Malaysian Court Practice
Bulletin
Issue 2 of 2013

PP 11356/01/2013 (031727)

Civil Procedure

APPLICATION OF DOCTRINE OF JUDICIAL PRECEDENT IN *SHARIAH* COURTS

ABSTRACT

The doctrine of judicial precedent plays an empirical role in common law, but it has only persuasive value in European continent countries which are practicing civil law system. It has not been recognised as having binding force in Islamic judicial system. In Islam, each case has to be decided based on its own merit and previous decisions can only be considered as guidance for the future cases. This position is still being maintained by some countries such as Malaysia and Saudi Arabia. In Pakistan and Nigeria the doctrine of judicial precedent is applied in deciding cases. Due to this contradiction among Islamic judicial system in various countries, a question arises relating to the feasibility of the application of the doctrine of judicial precedent in Shariah courts. Accordingly, in this paper, the factual nature of the judicial precedents in Islamic judicial systems have been examined comparatively in some details with reference to some selected countries such as Malaysia, Nigeria and Pakistan. This paper points out that the doctrine of stare decisis and judicial precedent can be applied in Shariah courts as guiding precedents but not as binding since there is no express prohibition in Shariah to take judicial guidance from previous decisions.

Introduction

The doctrine of judicial precedent has no significance value in Islamic judicial system. In Islam, it is not necessary to apply the doctrine of judicial precedent in deciding cases and judges are suppose to decide each case on its own merit. On the other hand, judges are also not prohibited to use former judgments as guidance in deciding cases. Thus, all cases have to be decided on their own merits and previous decisions are merely considered as guidance for the future cases. This position is still being maintained by some countries such as Malaysia and Saudi Arabia. In Pakistan, quite the opposite, the doctrines of judicial precedents are followed by *Shariah* Courts.[1] Again, in Nigeria, the *Shariah* Court of Appeal is competent to decide cases before it and its eventual decision becomes binding not only on all subordinate courts but will also have an impact on the country's legal system. Due to this contradiction among Islamic judicial system in various countries, there is a need to evaluate feasibility of the application of doctrine of judicial precedent in *Shariah* courts. Accordingly, this paper especially intends to discuss the relevancy of the doctrine of judicial precedent in Islamic judicial system and analyse its application in *Shariah* courts of selected countries.

Application of the Doctrine of Judicial Precedent in Islamic Judicial System

A judge (*qadi*) plays an essential role in Islamic judicial system. In the Qur'an, Allah (*s.w.t.*) says: '(They like to) listen to falsehood, to devour anything forbidden. So if they come to you (O 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.'[2] In Islam, judges are entrusted to render justice. Initially, the judicial functions were exercised by the Prophet (s.a.w.) himself and the task was subsequently done by rightly guided Caliphs. During that time there was no appeal against them. *Ibn Hazm* has given reason for non-existence of appellate courts in that time because decisions in *Shariah* are declaratory in character. 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.[3] This view is also very clear from the message sent by Caliph Umar (*r.a*) to Abu Musa al-Ashari as it has mentioned by some classical

1 See Gans, Jeremy on *The Faces of Islamic Criminal Justice*.

2 The Qur'an, Surah Al-Maidah (05:42).

3 See Azad, Ghulam Murtaza in his book entitled *Judicial System of Islam* p 100; Ansari, Abdul Haseeb *'Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System*' Journal of Islamic Law Review Vol 3 2007 p 152.

LexisNexis

Legal Editor
Gaayatri Narayanasamy

Editorial Operations Associate
Karina Koh

Publishing Director,
Southeast Asia
Annette Rosemarie John

Printed in Malaysia by
Sincere Service Centre Sdn Bhd

LexisNexis, a division of Reed Elsevier (Singapore) Pte Ltd RES (2008), is a leading provider of legal and professional information in Asia, with offices in Malaysia, Singapore, Hong Kong, India, and other regions. The complete range of works published by LexisNexis include law reports, legal indexes, major works, looseleaf services, textbooks, electronic products and other reference works for Asia.

