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PREVENTING DIFFERENT JUDGEMENTS ON SIMILAR CASES: A COMPARATIVE ANALYSIS ON IMPLEMENTATION OF JUDICIAL PRECEDENT IN NIGERIAN AND MALAYSIAN COURTS

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Abstract

Judicial precedent, a doctrine 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 asa means of preventing inconsistency in judgments and promoting speedy judicial decisions. However, the implementation of the doctrine is observed to vary among countries. This paper makes a comparative study of implementation of judicial precedent in Nigeria and Malaysia with a view to knowing the level of compliance, areas difference and similarity between the two countries and preventing different court judgments and decisions in similar cases. Based on doctrinal research approach, the paper examines the concept of judicial precedent and the operation of doctrine of judicial precedent among different categories of courts in Malaysia and Nigeria, It is however observed that Federal court which is the apex court in Malaysia is bound by precedent while the Supreme Court in is the Nigeria is not. The Court of Appeal in Nigeria is bound by precedent while that of Malaysia is not. On the other hand, it is observed both the High courts and in Magistrate courts in Malaysia are bound by precedent which is a similar position with Nigeria. Also, it is observed that judicial precedent is not applicable to Shari'ah courts, the Native and customary courts in Malaysia and Nigeria. The paper concludes that horizontal judicial precedent is not effectively practiced in Malaysia and Nigeria. This study provides an opportunity to compare note on the administration of judicial precedent in Nigeria and Malaysia. It further shows that more efforts should be made towards ensuring an effective compliance with judicial precedent in Nigeria and Malaysia so as to always avoid different judgments on similar cases.

Keywords: Judicial precedent, Operation and Comparative analysis.

1. INTRODUCTION

The practice whereby other courts follow earlier decision or judgment made by a judge in a similar case is called judicial precedent. This practice which exists for a long time is however common among the countries that practice common law system. The importance of judicial precedent includes promotion and preservation of uniformity in court judgment on similar cases as well as giving quick judgement on cases in courts.

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Despite the above, it is observed that judicial precedent is not seriously complied with particularly among the courts in the top cadre in Nigeria and Malaysia. For example, the Supreme Court of Nigeria and the Court of Appeal in Nigeria as well as the Federal Court in Malaysia (Equivalent of Supreme Court of Nigeria) and the Court of Appeal inMalaysia are known to have engaged in violation of with judicial precedent in the declaration of some of their judgments. This type of bad development bringsabout non uniformity in declaration of judgments among various divisions of Appeal in Nigeria and will also lead to delay in delivery of speedy judicial decision of Supreme Court of Nigeria and the Federal Court in Malaysia. Therefore, this paper shall focus discussion 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 of implementation of judicial precedent in the civil / common law courts, the *Sharī'ah* courts and native/customary courts in Malaysia and Nigeria. This is done with a view to knowing the level of compliance with implementation of judicial precedent and for preventing declaration of different courts judgments in similar cases.

2.0 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.[1] 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 fact sand 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.[2] 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.[3] 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.[4] Some instances where the above principle of judicial precedent was applied include the cases of Jones v Kany,[5] and Jones v Kernott,[6] In the above, the supreme court of UK did not depart from previous decisions of House of Commons. Also in the case of *Clement vIwuanyanwu (1988) 3 NWLR Pt (107),*

[1]Byrant A. Garner (ed),Black Law Dictionary(8th edn, Thompson West 2004) 45.
[2]Hamza W.A, Bulan R, An Introduction to the Malaysia Legal System(Oxford FajarSdnBhd,Malaysia, 2003) 68.
[3] Ibrahim A, Joned A, The Malaysian Legal System, (DemanBahasaolanPustaka,KualarLumpur,Malaysia1987)113.
[4]American Heritage Dictionary of English Language(5thednHougtonMiffinHarcot Publishing Company,2011) 1
[5]1WLR,1234(1966)
[6]UKSC (2011)

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.[7]

2.1 Types of Precedent

Precedent may be classified as original, derivative and declaratory or binding and persuasive as follows:[8]

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.[9] 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 non exists before.[10]

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 with 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.[11]

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[7]HamzaW.A,Bulan R, (n2) 69.

[8]John OchirimeAsien,Introduction into Nigerian Legal System,,(Sambookman Publication 1998) 72.

[9]See Zaidan v Mohasen [1973] 11, FS.C.1 at 17.

