

Operation of judicial precedent in Malaysia and Nigeria: A comparative analysis

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Abstract

The doctrine of judicial precedent, which states that the court must stand by what has been decided in a case when deciding a new case by a judge in court, is commonly known among the countries that practice common law system, but the operation of the doctrine is said to differ. This paper makes a comparative study of operation of judicial precedent in Malaysia and Nigeria, with a view to knowing the areas of difference, similarity and improvement. Based on doctrinal research approach, this paper examines operation of doctrine of judicial precedent among different categories of courts in Malaysia and Nigeria. Some discrepancies observed are that under the practice of horizontal precedent, the decision of Federal court in Malaysia is bound by precedent while the Supreme Court in Nigeria is not. Also, the decision of Court of Appeal in Nigeria is bound by precedent while that of Malaysia is not. However, the similarities observed in the practice of precedent are that the decisions of High courts and Magistrate courts in Malaysia are bound by precedent just like in Nigeria. Also, judicial precedent is not applicable to Shari'ah courts, the Native and customary courts in Malaysia and Nigeria. The paper concludes that more attention should be paid to observing horizontal precedent by the Supreme Court and Appeal Court in the two countries. This study provides an opportunity to compare note on the administration of judicial precedent in Nigeria and Malaysia.

Keywords: Judicial precedent, Operation and Comparative analysis.

Introduction

Discussion on the above topic shall focus on the concept of judicial precedent which includes the definition of judicial precedent, the types of judicial precedent, the principle of judicial precedent and the doctrine of judicial precedent. It shall also discuss the operation of judicial precedent as well as advantages and disadvantages of judicial precedent. Further, this paper shall embark on comparative analysis on the operation of judicial precedent in the civil / common law courts, the *Sharī'ah* courts and native/customary courts in Malaysia and Nigeria.

Concept of Judicial Precedent

Judicial precedent is defined as a judgment of a court of law, cited as an authority for deciding a similar set of facts in a similar case. A decision of the court is used as a source for future decision because, while giving judgment in a case, the judge having set out the facts of the case, will state the laws applicable to the facts and provide his decision on the case. Such decision given by the judge of a higher court, which remains binding on all other courts below and accepted as binding on such courts below, shall become authority for future similar decision and be regarded as judicial precedent. Judicial precedent which is also known as *Stare Decisis*, means to stand by what has been decided in a case in court or to stand by earlier decision made in court by judges. Further, judicial precedent can be defined as a judicial decision that is binding on lower courts or other equal courts of the same jurisdiction, with regards to its conclusion on a point of law and May also, be persuasive to courts of equal and other jurisdiction in future cases involving sufficient similar facts. Some instances where the above principle of judicial precedent was applied include the cases of

Jones v Kany, and *Jones v Kernott*, In the above, the supreme court of UK did not depart from previous decisions of House of Commons. Also in the case of *Clement v Iwuanyanwu (1988) 3 NWLR Pt (107), 54*, Oputa JSC, described judicial precedent as a decision of higher court considered as an example for identical cases with similar questions of law in future, such binding decision may not totally be that of a higher court as some courts are also bound by their own decisions.. The law derived solely from decision of the court is known as the common law which is largely a judgment law. The majority of English law was not enacted by parliament but developed by judges who applied existing rules to new situations as they arose. This is achieved by following the example or precedent of earlier decisions and. through this, the judges have developed common law case by case, by way of analogy. Therefore the practice of precedent is common with countries that follow common law system.

Types of Precedent

Precedent may be classified as original, derivative and declaratory or binding and persuasive as follows:

Original precedent: Original precedent is the precedent that establishes a new rule of law and usually occurs in cases of first impression where no existing precedent is available. However, this type of precedent is not common.

Derivative precedent: Derivative precedent is the one which extends frontier of an existing rule to accommodate similar cases where none exists before.

Declaratory Precedent; this is of a least value, it is just a mere declaratory precedent, it does not confer any validity on a decision, however, it helps to consolidate the authority and validity of past decision.

Persuasive Precedent: a precedent is known to be persuasive when it is urged to be followed or departed from, this is common the lower courts of the same power or senior courts of the same jurisdiction. For example, decisions of foreign court are not binding on courts in Nigeria or Malaysia, but are always taken on persuasive authority, notwithstanding the fact that judges often refer to judgment of foreign courts.