LexisNexis Malaysia Sdn Bhd
(formerly known as Malayan Law Journal Sdn Bhd)
T1-6, Jaya 33
3, Jalan Semangat, Seksyen 13
46100 Petaling Jaya
Selangor Darul Ehsan
Tel: 03 7882 3500
Fax: 03 7882 3506
Website:www.lexisnexis.com.my

scholars.[4] However, the later view is the prevalent one because it is closer to justice which is the ultimate purpose of adjudication.[5]

The Doctrine of Judicial Precedent in Islam

In Islam, a judge is tasked with disputes settlement through an explanation of the rights of genuine claimant by exposing the falsehood based on the proof and to end up with issuing the Islamic legal rule (*hukm*) under the mandatory *Shariah* provisions. Hence, judgment should not be based on personal interests. Therefore, judges should function with full qualifications required in *Shariah* to realise the justice. The Islamic judicial system combines adversarial and inquisitorial system. The judge is obliged to search for true in order to impart justice. The comprehensive functional and jurisdictional obligations of a judge have been clearly identified from the message sent by Caliph Umar (*r.a*) to Abu Musa al-Ash'ari. The relevant part to judicial precedent is: 'If you gave judgment yesterday and today, upon reconsideration, come to the correct 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 in worthlessness… Use your brain about maters that perplex you and to which neither the Qur'an nor the *Sunnah* seems to apply. Study similar cases and evaluate the situation through analogy with those similar cases.'[6] It can be seen evidently that this letter is contrary to the doctrine of judicial precedent. Thus, judges must give decisions based on their own personal interpretations. They are neither prevented nor bound by their previous decisions. However, the former decision may be taken as guidance.

It is clear that disagreement with the incorporation of the doctrines of judicial precedent adherent to solid evidences from consensus of the companions (*ijma'*). The fact that previous decisions made by judges of apex courts and subsequent decisions made by judges of subordinate courts are based on *ijtihad* (intellectual reasoning). Thus, in *Shariah*, none of this should be revoked because one of the Islamic legal maxims says: '*ijtihad* cannot be revoked by another *ijtihad*'. This legal maxim is of essence in relation to judicial system and accordingly it is discussed in detail for more clarification.

The Meaning of the Legal Maxim: '*Ijtihad* cannot be revoked by another *Ijtihad*'

This legal maxim is relating to validation and invalidation of *ijtihad*. It does not matter whether the revocation has been pronounced by the *mujtahid* (Islamic jurist) who initiates the *ijtihad*. According to this legal maxim, if a *mujtahid* exercises *ijtihad* in conformity to textual authority with a valid outcome, subsequently, the similar issue occurs and it appears to the same *mujtahid* or another *mujtahid*, then he gives an opinion different from the first one based on textual authority. The second opinion cannot revoke the first opinion even though there is identical similarity between the first issue and second one. It is immaterial whether the second *ijtihad* exercised by the same *mujtahid* or another *mujtahid*.

The Origin of this Legal Maxim

Scholars have traced back the pronunciation of this legal maxim (*qaa'idah*) to Imam al-Karkhi's book (*Usul al-Karkhi*) where he said: 'The norm is that any rule concluded based on *ijtihad* cannot be revoked by another *ijtihad* except by *Nass* (text).'[7]

The Proof of this Legal Maxim

The evidence of this legal maxim comes from the consensus of companions and the act of the second rightly guided Caliph Umar (*r.a*). The first evidence is consensus of the companions, as reported by Ibn Abbas (*r.a*) saying that the first Caliph Abu Bakar (*r.a*) after the demise of the Prophet (*s.a.w.*) gave some rules which Caliph Umar (*r.a*) disagreed. Nonetheless, he did not revoke Caliph Abu Bakar (*r.a*) rulings even when he became the second Caliph. One can infer from this statement that rules decided based on *ijtihad* cannot be revoked by another *ijtihad* except with clear and decisive *Nass*.

Secondly, it can be seen from the act of Caliph Umar (*r.a*) when he decided that the full brother (from the same father and mother) could not

4 The classic scholars referred to are *Al-Ramali, Abu Talib Az-Zaydu, Al-Qarafi, Ibn Farhun, al-Khalif al-Hanafi* and others. See Zaydan, Abdul Karim *Nizam al-Qada' fi Al-Shari'ah Al-Islamiyyah* (3rd edn, 2002) pp 233–237 Resalah Publishers.