[10]E.gChairman L.E.D.B v Oloponkwu (1959) 4 F.S.C.1 at 53, where court adopted an earlier rule in respectof a salt factory that turn outto be a wasteful venture.

[11]See Johson -Lawanson[1971] 1 MLR 380 , [1971] 1 ALL MNR 56 where supreme court upheld Awosanya v Anifowoshe (1959), 4 FFSC 94 and took opportunity to depart from earlier decision

1.3 The principle of judicial precedent or Stare Decisis

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

I. Ratio decidendi: this means reasons behind the decision, it also means the principle of rule of law on which court decision is bounded.[12] Ratio decidendi can also be explained as the point in a case which determines the judgment 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 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.[13]

ii. 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.[14] As it was explained by Edgar Jnr FCJ, in *Cooperative Central Bank Ltd((receivership) v Feyen Development SdnBhd,*[15] 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.[16]

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.[17] 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. Interm of weight and authority, ratio decidendi is observed to carry greater weight than Obita dictum. Further, interm 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.[18]

2.2 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

[12]Byran A. Garner n 1 at 1269.
[13]What is Ratio Decidendi?https://www.google.com/#q=ratio+decidendi>accessed 10 August 2015.
[14]Venugopel A. Vijayalakshmi, Introduction to Law in Malaysia,(Sweet Maxwell Publications Malaysia,2011) 123.
[15][1997] 3 AMR 2673 (Federal Court) at 2681.
[16] What is ratio Decideni? (n 13) 1
[17]Robert G ,Scofield, The Distinction between Judicial Dicta and ObitaDictahttp://www.com.my/?gws_rd=ss/#q=what+is+the+difference+between+ratio+decidendi+and+obita+dicta> accessed 12 August 2015
[18]Ibid

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, whether past or present in the same hierarchy.[19] 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.[20] In the case of *Clementv Iwunayanwu*,[21] 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 RamanathayOmg,*[22] Hock They 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 vpublic prosecutor stated*:[23] "The doctrine of Stare decisis is a necessary and well established doctrine in 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.[24] For example, if earlier decision was given from a magistrate court, a judge of high court is not bound to rely on the earlier decision in his current decision if the facts of the case are similar.

2.3 Operation of Doctrine of Judicial Precedent or Stare Decisis

The doctrine of stare decisis operates in two ways namely;[25]

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 cadre 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[26]. Also see the case of Johnson v Lawanson.[27] From the above, it can be understood that in practice, courts must abide by decisions of higher and other relevant court in the

[19]Paton G.W.A, Text book of Jurispudence, (Oxford Claredon Press, 1946) 151.
[20]Illegbu E.A, Duru S.A &Dafe E.U, Rationality of Judicial Precdent in Nigeria's jurisprudence (2014), (4) (5) America International Journal of ComtemporaryReasearch, 150.
[21](1988) 3NWLR pt (107), at 54.
[22][1967] 2 MLJ 211 (Federal Court) at 213.
[23][1971] 1 MLJ 1 (Singapore)at 1
[24]Venugopel A. Vijayalashimo,(n 11) 124.
[25]Ibid ,125.
[26]Ibrahim A, Joned.A,(n3) 68.
[27][1971] 1ALL N.L.R. 56.

same hierarchy. However, decision of superior court outside the jurisdiction in Nigeria are not binding but may be followed. For example, in the case of Alli vOkulaja,[28] it was held that the Nigerian courts are not bound to follow the decision of English Court of Appeal.

2.4 Advantages of Judicial Precedent

Operation of judicial precedent is said to have the following advantages:[29]

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
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.

2.5 Disadvantages of judicial precedent:[30]

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.

[28] [1970] 2 ALL N.L.R. 35.
[29] OgbuOsita, Modern System of Justice In Nigeria, (Tona Micro Publishers, Lagos, 1995) 151.
[30] Venugopel a Vijayalasko (n 11) 123

3.0 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.[31] The doctrine of stare decisis operated vertically and horizontally in Malaysian courts as follows:

3.1 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 Sessions Court of Malaya and Session court of Sabah and Sarawak The above is followed by magistrate court of Malaya and Magisterate 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 *Sharī'ah* court and Native court which constitute the three types of courts in Malaysia. By way of operation in the civil courts of Malaysia, the decisions of the Federal court of Malaysia is bind on 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 courts 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 or gnorant and faulty reasoning.[32] This was the position in *Haris Solid State v Bruno Gentil Pereira*[33] 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*[34] as 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 the Federal infirmity, because, it was a decision of the apex court and it constituted a binding precedent.[35] Also, in the case of *Cooperative Central Bank v Feyen Development*[36] 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.