Binding Precedent: a precedent is said to be binding when the lower court within which it is being used is bound to follow the decision of the higher court. This means judges of lower court must follow decisions of superior court but can choose whether or not to follow decision of inferior court or court of coordinate level with them. However, the use of binding or persuasive precedent depends on the position of the court from which it emanates.

The principle of judicial precedent or Stare Decisis

Two principles that are involved in judicial precedent or stare decisis include:

1. Ratio decidendi: this means reasons behind the decision, it also means the principle of rule of law on which court decision is bounded. Ratio decidendi can also be explained as the point in a case which determines the judgement or the principle on which the case is established. It is also known as the binding aspect of previous decision in court. This is because judges use decisions made from ratio decidendi to create binding a precedent to be followed by a lower courts. In addition, the rule of judicial precedent only appeal to cases with similar facts as a judge is not bound by decision of superior court that the facts are different from the case in hand.
2. Obiter dictum which constitutes the second principle of judicial precedent means anything said by the way of original case. Obita dictum is the passing comment made by the judge which may be relevant but not a direct justification for the decision. As it was explained by Edgar Jnr FCJ, in *Cooperative Central Bank Ltd (receivership) v Feyen Development Sdn Bhd*, an obita dictum is a mere chance remark by court the and is issued in contradiction to ratio decidendi which is the rule of law on which authority is based. Obita dictum is persuasive on courts because it is not strictly relevant and a judge may not have to strictly follow it in a later case.

However, the distinctions between Ratio decidendi and Obita dictum are that while Ratio decidendi should be followed in court, Obita dictum is viewed by court as a statement that can be ignored. Also, Ratio decidendi is judicially binding on the lower courts while Obita dictum is persuasive. Ratio decidendi is a statement made while relating to a case in court or while responding to an argument made by an attorney, while obita dictum was a statement made by the way. In term of weight and authority, ratio decidendi is observed to carry greater weight than Obita dictum. Further, in term of judicial application, Ratio decidendi is found to be more directly related to the facts in a case, it is binding and form part of judicial precedent while Obita dictum is not.

The Doctrine of judicial precedent or Stare decisis

The doctrine of judicial precedent or stare decisis means that in cases where material facts are similar, a lower court is bound to follow the earlier decision of a higher court and in case of a

higher and superior court, to follow its own prior decision and prior decision of court of the same level i.e. of equal coordinate jurisdiction, weather past or present in the same hierarchy. This is the position with binding precedent as the decision of superior court must be respected by the lower courts. Superior court has the power to overrule decisions of lower court. Appellate courts are always bound by their past decisions but can also depart from such decisions in some specific cases. In the case of *Clement v Iwunayanwu*, Oputa JSC explained doctrine of judicial precedent as a binding decision of higher court which is considered as an example for identical cases with similar facts in future. Also, in the case of *Sundralingam v Ramana thay Omg*, Hock Thye FJ, stated that "Each court is of course bound by decision of the court above it." It is similarly the case in Singapore when Wee Chong Jin CJ, in the case of *Mahkah Yew v public prosecutor* stated: "The doctrine of Stare decisis is a necessary and well established doctrine in our system of jurisdiction and our judicial system."

However, the doctrine of Stare decisis is said to operate well in the following three ways; firstly, if the part of earlier judgment in the earlier case being relied upon is the ratio decidendi of the case, secondly, if the earlier case involves fact that are not different from each other and thirdly, if the earlier case is a decision from the court of concurrent or inferior jurisdiction than the court faced with the case at hand. For example, if earlier decision was given from a magistrate court, a judge of high court may disagree with earlier decision in his current decision if the facts of the case are similar.

Operation of Doctrine of Judicial Precedent or Stare Decisis

The doctrine of stare decisis operates in two ways namely;

Vertical: this means that prior decision of a higher court is binding on the lower courts.

Horizontal: this means same court is bound to follow its own prior decision and prior decision of a court of the same level whether past or present.

The major reason for compliance with precedent is that a higher court in the superior cader laid down the principle as applicable law. If lower court disobeys the principle, on appeal, the higher court can correct or reverse the decision of the lower court as was the position in the cases of *Favelle Mort Ltd v Murray (1978)8 ALR 649* and *Viro v R (1978) 18 ALR 275, 260* in the High court of Australia. From the above, it can be understood that in practice, courts must abide by decisions of higher and other relevant court in the same heirarchy. However, decisions of superior court outside that jurisdiction are somehow not binding but may be followed.

