding precedents since Syariah allows the taking of guidance from previous decisions. In short, the doctrine of judicial precedent is not strictly applicable before Syariah courts. However, there were several attempts made to incorporate the doctrine of judicial precedent into the Syariah court system. Among such attempts, a remarkable memorandum was

26 For the constitution and jurisdictions of the Syariah Subordinate Court, Syariah High Court and Syariah Appeal Court, see the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) ss. 40-57. See also the case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara, Malaysia & Anor* [1999] 2 CLJ 707, FC, for a brief exposition of the hierarchy of the Syariah Courts. In relation to the Syariah courts' jurisdiction, these courts can only deal with matters which the various state Legislatures have enacted as conferring jurisdiction on them, pursuant to the Federal Constitution art. 74(2) and sch 9. See *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 CLJ 289, FC. The approach to be taken in determining the jurisdiction of the Syariah court (such jurisdiction only applies to Muslims) is the subject matter approach and not the remedy prayed approach, that is, to look into the State enactments to see whether or not the Syariah courts have been expressly conferred jurisdiction on a given matter: see the cases of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5, FC and *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 CLJ 289. Therefore, if the Legislature does not confer on the Syariah Court any jurisdiction to deal with any matter in the relevant items of sch. 9 to the Federal Constitution, the Syariah court is precluded from dealing with the matter. The exception to this general rule is conversion out of Islam. Although this issue is not regulated by all the State enactments, it still falls clearly within the exclusive jurisdiction of the Syariah court: see *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* (*supra*). Apart from the above, being a State court, a Syariah court's jurisdiction and power lies within the boundaries of the respective State: see the Federal Constitution sch 9 item 1 of the State List and item 6(e) of the Federal List (which refers expressly to item 1 of the State List).

submitted by the Sisters in Islam Organisation in March 1997.[27] The relevant part of the said memorandum provides: 'We propose that the Syariah court adopt the system of binding precedent similar to that practised by the civil courts. This would ensure that the Syariah courts of first instance would be bound by the decisions of the Syariah Court of Appeal. The decisions of the Syariah Appeal Court could be equated to a fatwa normally issued by the Islamic Affairs Council, except that the Appeal Court would rule only on matters concerning Islamic Family Law. This will avoid the tendency for judges to give widely disparate decisions in cases involving similar facts, or to give decisions influenced by personal prejudices.' The second is a proposal to have a grand *mufti* in the country mooted by Dr. Syed Ali Tawfiq Al-Attas, the Director General of the Institute of Islamic Understanding Malaysia (IKIM).[28]

20.7.2 Nigeria

Similar to Malaysia, Nigeria also has three sets of courts. However, the doctrine of judicial precedent as a common law doctrine applies solely to those courts which are labelled and empowered to administer adjective common law of which the doctrine forms a part. Therefore, the Syariah Court of Appeal, Customary and Area Courts are not empowered to apply adjective common law and, thus, the doctrine is not applicable to Syariah courts. Nonetheless, by virtue of the appellate system, the Syariah Court of Appeal should follow the decisions of the Supreme Court of Nigeria, while Customary Courts and Area Courts should follow the decision of the High Courts.[29]

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27 See 'Reform of the Islamic Family Laws & the Administration of Justice in the Syariah System in Malaysia (March, 1997)' at www.sistersinislam.org.my/news.php?item.617.54

28 See Ansari, Abdul Haseeb, *Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System*, (Vol 3, 2007) Journal of Islamic Law Review, pp. 154-158.