[31] Hamza W.A, Bulan R, An Introduction to the Malaysian Legal (System, Oxford Fajar Sdn Bhd Malaysia 2003) 69.
[32] Ibrahim A, Joned, (n20) 113.
[33] (1996) 3MLJ 489
[34] (1997) 2MLJ 829.
[35] Hamza W.A, Bulan R, (n 23) 71.
[36] (1977) AC 1027.

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*[37] 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 B*ased 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.[39] 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 hierachy are expected to follow the later decision of the court of appeal as this represents the existing state of law. So also. the Court appeal is bound to follow the final decision of Federal Court of Malaysia even if there is any conflicting cases. 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 with such problems like:[40]

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 Asia Fire Bricks v Non Metallic mineral Product Manufacturer Employees Union.*[41]

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 *HartaEmpat vKoperasi Rakyat.*[42] The above practice of noncompliance with the doctrine of judicial precedent may endanger survival of judicial precedentinterm of uniformity in judicial decision and realization of speedy judicial decision in Malaysian courts if this practice is not improved upon.

3.2 Horizontal operationof judicial precedent in Malaysia

By horizontal operation of judicial precedent, it means that a court usually an

[37](1964) AC1129.
[38](1964) AC1129.
[39]Ibid, 72.
[40]Id, 73.
[41](1995) 2 MLJ 317.
[42](1997) 1 MLJ 381.

appellate court is bound by its own decision, the decision of its predecessors and decisions of courts of co-ordinate jurisdiction.[43] 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,[44] 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, decisions in appeals 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.*[45] The case which was to determine the extent of liability of insurers against their third party under comprehensive 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 Supreme Court was the earlier name given to the apex court in Malaysis but this was later changed to Federal court of Malaysia and its responsibilities and earlier decisions passed to the Federal Court of Malaysia.In its decision, 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) 1MLJ 53*,where Justice Chang Min Tat did not follow the decision of another High Court Judge, Justice Smith while exercising appellate jurisdiction over a case from the lower court.. Also, in *Joginder Singh v Public prosecutor* [46]the High court, while exercising appellate jurisdiction over a case from

[43]Hamza W.A Bulan R,(n 27) 74.
[44]Ibid 90.
[45](1997) 2MLJ 165.
[46](1948) 2MLJ 133.

the magisterate court, ruled that it would not follow the decision of another 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 its previous decision in *YarikatKayuBersata v OMW(Sarawak)(1995)* and other cases which followed it.[47] 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.

3.3 Operation of Judicial Precedent in *Sharī'ah* Courts in Malaysia

In Malaysia, the existing three types of courts comprise of the civil courts, the *Sharī'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 the civil court, judicial precedent is known to be widely practiced. However, *Sharī'ah* courts for states and Federal were created under the Federal Constitution 9th schedule,[48] while the native courts were created under 19th schedule item 13 of the federal constitution.

It is reported in the case of *Sukma Darmaja SasmitatMadjavKetuahpengarah Penjara,* Malaysia and anor,[49] The *Sharī'ah*court in Malaysia constitutes of *Sharī'ah*Appeal court,*Sharī'ah*High court and *Sharī'ah*subordinate court. Eventhough, *Sharī'ah*subordinate court is under the administrative control of *Sharī'ah*high court in the states in relation to judicial matters, all *Sharī'ah*courts are independent and the doctrine of judicial precedent is not applicable in *Sharī'ah*courts.Even several attempts made to introduce judicial precedent into *Sharī'ah*court system in Malaysia have not succeeded.[50]

3.4 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 Sarawa. As reported in the case of *SukmaDarmawaSasmittatMadja v KetuahPengarahPenjarah Malaysia&anor above,*[51] this type of court is administered in a parallel way as other courts like the *Sharī'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.

[47] HamzaW.A,Bulan R, (n 30) 11.
[48] Federal Court of Malaysia, Act 19, Article 121-135.
[49] (1992) 2MLJ 219 FC.
[50] See Ansari Abdul Haseeb, Judicial Precedent: An Expository Study of Civil Judicial System and Sharia Court System,(2007) (3)Jounal of Islamic Law Review, 154-158.
[51] Ibid

3.5 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,*[52] 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.