Advantages of judicial precedent:

Operation of judicial precedent is said to have the following advantages:

1. Judicial precedent avoids waste of judicial effort and time for rethinking about solution to similar to similar problem previously settled.
2. It avoids arbitrariness in judicial decision during determination of cases.
3. It promotes predictability of judicial decision in cases with similar facts in court.
4. It encourages uniformity in judicial decisions.
5. It promotes certainty of applicable law whereby one is almost certain of the applicable laws to be used and the likely judicial decision in cases with similar facts in court.

6. Judicial precedent preserves the tradition of compliance and respect in the judicial system as the higher court has the power to correct or reverse the decision of the lower court.
7. Judicial precedent promotes uniformity in judicial decision.

Disadvantages of judicial precedent:

Operation of judicial precedent is said to have the following disadvantages:

1. Judicial precedent does not encourage flexibility in judicial decision as all courts must abide by the principle of stare decisis in their decisions.
2. Judicial precedent lacks judicial autonomy. This observation is corroborated by the principle of stare decisis which states that any lower court that fails to comply with the applicable law and decisions laid down by the higher court shall have its decision corrected or reversed.
3. Judicial precedent is conservative as it does not allow for quick transformation and application of law in line with the changing situations in the society.
4. Judicial precedent focuses more on compliance with precedent rather than the quality of law and decisions it discharges. This makes the practice of precedent to be fraught with restrictions.
5. Judicial precedent is stereo typed in practice and this weakens the power for judicial independence and accountability among courts.

Operation of Judicial Precedent in Malaysian Courts

The practice of judicial precedent is found applicable in Malaysian courts and this has been confirmed by Chang Min Tat F.J in *public prosecutor v Datuk Tan Chang Swee* (1980) 2 MLJ 276-277, where the need for Federal court, the high court and other inferior courts in Malaysia to follow the doctrine of stare decisis was reaffirmed. The doctrine of stare decisis is however, operated in vertically and horizontally in Malaysian courts as follows:

Vertical operation of judicial precedent in Malaysia

By vertical operation, it means the higher or superior court binds all courts subordinate to follow to it, to follow its prior decisions. A look at hierarchy of courts in Malaysia shows that the Federal court is at the top followed by court of appeal and followed by the high court of Malaya and high court of Sabah and Sarawak. The above is followed by session's court and session court of Sabah and Sarawak. This is followed by magistrate court of Sabah and Sarawak. The next to magistrate court is the penghulu's court of Malaya. However, apart from the above civil courts, there is also the existence of *Shari'ah* court and Native court which constitute the three types of courts in Malaysia. By way of operation the civil courts, decisions of the Federal court bind all courts. The court of appeal is bound by decisions of Federal court but court of Appeal's decisions bind the two High courts of Malaya and Saba/Sarawak and subordinate courts. The High courts are bound by decisions of Federal court and court of appeal.

Decisions of the High court's bind the subordinate courts but decisions of subordinate courts are not binding. All courts in the hierarchy must follow prior decisions of courts higher than itself and it may not decline to follow such decisions of higher court on the ground that it is wrong, obsolete or delivered per incuriam of ignorance and faulty reasoning. This was the position in *Haris Solid State v Bruno Gentil Pereira* (1996) 3mlj 489 when

counsel for the appellant argued before the court of appeal that majority decision of Federal court in *Rama Chandra v The industrial court of Malaysia* (1977) 1 MLJ 145 was wrong and ought not to be complied with. The court of appeal disagreed with this submission that the court is bound to follow the prior decision of Federal court, even if it suffers from any infirmity, because, it was a decision of the apex court and it constituted a binding precedent. Also, in the case of *Cooperative Central Bank v Feyen Development* (1997), 2MLJ 829, the question arose as to whether it was permissible for an intermediate court like the Court of Appeal in Malaysia to disregard judgment of the Federal Court on the ground that it was given per incuriam. Delivering the judgment of the Federal Court on this case, Edgar Joseph Junior, the Federal court judge, adopted in an unequivocal term, the remarks of Lord Hailsham in *Cassell v Broome* (1972) AC 1027, 1054 which expressed disapproval of the House of Lords for the court of appeal's refusal to follow the House of Lord's prior decision in *Rookes v Barnard* (1964) AC 1129. Based on this, the Court of Appeal in Malaysia was reminded of its obligation to accept loyally the decisions of the higher court (Federal Court) and the need not to allow itself to be reminded to follow and apply the principles of judicial precedent in future. The above goes to show the importance attached to the practice of judicial precedent in Malaysia. In the case of two conflicting decisions of the court of appeal, the courts lower in heirachy are expected to follow the later decision of the court of appeal as this represents the existing state of law. Several cases in Malaysia were treated in line with doctrine of judicial precedent above. However, despite the level of compliance with judicial precedent under vertical operation of stare decisis in Malaysia, it is noted that the operation is not so smooth as it is faced such problems like:

1. Status of decision of the privy council and
2. Status of decisions of a predecessor courts of the present Federal court.