29 See Obilade, Akintunde Olusegun, *The Nigerian Legal System*, (Spectrum Law Publishing, Nigeria, 2002), pp. 114-134.

In each of the northern States, the Syariah Court of Appeal of the State is empowered to determine certain cases in accordance with the Muslim law: '[W]here all the parties to the proceedings (whether they are Muslims or non-Muslims) have by writing requested the court to settle their case in the first instance and determine it in accordance with the rule of Syariah.' This provision is substantially the same in wording as s. (53)(5) of the Constitution of the Northern Nigeria which is enforced in each of the northern States. Therefore, the rules apply subject to this provision. It is unfortunate that parties who have agreed to be bound by a particular law or who are otherwise bound by that law could be held at their instance to be bound by a different law when dispute arises after the conclusion of the transaction involved.[30] In short, the doctrine of judicial precedent is not applied in Syariah courts in Nigeria because it is not subject to the rules of common law, rather it is subject to the rules of the Syariah which does not acknowledge it. In fact, each judge must decide a case based on its own merit and intellectual interpretation based on the principles of *Usul al-Fiqh*.

Two eminently outstanding cases in Nigeria that have touched on the issue of precedent in Syariah are *Karimatu Yakubu Paiko & Another v. Yakubu Paiko & Another*,[31] and *Chamberlain v. Abdullahi Dan Fulani*,[32] both of which were actually civil cases. In the case of Karimatu Yakubu, the question is about ijbar (the right of a father to marry off a virgin daughter with or without her free consent) in which the court cited with approval the earlier decision of a Syariah Court of Appeal. However, Auwalu Hamisu Yadudu and Muhammad Tawfiq Ladan[33] have criticised the Federal Court of Appeal for relying on an earlier decision of the Syariah Court of Appeal in reaching its own decision and concluded that this reliance was a deviation from the Syariah principles.

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30 *Ibid*, p. 165.

31 Unreported Federal Court of Appeal case number CA/K/805/85.

32 (1961-1989) 1 ShLRN 54 at p. 61, per Gwarzo JCA.

33 See Ladan, MT, *Introduction to Jurisprudence Classical and Islamic*, (Malthouse Press, Nigeria, 2006), pp. 202-295.

One of the cogent positions relating to the *Chamberlain*'s case is that of Gwarzo JCA, who observed: "There is no question of relying on higher or lower court's interpretation when the prescription of the law is vividly clear. In Islamic law, a judge is not bound by a precedent in a case which is similar".[34] Thus, if a judge gave a judgment in a case, and when a similar case arises, his judgment in the earlier case will not be extended to the latter case, as trying a case is non-integral. Even if a similar case arises after the first judgment between the same litigants or others, independent examination is required by law to be conducted by the first judge or another.[35]

Section 6(3) of the Constitution of the Federal Republic of Nigeria 1999 has created a hierarchy of courts including the Syariah courts. The section provides that: 'The courts to which this section relates, established by this Constitution for the Federation and for the States, specified in sub-s. (5)(a)-(i) of this section shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State, each court shall have all the powers of a superior court of record. The courts to which s. 6(3) relates, include at s. 6(5)(g), a Syariah Court of Appeal of a State, and at s. 6(5)(k) such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws.' These constitutional provisions evidently enabled the Syariah implementing States in Nigeria to create their respective processes of implementation, establishing courts and assigning jurisdiction to them.[36] This hierarchy has apparently divided the courts into superior and inferior courts. It

34 See also Khalil, Mukhtasar, Jawahir al-Iklil, (Vol 2, 1914) Cairo: 'Isa al-Babi al-Halabi, p. 30.

35 See *Chamberlain v. Abdullahi Dan Fulani* (1961-1989) 1 ShLRN 54. For more details see also Bello, Aminu Adamu, 'Binding Precedent and Syari'a/Islamic Law in Nigeria: An Attempt at a Civil-Criminal Distinction,' Islamic Law and Law of the Muslim World Paper No 09-67 (1 May 2009). Available at SSRN:http://ssrn. com/abstract=1397737.

36 See Oba, A.A, *Lawyers, Legal Education and the Syari'ah Courts in Nigeria*, Journal of Legal Pluralism, nr 49, 2004, pp. 278-310.

was argued that judges of superior courts may now each tend to place themselves in the position of *mujtahid* solely by virtue of their being so appointed,[37] whilst judges in inferior courts would be *muqalid*. As a result, the decision of the Syariah High Courts will have binding authority upon judges of Syariah Subordinate courts.