4.0 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 lower courts based their decisions on the disputes brought before them on the previous decision of superior courts and this practice is called judicial precedent. This judicial precedent is called a binding precedent if the court is bound to follow the precedent.[53]

4.1 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 *Osakwev. Federal College of Education (Technical) Asaba.*[54] 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.

4.2 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.[55]

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 follow:[56]

[52] [1948] 1MLJ 217
[53] American Heritage Dictionary of English Language, (n4) 1
[54] (2010) NWLR (PL1201) at 34.
[55] Ikegbu E.A, Duru S.A, &Dafe E.U, n 14 at 151.
[56] Magarret C. Onokan, Family Law, (Specftrum Books Ltd, Ibadan Nigeria, 2003) 65.

Hierarchy of courts in Nigeria

The hierarchy of Courts in Nigeria is as follow

1. The Supreme Court of Nigeria
2. The Federal Court of Appeal.
3. The High Courts (Federal and state). The Federal Revenue Court. 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.[57]

4.2.1 Supreme Court

The Supreme Court was established by section 230 (1) of 1999 constitution of Nigeria.[58] 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 has been reaffirmed in the cases of *Dairo v. UBN PLC and Osho V. Foreign Finance Incorporation.*[59]

Conflicting Decision:

In case of two conflicting decisions emanating from Supreme Court or the Court of Appeal or a 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.

4.2.2 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.

4.2.3 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.

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[57] Ibid

[58] The Constitution of Federal Repulic of Nigeria 1999.

[59] (2007) 16 NWLR (pt 1059)99 at 159 and(1991) 4NWLR (pt 184) 157.

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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,*[52] 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.

4.0 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 lower courts based their decisions on the disputes brought before them on the previous decision of superior courts and this practice is called judicial precedent. This judicial precedent is called a binding precedent if the court is bound to follow the precedent.[53]

4.1 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 *Osakwev. Federal College of Education (Technical) Asaba.*[54] 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.

4.2 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.[55]

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 follow:[56]

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[52] [1948] 1MLJ 217

[53] American Heritage Dictionary of English Language, (n4) 1

[54] (2010) NWLR (PL1201) at 34.

[55] Ikegbu E.A, Duru S.A, &Dafe E.U, n 14 at 151.

[56] Magarret C. Onokan, Family Law, (Specftrum Books Ltd, Ibadan Nigeria, 2003) 65.

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 incuriam.

4.2.4 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.[60] 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.

4.2.5 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.

5.0 Horizontal Operation of Judicial Precedent in Nigerian Courts

The above means the superior courts are bound by their previous decisions and decisions of courts 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.

5.1 Supreme Court

The Supreme Court is not bound by its previous decisions and can over-rule 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[61] 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)2MLJ 165.*

5.2 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*YarikatuKayuBersatu v. UMW(Sarawak) (1995).*

[60]The Constitution of Federal Republic of Nigeria 1999.
[61] (2000) 10 NWLR PT 674, 116, (1971) ALL NLR 57 and Appeal no 17 (1957)decided 24/7/58.

5.3 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.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.

5.4 Operation of Judicial Precedent in *Sharī'Ah*Court of Appeal and *Sharī'Ah* Courts.

It has been observed that Nigeria also operates many types of court which include common Law court, *Sharī'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 *Sharī'ah* Court of Appeal and the Area courts do not practice judicial precedent.[62] However, it has been found that by the virtue of appellate system, the *Sharī'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.[63]

In accordance with provision of section 11(e) of the constitution of Federal Republic of Nigeria 1999[64] *Sharī'ah*court of Appeal is established for of each of the northern states of Nigeria. The *Sharīah*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 *Sharī'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 *Sharī'ah* court as the rules of *Sharī'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 *Sharī'ah*courts from applying judicial precedent, it has been reported that there were two prominent *Sharī'ah*cases that bothered on application of judicial precedent and application of judicial precedent in *Sharī'ah*courts have been severally criticized. The first case was that of *Karimatu Yakubu Paiko & anor vYakubu Paiko & anor*,[65] which bothered on the power of Ijba (the right of a father to marry off his virgin daughter without her free consent). In deciding this case, the Court of Appeal cited an earlier decision of *Sharī'ah*court of appeal.[66] Subsequently, the Court of Appeal has been criticized for relying on the

[62]See Obilade, Akintunde Olusegun in his book ,The Nigerian Legal System (2005) 114.
[63]Ibid 116.
[64]Ibid 165.
[65](1969-1989) Sh LRN 54 at 61 per Gwarzo JCA.
[66]See Ladan M,T, Introduction to Jurisprudence, Classical and Islamic Law, (Malt House Press Ltd 2006) 202-295.