On the status of decision of the Privy Council, it has been observed that the Court of Appeal has on many occasions refused to follow the decisions of the Privy Council on appeal cases, a case in point was that of Court of Appeal Justices Gopal Sri Ram, N.H. Chan and V.C George who declined to follow the Privy Council's decision in *South South Asia Fire Bricks v Non Metallic mineral Product Manufacturer Employees Union*.

Also, on the status of decision of predecessor courts of the present Federal Court, it has equally been observed that the intermediate courts especially High Court and Court of Appeal in Malaysia have on some occasions disregarded decisions of the Privy Council and the present Federal Court. One of such attempts was *Harta Empat v Koperasi Rakyat*. The practice which flouts the doctrine of judicial precedent may short live the existence of judicial precedent in Malaysia if remains unchecked.

Horizontal operation of judicial precedent in Malaysia

By horizontal operation of judicial precedent, it means that a court usually an appellate court is bound by its own decision, the decision of its predecessors and decisions of courts of co-ordinate jurisdiction. In this circumstance, the Federal court, the court of appeal and even the high courts in Malaysia are bound to follow their own prior decision and prior decisions of a court of the same level, whether present or past. The horizontal operation of the doctrine of judicial precedent is however observed to be more problematic compared to vertical operation.

This is because both the Federal court and the court of Appeal have been found in many cases not to allow themselves to be bound by their own prior decisions or by decisions of a court of coordinate jurisdiction whether present or past.

Following the creation of a Federal court which replaced Supreme Court, Section 17 of the court of judicature acts 1995, in Malaysia, provided that any proceeding pending before the Supreme Court 1994, shall continue in the Federal court and the Federal court shall exercise all powers of the defunct Supreme Court. On the basis of the above provision, decision in appeal pending before supreme court are to be treated as decisions of the present Federal, as the Federal court is expected to be bound by the practice and precedent of the then supreme court. However, it is observed that the reverse was the case, as the Federal court refused to be bound by decision or precedent of the then supreme court. This can be seen in the civil matter of *Malaysia National Insurance v Lim Tiok*. The case was which was to determine the extent of liability of insurers against their third party under compulsory insurance policy was a direct action brought by a third party. The Supreme Court had earlier decided this case but the current issue was whether the Supreme Court's decision should be reviewed or over ruled. The Federal court eventually reviewed the prior decision of Supreme Court. The Federal Court decided that the decision was wrongly decided and should not be followed. In effect, the Federal court of Malaysia over ruled a decision of the supreme court of Malaysia. As far as the High Courts are concerned about the practice of horizontal judicial precedent, The attitude and assumption of Malaysian High Court Judges are that one High Court Judge is not bound by decision made by another High Court Judge either of original or appellate jurisdiction. This was the position in the case of *Ng Hoi Cheu v Public prosecutor(1968) IMLJ 53*, where Justice Chang Min Tat did not follow the decision of his contemporary Justice Smith while exercising appellate jurisdiction. Also, in *Joginder Singh v Public prosecutor* the High court while exercising appellate jurisdiction ruled that it would not follow the decision of High Court in an appeal presided over by three judges. The above practice of High Court is observed to continue to exist unchanged under the Malaysian court system. Similarly, the court of Appeal in Malaysia over ruled High court's decision in *Yarikat Kayu Bersata v OMW(Sarawak)(1995)* and other cases which followed it. By so doing, the court of Appeal has jettisoned the fact that it is bound by its own decision and decision of other court of coordinate jurisdiction.