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

6 See Zaydan, Abdul Karim, *Nizam al-Qada' fi Al-Shari'ah Al-Islamiyyah* (3rd edn, 2002) pp 233–237.

7 See Al-Karkhi, *Usul al-Karkhi ma' Tasis al-Nazar li-Dabbusu* p 118.

LexisNexis

participate with stepbrother in inheritance. Then the similar issue came before him later on and he associated the full brother with stepbrother in inheritance. They asked him that why he gave two different decisions in two similar factual cases. He answered that: 'The former decision was past and this is 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 would result to instability of transactions and inconsistency of rulings because the revocation of the first rule based on *ijtihad* might cause chaos and instability to some transactions which have already been performed on that basis. This also would lead to loss of confidence and authoritative interest in *mujtahid*, *qadi*, even *mufti* as well.[8]

The Scope of this Legal Maxim

Generally, the scope of this legal maxim includes three types. The first type is the exercise of *ijtihad* by a *mujtahid* on hypothetical issues that has no direct textual ruling. The second is the judgment of a judge in a case based on *ijtihad* where it is impermissible to revoke such judgment by another judgment. The later may be given by the same judge or another judge on the basis of legal maxim: 'A cause settled according to *Shariah* principles cannot be revoked, repeated or redone'.[9]

The General Rule of this Legal Maxim

The general rule is that *ijtihad* is a valid evidence in *Shariah*. Once the *ijtihad* has correctly exercised, it would not be revoked or altered even when the view of the *mujtahid* who passed the ruling changes on the same matter. Hanafi School has validated the evidentiary value of *ijtihad* by saying 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.[10] For the application of this rule, the following conditions must be fulfilled:

(1) The previous decision must be based on *ijtihad*.
(2) The previous *ijtihad* should not violate the texts from the Qur'an, *Sunnah*, decisive *ijma'* or clear analogy where an effective cause is being clearly mentioned.
(3) The previous *ijtihad* should not depend on clear error, iniquity and/or injustice.
(4) The previous *ijtihad* should not base on public interests (*moslahah Aammah*).

Therefore, the rule of *qaa'idah* seems to be benefit for elimination hardships for people due to changes of *ijtihad* on hypothetical issues. The application of changing *ijtihad* by means of revocation will resort to instability of the rules and cause severe harms.[11]

Application of Doctrine of Judicial Precedent in *Shahriah* Courts of Selected Countries

Some countries adopt dual judicial system, i.e., civil judicial system and Islamic judicial system. As a result, many unresolved issues and problems have occurred and notably one of them is the applicability of the concept of judicial precedent in *Shariah* courts. In this paper, Malaysia, Nigeria and Pakistan are selected as models to analyse the application of the doctrine of judicial precedent in their *Shariah* courts.

Malaysia

There are three sets of courts in Malaysia, namely, civil courts, *Shariah* courts and native courts of Sabah and Sarawak. The Federal Constitution of Malaysia empowers civil courts to administer civil law in the country, which consists of the Federal Court, the Court of Appeal and High Courts.[12] *Shariah* Courts of States and Federal Territories have been established under the Federal Constitution Ninth Schedule State List item 1 and the Federal List item (6)(e). Native Courts in Sabah and Sarawak are composed under the Federal Constitution Ninth Schedule State List item 13. In the case of *Sukma Darmawan Sasmittat Madja v Ketua Pengarah Penjara, Malaysia and Anor*,[13] it is observed that these three sets of courts are explicitly parallel and thus one court system cannot interfere in other systems.

Each States and the Federal Territories have their separate sets of *Shariah* courts system. The hierarchy of *Shariah* courts in Malaysia consists of *Shariah* Appeal Court, *Shariah* High Court and *Shariah* Subordinate Courts. Administratively, *Shariah* Subordinate Courts in every States are bound by orders from *Shariah* High Court.