Again, s. 240 of the Nigerian Constitution 1999 provides for the appellate jurisdiction of the Court of Appeal in the hierarchy of courts in Nigeria. This section provides that: 'Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Shariah Court of Appeal of the Federal Capital Territory, Abuja, Syariah Court of Appeal of a State, Customary Court of Appeal of a State and from decisions of a court martial or other tribunal as may be prescribed by an Act of the National Assembly'. The implication of this provision is that all appeals from the Syariah Court of Appeal of a State lay to the Court of Appeal, regardless of the fact that the particular law, by virtue of an appeal, would fall under the jurisdiction of the Federal High Court.[38]

Although s. 244 of the 1999 Constitution provides that an appeal shall lie from decisions of a Syariah Court of Appeal to the Court of Appeal as of right in all civil proceedings before the Syariah Court of Appeal with respect to any question of Islamic personal law which the Syariah Court of Appeal is competent to decide, the Court of Appeal will not decline jurisdiction to hear criminal appeals from the Syariah Court of Appeal of a State. It may only be compelled to determine the legality of the law, i.e., the consistency of the law with the provisions of the constitution. Its eventual decision becomes binding not only on all courts below, but will also have an impact on the country's legal system. This will necessarily have the effect of establishing a binding precedent on the Syariah Court of Appeal of each State.

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37 *Ibid*, p. 134.

38 For more details, see ss. 277 and 278 of the 1999 Constitution Federal Republic of Nigeria ('FRN').

20.7.3 Pakistan

Pakistan has an integrated judicial system, where courts are free to decide on civil matters peculiar to Syariah. For instance, Criminal Courts have jurisdiction to hear cases pertaining to *hudud*. Decisions of Criminal Courts are appealable to the Federal Syariah Court. The Federal Syariah Court has eight Muslim judges with three *Ulama* and is also part of Supreme Court which may decide (whether on its own motion or through the request of a citizen or government) the compatibility of certain laws to Syariah precepts. Appeal against its own decision lies in the Shariah Appellate Bench of the Supreme Court consisting of three Muslim judges of the Supreme Court and only two *Ulama* nominated by the President. Then, the government will take necessary action to amend such law if it is contrary to Syariah principles. By virtue of art. 203 of the Constitution, decisions of the Federal Syariah Court are binding on the High Courts as well as the subordinate judiciary. Moreover, according to art. 189 of the Constitution, decisions of the Supreme Court are binding upon all other courts. As such, it may be observed that the doctrine of judicial precedent is applicable in Pakistani Syariah Courts. However, the superior courts are free to resort to *ijtihad* to derive new rules from the Qur'an, the *Sunnah*, *ijma*, *Qiyas* (analogy), *maslahah*, custom and other secondary sources of Islamic law.[39]

39 See also Muhammad Munir, 'Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan' *Islamic Studies* 47.4 (2008): 445-482. See also Ansari, Abdul Haseeb, *Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System*, (Vol 3) Journal of Islamic Law Review, 2007, pp. 158-159.

20.8 CONCLUSION

The doctrine of judicial precedent is a fundamental principle of judicial practice in most of the commonwealth countries. Judicial decisions become binding precedents for the determination of cases in the future and therefore contribute to the material content of the legal system. Judicial precedents have always been considered as an imperative source of law in the Malaysian legal system. The important and distinctive element of common law is that the reasoning and decisions found in preceding cases are not simply considered with respect or as a guide, but can be binding on lower courts. In other words, the earlier decision of the superior court on questions of law and principles of law are strictly binding on the courts below in dealing with similar cases.[40] Conversely, in the Continental Europe, the doctrine of judicial precedent has not been firmly established. Jurists from that part of Europe insist that a judicial decision cannot claim any legal authority or binding force *per se*. However, although a single judicial decision has no binding force, if a course of judicial decision precedents is repeatedly given, by some means, these judicial decisions have persuasive value.