Operation of Judicial Precedent in Shari'ah Courts in Malaysia

In Malaysia, the three types of courts comprise of the civil courts, the *Shari'ah* courts and the native courts as earlier mentioned. The civil courts constitute of the Federal court, the court of Appeal and the High court as created by Federal constitution of Malaysia. Under civil court, judicial precedent is known to be widely practiced. However, *Shari'ah* courts for states and Federal were created under the Federal constitution 9th schedule, while the native courts were created under 19th schedule item 13 of the federal constitution, in Saba and Sarawak. It has been reported in the case of *Sukma Darmaja Sasmitat Madja v Ketua pengarah Penjara*, Malaysia and anor, that these set of courts are administered in a parallel way as one court cannot interfere in the work of others. The *Shari'ah* court in Malaysia constitutes of *Shari'ah* Appeal court, *Shari'ah* High

court and *Shari'ah* subordinate court. Eventhough, *Shari'ah* subordinate court is under the administrative control of *Shari'ah* high court in the states in relation to judicial matters, all *Shari'ah* courts are independent and the doctrine of judicial precedent is not applicable in *Shari'ah* courts. Even several attempts made to introduce judicial precedent into *Shari'ah* court system in Malaysia have not succeeded.

Operation of Judicial Precedent in Native Courts in Malaysia

Under the Federal Constitution of Malaysia Schedule 19 item 13, Native Courts were created in Saba and Sarawak. As reported in the case of *Sukma Darmawa Sasmitat Madja v Ketua Pengarah Penjara Malaysia & anor above*, this type of court is administered in a parallel way as other courts like the *Shari'ah* court or civil court cannot interfere in the work of each other particularly interim of enforcing judicial precedent. Indeed, the doctrine of judicial precedent is not applicable in the native courts in Malaysia.

Decisions of foreign courts

Decisions of courts that are not within Malaysian judicial hierarchy are not binding, but only persuasive. This was clearly shown in the case of Privy Council in *Jamil bin Harun v yankamsiah*, an appeal against decision of Federal court to include principle of itemizing heads of damage in personal injury cases where the Federal court followed the house of Lord's decision. In this case, relying on foreign decisions to decide cases in Malaysian courts was declared not binding but persuasive.

Judicial Precedent and the Nigerian Legal System

The Nigerian legal system is based on common law system, the *Shari'ah* law system and the customary law system similar to that of Malaysia. Under the common law system, the courts based decisions on the disputes brought to them after previous decision of a superior court and this practice is called judicial precedent. This judicial precedent is called a binding precedent if the court is bound to follow the precedent.

The Doctrine of Judicial Precedent or Stare Decisis in Nigeria

The doctrine of stare decisis stipulates that precedent must be followed in judicial decisions among courts. The doctrine applied in *Osakwe v. Federal College of Education (Technical) Asaba*. In this case, The Supreme court of Nigeria per Ogbuagu J.SC clearly defined stare decisis as abiding by the former precedent where the same or similar points came up again for litigation. However, the doctrine of stare decisis is said to be binding on lower courts from higher courts and persuasive between one high court and another high court or between courts of coordinate jurisdiction.

Operation of Judicial Precedent in Nigerian Courts

It has been observed, that the doctrine of judicial precedent or Stare decisis is also applicable under Nigerian legal system, in the sense that the lower court is bound to follow the decision of the higher court on any point even, if the decision of the higher court was reached per incuriam, as in the of *Osakwe v. Federal college of education Asaba (supra)*. It is however, further observed that both vertical operation of judicial precedent and

persuasive horizontal judicial precedent are generally operated in the common law courts in Nigeria.

Operation of Vertical Judicial Precedent in Nigerian Courts. By vertical operation of judicial precedent, it means the higher or superior court binds all subordinate courts under it to follow its prior decision. This practice of vertical operation of stare decisis is however enhanced by the operation of hierarchy of courts in Nigeria, which will be explained as follows:

Hierarchy of courts in Nigeria

The hierarchy of courts in Nigeria is as follows:

1. The Supreme court
2. The court of Appeal.
3. The High courts (Federal and state). The Sharia court of Appeal and the Customary Court of Appeal in the federal capital territory and the states.
4. The Magistrate court.
5. Area court or district courts of various grades, Customary and Native courts.
6. The National Industrial court, Investment and Securities Tribunal and Court Martial constitute specialized courts in Nigeria.

Supreme Court

The Supreme Court was established by section 230 (1) of 1999 constitution of Nigeria. It is the apex court in the hierarchy of courts in Nigeria. By vertical precedent its decision binds the court of Appeal and all other courts in Nigeria. The supremacy of the Supreme Court over all courts in Nigeria and essence for compliance with its decisions by all courts in Nigeria have been reaffirmed in the cases of *Dairo v. UBN PLC and Osho V. Foreign Finance Incorporation*.