8 Dr Muhammad Uthman Shubair (2006M-1426H). *Al-Qawa'id al-Fiqhiyyah and Dawabit al-Fiqhiyyah-fi-as-Shari'ah al-Islamiyyah*, Maktabat Dar al-Nafais pp 367–368.

9 Ibid, 368.

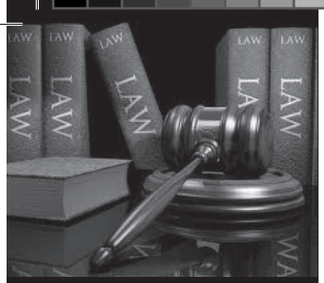
10 An-Nadawi, Ali *Al-Qawa'id wa Dawabit al-Mustakhlasah miun Kitab at-Tahrir* p 208.

11 Ibid, 165.

12 The Federal Constitution of Malaysia art 121–131.

13 *Sukma Darmawan Sasmittat Madja v Ketua Pengarah Penjara, Malaysia and Anor* [1992] 2 MLJ 241, FC.

Article



Article

However, in relation to judicial matters, all *Shariah* Courts are independent. In short, the doctrine of judicial precedent is not applicable in *Shariah* Courts of Malaysia. In this regard, several attempts were made to introduce the incorporation of the doctrine of judicial precedent into the Islamic judicial system. A remarkably attempt was 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).[14]

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 labeled and empowered to administer adjective common law of which the doctrine forms a part. Therefore, *Shariah* Court of Appeal, Customary and Area Courts are not empowered to apply adjective common law. Thus, the doctrine is not applicable to *Shariah* Courts. However, by virtue of appellate system, the Shariah 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.[15]

Under section 11(e) of the *Shariah* Court of Appeal of each of the northern States, the *Shariah* Court of Appeal of the state is empowered to determine certain cases in accordance with the Muslim Law, 'where 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 *Shariah*'. It is unfortunate that parties who had 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.[16] In short, the doctrine of judicial precedent is not applicable in *Shariah* Courts as the rules of *Shariah* do not acknowledge the doctrine. In fact, each judge must decide a case on its own merit and intellectual interpretation based on principles of Islamic jurisprudence (*Usul al-Fiqh*).

Two eminently outstanding cases that have touched on the issue of precedent in *Shariah* Courts are *Karimatu Yakubu Paiko & Anor v Yakubu Paiko & Anor*,[17] and *Chamberlain v Abdullahi Dan Fulani*.[18] In the case of *Karimatu Yakubu*, the question before the court was pertaining to *ijbar* (the right of a father to marry off a virgin daughter with or without her free consent). In this case, the Court cited an earlier decision of a *Shariah* Court of Appeal. Some scholars criticised the Federal Court of Appeal for relying on an earlier decision of the *Shariah* Court of Appeal in reaching its own decision and pointed out that this reliance was a deviation from *Shariah* principles.[19] One of the cogent positions related to Chamberlain case in which Gwarzo, J, observed that: '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.'[20] Thus, if a judge passed a judgment in a case and when a similar case come, his judgment in the first case would not extend to the second case because trying a case is not integral. Albeit a similar case arises after the first judgment between the same litigants or others, a fresh and independent examination is required under the rule of law by the same judge or another.[21]

The Constitution of the Federal Republic of Nigeria 1999 s 6(3) has created a hierarchy of courts including *Shariah* courts. It provides that: 'The courts to which this section relates, established by this Constitution for the Federation and for the States, specified in subsection 5(a)–(i) of this section will 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 will have all the powers of a superior court of record.

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

15 See Obilade, Akintunde Olusegun in his book *The Nigerian Legal System* (2005) pp 114–134 Spectrum Law Publishing.

16 Ibid, 165.

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

18 (1961–1989) 1 Sh.L.R.N. 54 at 61, per Gwarzo, JCA.

19 See Ladan, M.T. in his book *Introduction to Jurisprudence Classical and Islamic* (2006) pp 202–295 Malthouse Press Limited.