earlier decision of the *Sharī'ah*Court of appeal in reaching its own decision as a deviation from *Sharī'ah*principles and pointed that the prescription of the law on non applicability of judicial precedent in *Sharī'ah* Courts is clear.[67] In the second case of *Chamberlain v Abdullahi Dan Fulani*,[68] 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 is observed that S .6.(3) of the constitution of Federal Republic of Nigeria (1999), created hierarchy of courts which includes *Sharī'ah*Court of Appeal 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 Nigeria1999, provides for appellate jurisdiction of the Court of Appeal over cases from *Shariah* Court of Appeal in the states and makes the decision of Court of Appeal binding on the *Sharī'ah*courtof appeal in the states and all other courts below it, appears to be seen as the provision that preserves a binding judicial precedent on the *Sharī'ah*court of appeal. Though, this can be conceived as the only limitation on the freedom of *Sharī'ah*court on judicial precedent, it can be still be said that judging from all other considerations and cases above, judicial precedent is not provided for under *Sharī'ah* law.[69] Comparatively , it can be said that the doctrine of judicial precedent is not applicable in *Sharī'ah* courts in Malaysia and Nigeria as the *Sharī'ah*courts are not compelled to do so under the legal system of the two countries.

5.5 Operation of Judicial Precedent in Customary Court of Appeal And customary courts

It has been generally observed that the Customary Court and Customary Court of Appeal 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,[70] 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.

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[67] Ibid

[68] Chamberlain v Abdullahi Dan Fulani. For detail see Bello AminuAdamu in his article, 'Binding Precedent and Sharia / Islamic Law in Nigeria: An Attempt at a Civil – Criminal Distinction'

[69] Said Adekunle Mikail& Mohammed Arifin.'Application of Doctrine of Judicial Precedent in Sharia Courts', Social Science Research Network< paper ss.m .con / so/3/ paper /cfm 2 abstract-id=2405000>accessed 18 January 2015.

[70] Obilade, AkintundeOlusegun T, (n49) 134.

5 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.[71] Therefore, foreign cases and decisions are only persuasive and are not binding on Nigerian courts. Thus, the court in *AllivOkulaja* did not see any reason to be bound by English Court of Appeal decision in *Edmeadesv Thames Board Mills Ltd.*[72] 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.

6.0 COMPARATIVE ANALYSIS

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

On the decisions of Federal or Supreme Court, it is observed that the Federal court of Malaysia is bound under the practice of horizontal precedent, to follow its previous decision, or the decision of its predecessor. But contrary to this, the Supreme Court in Nigeria is not bound to follow its previous decisions and can over-rule such previous decisions.[73]

On the decisions of Court of Appeal, it is observed that the Court of Appeal in Malaysia does not allow itself to be bound by its previous decisions 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.[74]

As for decision of the High Court, it is however observed that 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

The Magistrate court in Malaysia is, however, bound by decisions of the Federal Court, the Court of Appeal and the High court. Similarly, the Magistrate court in Nigeria, is bound by decisions of the Supreme court, the Court of Appeal and the High court. 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,theShar'iah Court of and the customary court in Nigeria are not bound by judicial precedent.[75]

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[71]Esein J.O, Introduction to Nigerian Legal System, (Sam Bookman Publications, Ibadan, 1998) 85.
[72]{1970] 2ALL NLR 35 at 44.
[73]Obilade, Akitunde, O, The Nigerian Legal System,(n 60) 114.
[74]Essien J.O Introduction to Nigerian Legal system(n61) 85
[75]Ladan, M.T, Introduction to Jurisprudence(n.56)285.

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

7. 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 *Sharī'ah* and the native/customary courts. The paper observed that 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. However both the High Court and Magistrate court in Malaysia are bound by precedent while the High Court and magistrate court in Nigeria are similarly bound by precedent. Further, it is observed that the doctrine of judicial precedent is not applicable in the *Sharī'ah*courts and the native/ customary court in Malaysia and Nigeria.

However, it is noted from this study that both Malaysian and Nigerian courts do not accord enough compliance to horizontal precedent like vertical precedent, this aspect should be improved upon to facilitate a more effective implementation of judicial precedent and to always prevent the current spate of arriving at different court judgments on similar cases in the two countries and essentially to promote speedy judicial decisions in courts.