On the other hand, the doctrine of judicial precedent has no significant value in the Syariah court system. In Islam, judges must decide according to the merit of each case and, thus, the concept of *stare decisis* is alien to Syariah. It may be argued that there is communal interest in applying the doctrine of judicial precedent and this seems to be right to some extent. However, there are some significant negative effects which may be caused by the incorporation of this doctrine, i.e., closing the door of *ijtihad*, feeling of inferiority among the subordinate courts and continuation of erroneous judgment which will lead to injustice.

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40 See *Tan Heng Chew & Ors v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577.

With regard to the view that judges of superior courts are considered *mujtahid*, whilst judges of inferior courts are *muqalid*, this view opens the ground for closing the door of *ijtihad* which is highly discouraged by contemporary Islamic scholars. It is also quite undesirable that a *qadhi* will be an absolute *muqalid* who is bound to follow the decision of *mujtahid* because a *qadhi* must fulfil certain conditions before he can be appointed as a *qadhi*, among which, is the ability to exercise *ijtihad*. In the concept of *stare decisis*, if the decision of the superior court is erroneous, injustice would prevail and will not be corrected. On the contrary, in Syariah, the injustice or error will not be continuously recurring. It is worthy to note that the rule of *ijtihad* should not be revoked by another, and it is only applicable if both the former and latter decisions are *ijtihad*-based. If there is a clear text ignored by one of the decisions, a decision which is made based on the text must be applied.

In a nutshell, precedent cases should be taken as guidance for subsequent cases. This is in order to harmonise the decision of both sides. This position is still being maintained by some countries. For example, in *Tan Heng Chew & Ors v. Tan Kim Hor & Ors*,[41] a Malaysian case, Abdul Hamid Mohamad FCJ (as he then was) referred to the earlier judgments of the Federal Court in *Majlis Perbandaran Pulau Pinang*[42] and *Mohamed Ezam bin Mohd Nor*[43] and accordingly advised the lower tier courts as follows:

> These judgments, being judgments of the Federal Court, are binding on the Court of Appeal. Whether the Court of Appeal agrees with them or not, it is incumbent upon it to apply the test. However, if the court thinks that it has good reasons for disagreeing with the judgments, it may, while following them, point out why they should be reviewed by this court. But the review, if it were to be done, should be done by this court. Until it is actually done by this court, they remain binding on the Court of Appeal.

41 [2006] 1 CLJ 577.

42 *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, FC.

43 *Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara* [2001] 4 CLJ 701, FC.

It is also worthwhile to reproduce the view expressed by Richard Malanjum CJ (Sabah and Sarawak) in delivering the judgment of the Federal Court in *Public Prosecutor v. Kok Wah Kuan*.[44] His Lordship stated that:

> The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that the existence of this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and maneuverability still exist. Though a superior court is generally reluctant to disregard its own precedents, it does have the power 'to refuse to follow' its earlier decisions or to cite them with disapproval. Our Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High Court decisions. An inferior court can maneuver around a binding decision through a host of indirect techniques.

According to Abdul Malik Ishak J, '[A]lthough the lower courts are bound in theory by the superior or higher court precedents, in practice judges may sometimes attempt to evade precedents, by distinguishing them on spurious grounds. It is, however, advisable to follow the doctrine of *stare decisis* because it is a wise policy. It is important that the applicable law be settled. There must be certainty in the law'.[45]

Accordingly, the doctrine of judicial precedent can be applied in the Syariah courts system as a guiding precedent but not a binding one as there is no express prohibition to do so. In Islam, judges are allowed to use previous decisions as guidance in adjudicating cases. In addition, having guiding precedents rather than binding would benefit the Syariah courts system – it ensures judicial consistency, certainty and reliability in the Syariah legal system.

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44 [2007] 6 CLJ 341.

45 See *Pengurusan Danaharta Nasional Berhad v. Yong Wan Hoi & Anor* [2007] 9 CLJ 416.