20 See commentary *Mukhtasar Khalil* Vol 2 entitled Jawahir al-Iklil p 30.

21 *Chamberlain v Abdullahi Dan Fulani*. For more details see Bello, Aminu Adamu in his article *'Binding Precedent and Shari'ah/Islamic Law in Nigeria: An Attempt at a Civil-Criminal Distinction'* Islamic Law and Law of the Muslim World Paper No. 09-67. Available at <http://ssrn.com/abstract=1397737>

The courts to which s 6(3) relates, include at s 6(5)(g), a *Shariah* 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 *Shariah* implementing states in Nigeria to create their respective processes of implementation, establishing courts and assigning jurisdiction to them.[22] This hierarchy has apparently divided the courts into superior and inferior courts. It was argued that judges of superior courts may now each tend to place themselves in the position of *mujtahid* solely by virtue of their appointment,[23] whilst judges in inferior courts would be *muqalid*. As a result, the decision made by judges of *Shariah* High Courts will have binding authority upon judges of *Shariah* Subordinate Courts.

Again, the Constitution of the Federal Republic of Nigeria 1999 s 240 provides for the appellate jurisdiction of the Court of Appeal. It 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, *Shariah* 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 *Shariah* Court of Appeal of a State lay to the Court of Appeal, regardless of the nature of the particular law fall under the jurisdiction of the Federal High Court by virtue of appeal.[24]

Although the Constitution of the Federal Republic of Nigeria 1999 s 244 provides that an appeal shall lie from decisions of a *Shariah* Court of Appeal to the Court of Appeal as of right in all civil proceedings before the *Shariah* Court of Appeal with respect to any question of Islamic personal law which the *Shariah* Court of Appeal is competent to decide, the Court of Appeal will not decline jurisdiction to hear criminal appeals from the *Shariah* 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 decisions are binding on all courts below it in Nigeria. Thus, it can be seen that these provisions establish binding precedent on the *Shariah* Court of Appeal of each State.

Pakistan

Pakistan has an integrated judicial system where courts are free to decide on civil matters peculiar to *Shariah*. For instance, Criminal Courts have jurisdiction to hear cases pertaining to *hudud*. Decisions of Criminal Courts are appealable to the Federal *Shariah* Court. The Federal *Shariah* Court has eight Muslim judges with three *Ulama'* and it is also being 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 law to *Shariah* precepts. Appeal against its own decision lies to the *Shariah* Appellate Bench of the Supreme Court consisting 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 *Shariah* principles. By virtue of the Constitution of Pakistan art 203, decisions of the Federal *Shariah* Court are binding on High Courts as well as Subordinate Courts. Moreover, according to the Constitution of Pakistan art 189, decisions of Supreme Court are binding upon all other courts. Thus, in Pakistan, the doctrine of judicial precedent is applicable in *Shariah* Courts as in the case of common law.[25]

Conclusion

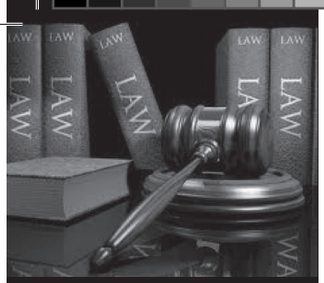
It can be observed that the doctrine of judicial precedent has no significant value in Islamic judicial system as it has been discussed above from the consensus of companions, the act of the second rightly guided Caliph Umar (*r.a*) and the legal maxim (*ijtihad* cannot be revoked by another *ijtihad*). In Islam, judges must decide each case in accordance with its own merit. Some might assert that there is communal interest in applying the doctrine of judicial precedent and it seems to be right to some extent. However, there are some significant negative effects which the incorporation of the doctrine of judicial precedent may cause, i.e., instability of legal rulings, closing the door of *ijtihad*, feeling inferiority of subordinate courts and continuation of erroneous judgment which leads to injustice.

22 See Oba, A. A. in his article *'Lawyers, Legal Education and the Shari'ah Courts in Nigeria'* Journal of Legal Pluralism (2004) nr–49 pp 278–310.

23 Ibid, 134.

24 For more details see the Constitution of the Federal Republic of Nigeria 1999 ss 277–278.

25 See Ansari, Abdul Haseeb *'Judicial Precedents: An Expository Study of Civil Judicial System and Shari'ah Court System'* Journal of Islamic Law Review Vol 3, 2007 pp 158–159.