Conflicting Decision:

In case of two conflicting decisions emanating from Supreme Court or the court of Appeal or High court, the court of appeal or court below is expected to follow the latter or last decision of Supreme Court as decided in the case of *Osakue v. Federal College of Education Asaba (supra)*. Comparatively, the position with binding vertical precedent of Supreme Court in Nigeria is similar to Malaysia as already discussed, all civil courts in Malaysia are bound to follow the decisions of the Federal Court of Malaysia.

The Court Of Appeal

Established by section 237 of 1999 constitution of Nigeria. The Court of Appeal is next to Supreme Court on the hierarchy of courts, its decisions are binding on the high court and all other courts below.

Conflicting Decision of Court of Appeal:

In case of two conflicting decisions of Court of Appeal, the court below is expected to stand by the earlier or first decision. Comparatively, the position with the Court of Appeal in Nigeria over vertical binding precedent above is the same with Malaysia. As already observed, the High Courts and other courts below are bound to follow the decision of the Court of Appeal in Malaysia even if delivered per incuram.

The High Court

There exist Federal and State high courts in Nigeria. The Federal high court was established by section 249(1) of the 1999 constitution. The High court attends to cases from many trial courts and it has the widest jurisdiction. All High courts in

Nigeria are courts of coordinate jurisdiction. By vertical operation, the decisions of High court are binding on the magistrate courts and other courts below just as the decisions of Appeal court are binding on the high courts in Nigeria. Comparatively the position of binding precedent under high court in Nigeria is virtually the same with the civil courts in Malaysia.

Magistrate Court

The Magistrate courts are bound by decisions of Supreme Court, Court of Appeal and High courts generally. This position of binding precedent on magistrate Courts in Nigeria is equally the same under Malaysian legal system.

Horizontal Operation of Judicial Precedent in Nigerian Courts

The above means the superior courts are bound by their previous decisions and decisions of court of coordinate jurisdiction. However, it is observed that only persuasive horizontal precedent is popularly operated among superior courts of coordinate jurisdiction as under this category.

Supreme Court

The Supreme Court is not bound by its previous decisions and can overrule her previous decisions if found unjusticeable. Previous decisions over ruled by the Supreme Court of Nigeria include: *Adisa v. Oyinwola, Johson v. Lawanson (and Mauria Grauhin Ltd v. Wahab Atanda Aminu)*. Wherein Supreme Court of Nigeria over ruled Privy Council Decision. Comparatively, it is observed that the Federal Court in Malaysia has similarly refused to be bound by previous decisions and can also over rule such, as it did in the case of *Malaysia National Insurance v. Lim Tiok (1997)2ML J 165*.

However, it has been noticed that lack of observation of precedent by the Supreme Court is bringing about conflicting decision and confusion at the apex court. The conflicting decision of Supreme Court is reflected in the case of *GTB PLC v Fadco Ind. LTD*, Also, in the case of *Moh v Martins Electronics Company Ltd*. The confusion would have earlier been solved in the case of *Osakwe v Federal College of Education Asaba*, where the Supreme Court held that where court of Appeal is faced with confusion over two conflicting judgments, the later judgment should be followed. But the confusion in this ruling later came to the glare when the same justice of the Supreme Court handed down a conflicting decision that the lower court or appellate court are free is free to choose any of the two conflicting decisions of Supreme that appears to look better. Therefore, this type of conflicting decision emanating from lack of observation of precedent by the Supreme Court can bring about rendering of partial judgement and should be discouraged.

Court of Appeal

The Court of Appeal in Nigeria is however bound by its previous decisions and cannot over rule them. But in case of decision from two divisions of Court of Appeal, the Court of Appeal is not bound to follow decision of the other division. Comparatively, the Court of Appeal in Malaysia is not bound by its previous decisions and can overrule them as it did in the case of *Yarikatu Kayu Bersatu v. UMW(Sarawak) (1995)*. However, despite the claim of observing precedent in the Court of Appeal in Nigeria, it has been found that observation of

precedent in the Court of Appeal is not adequate enough and this calls for a change. In line with this view, the former Chief Justice of Nigeria, Justice Dahiru Musapha, said the way judges of Court of Appeal distinguish cases and use it to circumvent judicial precedent has become alarming that the bad practice has to be discontinued. This type of situation which is prevalent in the Court of Appeal and the Supreme Court of Nigeria further prompted the remark of Justice Musdapha which denounced contradictory decisions coming out of Supreme Court and Appeal Court of Nigeria. He also bemoaned the confusion such judgments bring among the legal practitioners and the public and called for observance of doctrine of judicial precedence so as to deter judges from rendering partial judgement and promotion of judicial inequity.

The High Court

The High Courts in Nigeria is not bound by its previous decisions or previous decision of another High Court but can only follow persuasive decision of another High Court of the same coordinate jurisdiction. Comparatively, the High Courts in Malaysia are not similarly bound by their previous decisions or decision of another High Court but can only accept persuasive decisions of another High Court of coordinate jurisdiction.

Operation of Judicial Precedent in *Shari'ah* Court of Appeal and *Shari'ah* Courts.

It has been observed that Nigeria also operates many types of court system which include common Law court, *Shari'ah* court and customary courts. Under this system, application of doctrine of judicial precedent is said to be limited to courts that practice common law system, while *Shari'ah* court of Appeal and the Area courts do not practice judicial precedent. However, it has been found that by the virtue of appellate system, the *Shari'ah* court of Appeal follow the decision of Federal Court of Appeal and the Supreme court of Nigeria, while customary courts and area courts should follow decisions of high court.

In accordance with provision of section 11(e) of the constitution of Federal Republic of Nigeria 1999, for creation of *Shari'ah* court of Appeal of each of the northern states, the *Shari'ah* court of appeal of each of state is empowered to determine cases in accordance with Muslim laws. Therefore, where all parties either Muslim or non-Muslim have agreed to the proceeding and by writing, agreed that their case be settled in accordance with *Shari'ah*, such parties who have agreed to be bound by a particular law cannot come forward and request to be bound by judicial precedent again. From the above, the doctrine of judicial precedent does not apply in *Shari'ah* court as the rules of *Shari'ah* courts do not acknowledge the doctrine. As such, each court must determine a case on its merit and make intellectual interpretation based on principles of Islamic jurisprudence.

To strengthen the claim on exclusion of *Shari'ah* courts from applying judicial precedent, it has been reported that there were two prominent *Shari'ah* cases that bothered on application of judicial precedent and application of judicial precedent in *Shari'ah* courts on those two cases was totally criticised. The first case was that of *Karimatu Yakubu Paiko & anor v Yakubu Paiko & anor*, which bothered on Ijba (the right of a father to marry off her virgin daughter without her free consent). In deciding this case, the Federal Court of Appeal cited an earlier decision of *Shari'ah* court of appeal. Subsequently, some scholars criticized the Federal court of Appeal for relying on the earlier decision of the *Shari'ah* court of appeal in reaching its

own decision was a deviation from *Shari'ah* principles and pointed that the prescription of the law on non-applicability of judicial precedent in *Shari'ah* courts is clear. In the second case of *Chamberlain v Abdullahi Dan Fulani*, It was remarked by Gwarzo J, that in Islamic law, a judge is not bound by a precedent in a case which is similar and if a judge passed a judgment in a case, when a similar case comes, his judgment in the first case will not extend to the second case.

Therefore, a fresh and independent examination is required under the rule of law by same judge or another. Further, it has been observed that S.6.(3) of the constitution of Federal Republic of Nigeria (1999), has created hierarchy of courts including *Shari'ah* court and stated that each court will have all the power of a superior court of record. However, the fact that S. 240 of the constitution of Federal Republic of Nigeria 1999, provides for appellate jurisdiction of the Federal Court of Appeal over cases from *Shari'ah* court of Appeal of states and makes the decision of Federal court of appeal binding on the *Shari'ah* court of appeal and all courts below it in Nigeria, appears to be seen as the provision establishing binding precedent on the *Shari'ah* court of appeal, but this can be seen as the only limitation on the freedom of *Shari'ah* court on precedent but it can be said from all the above that judicial precedent is not provided for under *Shari'ah* law. Comparatively therefore, it can be said that the doctrine of judicial precedent is not applicable in *Shari'ah* courts in Malaysia and Nigeria as the *Shari'ah* courts were not empowered to do so under the legal system of the two countries.

Operation of Judicial Precedent in Customary Court of Appeal and customary courts

It has been generally observed that the customary court of Appeal and customary courts in Nigeria are not empowered to apply common law doctrine and they do not practice common law system, so, application of judicial precedent does not apply to customary courts in Nigeria, even though, for appellate purposes, appeals can be forwarded from customary court of appeal to the court of Appeal. By comparison, it is observed that the practice of judicial precedent is not applicable in native courts in Malaysia and in Customary Courts in Nigeria.