Article

If the doctrine of judicial precedent is applied in Islamic judicial system, judges of superior courts will be considered as *mujtahid*, whilst judges of inferior courts will be considered as *muqalid*. This view opens the ground for closing the door of *ijtihad* which is highly discouraged by majority of the contemporary *Shariah* scholars. It is also undesirable that a *qadi* will be an absolute *muqalid*, who is bound to follow the decision of a *mujtahid*, whereas a *qadi* himself must possess qualification of exercising *ijtihad* in deciding cases. Having agreed with the concept of stare decisis, suppose the decision of superior Courts is erroneous, the injustice would be retained. In Islam, on contrary, the injustice or error will not be continually recurring. It is noteworthy that the rule of *ijtihad* should not be revoked by another is only applicable if both former and latter decisions are *ijtihad* based. If there is a clear text which is ignored by one of the decisions, a decision with text must be applied. Again, if a *qadi* in a lower court singles out ratio decidendi of a case and extends the rule of previous case by virtue of analogy, it would not be considered as binding precedents.

In a nutshell, there is no express prohibition in *Shariah* to use decisions of the former cases as guidance for subsequent cases. Accordingly, it is recommended that the doctrine of judicial precedent can be applied in *Shariah* courts as guiding precedent but not binding. By applying previous decisions as guiding precedents in deciding future cases, the Islamic judicial system would offer some degree of assurance of the judicial consistency, certainty and reliability.

REFERENCES

(1) Al-Karkhi *Usul al-Karkh ma' Tasis al-Nazar li-Dabbusu*.

(2) Al-Ramali, Abu Talib Az-Zaydu, Al-Qarafi, Ibn Farhun, al-Khalif al-Hanafi and others. See also Zaydan, Abdul Karim *'Nizam al-Qada' fi Al-Shariah Al-Islamiyyah* (3rd edn, 2002) Resalah Publishers.

(3) An-Nadawi, Ali *Al-Qawa'id wa Dawabit al-mustakhlasah miun Kitab at-Tahrir*.

(4) Ansari, Abdul Haseeb *'Judicial Precedents: An Expository Study of Civil Judicial System and Shariah Court System'* Journal of Islamic Law Review, Vol 3, 2007.

(5) Azad, Ghulam Murtaza in his book entitled *Judicial System of Islam*.

(6) Bello, Aminu Adamu in his article *'Binding Precedent and Shari'ah/Islamic Law in Nigeria: An Attempt at a Civil-Criminal Distinction'* Islamic Law and Law of the Muslim World Paper No. 09-67. Available at <http://ssrn.com/abstract=1397737>

(7) Gans, Jeremy on *The Faces of Islamic Criminal Justice*.

(8) Ladan, M.T. in his book *Introduction to Jurisprudence Classical and Islamic* (2006) Malthouse Press Limited.

(9) *Mukhtasar Khalil* Vol 2 entitled Jawahir al-Iklil.

(10) Oba, A. A. in his article *'Lawyers, Legal Education and the Shariah Courts in Nigeria'* Journal of Legal Pluralism (2004) nr–49.

(11) Obilade, Akintunde Olusegun in his book *The Nigerian Legal System* (2005) Spectrum Law Publishing.

(12) Dr Muhammad Uthman Shubair (2006M-1426H). *Al-Qawa'id al-Fiqhiyyah wa Dawabit al-Fiqhiyyah-fi-as-Shariah al-Islamiyyah*, Maktabat Dar al-Nafais.

(13) The Qur'an, Surah Al-Maidah (05:42).

By

Kyaw Hla Win @ Md. Hassan Ahmed

****Ph.D Candidate, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.***

Email: <kyawhlawin88@gmail.com>

Sa'id Adekunle Mikail

****Ph.D Candidate, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.***

Email: <saidmik@gmail.com>

Dr. Mahamad Arifin

****Associate Professor, Department of Islamic Law, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia.***
Email: <mahamad@iium.edu.my>