Decisions of Foreign Courts

It is allowed for Nigerian Courts to rely on English authorities and decision while interpreting provisions of Nigerian statutes that are the same as the English provisions but as a general caution, the Supreme Court has stressed the need to rely on Nigerian provisions above the foreign one. Therefore, foreign cases and decisions are only persuasive and are not binding on Nigerian courts. Thus, the court in *Alli v Okulaja* did not see any reason to be bound by English court of Appeal decision in *Edmeades v Thames Board Mills Ltd*. Having realized the fact that Nigeria is equally an independent state. The decisions of foreign courts are similarly not binding on courts in Malaysia but persuasive.

Comparisons

From the study above, the following comparisons can be drawn in respect of the practice of judicial precedent in Malaysia and Nigeria:

The Federal Court which is the apex Court in Malaysia, is bound to follow its previous decision, or the decision of its predecessor under the practice of horizontal precedent. But contrary to this, the Supreme Court which is the apex court in Nigeria, is not

bound to follow its previous decisions and can overrule such previous decisions. Therefore, it can be deduced from the above that there is a discrepancy in the observation of horizontal precedent between Malaysia and Nigeria at the Federal/Supreme court level.

The Court of Appeal in Malaysia, does not allow itself to be bound by its previous decisions and that of its co-ordinate court under the practice of horizontal precedent and has on several cases, over ruled decisions of its predecessor and co-ordinate court. But to the contrary also, the court of Appeal in Nigeria is bound to follow its previous decisions and cannot over rule such. This also shows that there is discrepancy in the observation of precedent at the Appeal Court level by Malaysia and Nigeria.

As for decision of the High Court a noticeable similarity has been observed over this. The High court in Malaysia is not bound to follow precedent on its previous decisions, that of their predecessors and co-ordinate court. Similarly, the High Court in Nigeria is not bound by its previous decision and has over ruled decisions of co-ordinate High Court. It is hereby remarked that vertical precedent is effectively observed by the High court of the two countries.

As for practice of precedent at the magistrate court level, similarity in practice is also observed. The Magistrate court in Malaysia is, bound by decisions of the Federal Court, the Court of Appeal and the High court. while the Magistrate court in Nigeria, is also bound by to follow precedent over the decisions of the Supreme court, the Court of Appeal and the High court. Therefore, it can be said that the two countries are similar in observing effective vertical judicial precedent at the magistrate court level.

In respect of practice of precedent among the Shariah courts, the Native and Customary courts, it is observed that the Shari'ah Court of Appeal, the Shariah court and the Native court in Malaysia are not bound by judicial precedent. Similarly, the Shari'ah Court of Appeal, the Shar'iah Court of and the customary court in Nigeria are not bound by judicial precedent. Therefore, the two countries do not practice precedent in the Sharia'h, Native and Customary courts.

As regards decisions of foreign court, it is observed that reliance on decisions of foreign courts to decide Malaysian cases is not binding but persuasive. Also in Nigeria, relying on decisions of foreign court to decide Nigerian cases is only persuasive and not binding Therefore, it can also be said that Both Malaysia and Nigeria observe similar practice of nonbinding precedent on decisions of foreign courts.

Conclusion

From the above, the definitions of judicial precedent have been examined. The types of judicial precedent, the principle of judicial precedent, the doctrine of judicial precedent, operation of doctrine of judicial precedent as well as advantages and disadvantages of judicial precedent have been discussed. The paper further made a comparative analysis on the application of judicial precedent in various courts in Malaysia and Nigeria, including, the *Shari'ah* and the native/customary courts. The paper found that there are discrepancies in the observation of precedent in Malaysia and Nigeria at the Federal/Supreme court and Appeal court levels. while the Federal court in Malaysia is bound by precedent, the Supreme Court in Nigeria is not. Also, while the Court of Appeal in Malaysia is not bound by precedent, the Court of Appeal in Nigeria is bound. It is hereby remarked that the above position does not make for proper

observance of judicial precedent in the two countries however the paper observed similarities in operation of precedent in Malaysia and Nigeria in other courts. Both the High Court and the Magistrate court in Malaysia are bound by precedent in their court decisions while the High Court and magistrate court in Nigeria are similarly bound by precedent. Further, it is similarly observed that the doctrine of judicial precedent is not applicable in the *Shari'ah* courts and the native/ customary court in Malaysia and Nigeria. Based on the above, it is advised that the two countries should pay more attention to observing horizontal precedent at the Supreme Court and Appeal court levels so as to discourage partial judgment and judicial inequity.

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