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"Precedent in Islamic Law with Special Reference
to the Federal Shariat Court and the Legal System
in Pakistan"

Muhammad Munir, Dr., *International Islamic University, Islamabad*



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Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan

MUHAMMAD MUNIR*

Abstract

This paper attempts to answer the question whether the common law doctrine of precedent as practiced in Pakistan is compatible with the traditional Islamic legal system. The paper examines the role of the principles of Islamic law in the Pakistani legal system and focuses on the role of the Federal Shariat Court and the binding status of its decisions. The paper also examines the prevalent practice of courts in Saudi Arabia and finds that judges there are not bound by the decisions of the higher courts. Those who oppose the doctrine of precedent generally argue that this doctrine restricts judges from undertaking ijtihād and that it is against the principle of independence of judiciary. However, the supporters of precedent argue that the doctrine ensures uniformity and analytical consistency in the legal system. It concludes that the practice of binding precedent under Articles 189, 201 and 203 GG of the 1973 Constitution is “institutionalized taqlid” and that there is little, if any, material about the role of precedent in Islamic law.



Let not a judgment you rendered yesterday, and that you have [later] reflected upon, receiving guidance towards the correct view, prevent you from restoring a right. Rights are ancient and cannot be annulled. Restoring a right is by far better than persisting in a manifest error.**

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** The letter of 'Umar ibn al-Khaṭṭāb (d. 23/644) to Abū Mūsā al-Ash'arī (d. 44/665). For the

Introduction

This article deals with the issue of precedent in Pakistani law. Primarily, we want to discuss the jurisdiction of the Federal Shariat Court (hereafter FSC) and its attitude regarding precedent. However, this article will also discuss, in the Pakistani legal context, the issue of precedent in Islamic legal theory as such. The main questions that are raised in this paper are: What is the position of Islamic legal principles in the Pakistani legal system? What is the basic structure doctrine in its legal system? What is the jurisdiction of FSC? Is FSC bound by the judgments of the Shariat Appellate Bench of the Supreme Court? Also, is FSC bound by the decisions of the Supreme Court and the High Courts in matters of law other than the question whether a certain law is repugnant to the injunctions of Islam? Is FSC bound by the decisions of the Shariat Bench of the High Courts that existed prior to constitution of FSC? Does the doctrine of precedent enjoy validity in Islamic law? What is the status of precedent in Islamic law? In other words, does Islamic law recognize the principle that decisions of the higher courts are binding on the lower courts? Is the practice of precedent in Pakistani law justifiable in Islamic terms? What is the status of precedent in Islamic legal tradition? Considering the case of a contemporary Muslim country, Saudi Arabia, it needs to be asked: what is the status of precedent in the Saudi legal system as compared with Pakistan? These are the main questions that are addressed in this paper. However, other related questions will also be discussed along the way.

Literature Review

The topic of precedent in Islamic law has not attracted serious attention of modern scholars as such. In general, there are several books regarding *qaḍā'* (judgeship) known as *Adab al-Qāḍī*.¹ Two early books are of great help in understanding the institution of *qaḍā'* and the work of *qāḍīs* in the Umayyad and early Abbasid periods. These are *Akbbār al-Quḍāh* by Abū Bakr

Arabic text of the letter see, Abū Bakr Muḥammad b. Khalaf b. Ḥayyān Wakī', *Akbbār al-Quḍāh*, ed. 'Abd al-'Azīz Muṣṭafā al-Marāghī, 3 vols. (Cairo: Maṭba'at al-Istiḳāmah, 1947–50), 1: 71–72; for its English translation see, 'Alā' al-Dīn Abū Bakr al-Kāsānī, *The Unprecedented Analytical Arrangement of Islamic Laws*, trans. Imran A. K. Nyazee (Islamabad: Advanced Legal Studies Institute, 2007), 58. The contents of a separate letter by 'Umar to Mu'ādh b. Jabal (d. 18/639) are identical to the one above. See, Shams al-Dīn Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, ed. Muḥammad Munīr al-Dimashqī (Cairo: Idārat al-Ṭibā'ah al-Muniriyyah, n.d.), 1:85; and Abū 'l-Ḥasan 'Alī b. Muḥammad al-Māwardī, *Kitāb al-Aḥkām al-Sultāniyyah* (Cairo: Maṭba'at al-Sa'ādah, n.d.), 72.

¹ The genre of literature known as *Adab al-Qāḍī*, literally, "the etiquette of the judge," deals with *qaḍā'* and procedural laws of *qaḍā'*. *Adab al-Qāḍī* is similar in certain respects to the Pakistani "Etiquette of Bar and Profession."

Muḥammad b. Khalaf Wakī' (d. 306/916), a *qāḍī* in Ahwāz (Persia),² and *Kitāb al-Wulāb wa 'l-Quḍāb* by Abū 'Umar Muḥammad b. Yūsuf al-Kindī (d. 350/961).³ The book of Wakī' aims to cover all the territories of the 'Abbasid caliphate and includes references to the judgments of *qāḍīs*, their poetry, *Ḥadīth* reports and juristic opinions. He wrote on judicial practice in the various cities from the days of the Prophet (peace be on him) until his own time.⁴ He provides information about *qāḍīs* in Makkah, Madīnah, Ṭā'if, Baṣrah, and the cities of Syria, Africa, Iraq and Persia. Kindī's book, on the other hand, describes the biographies of the governors as well as of *qāḍīs* as well as their judgments in Egypt.⁵ However, these and other *Adab al-Qāḍī* books were principally guides for *qāḍīs* (judges). These books are not about actual judicial practice and do not offer anything about the status of precedent in Islamic law. According to Émile Tyan, these writings describe the ideal rather than the actual practice of the Muslim courts.⁶ A study of 19 cases of *matā'* (gift)⁷ cited by Khalid Masud from the two books shows that the judges whose decisions are analysed neither referred to their previous decisions nor considered themselves bound by them in their later decisions.⁸

There are separate treatises on *Adab al-Qāḍī*⁹ and the books on *fiqh* also devote a chapter to *adab al-qāḍī*. Ḥājī Khalīfah (d. 1067/1657) mentions at

² Abū Bakr Muḥammad b. Khalaf Wakī', *Akbbār al-Quḍāb*, ed. 'Abd al-'Azīz Muṣṭafā al-Marāghī, 3 vols. (Cairo: Maṭba'at al-Istiḳāmah, 1947–1950).

³ Abū 'Umar Muḥammad b. Yūsuf al-Kindī, *Kitāb al-Wulāb wa 'l-Quḍāb*, ed. Rhuvon Guest (Beirut: Maṭba'at al-Ābā' al-Yasū'iyyin, 1908).

⁴ See, Wakī', *Akbbār*, 1: 4–5.

⁵ Muhammad Khalid Masud has analysed nineteen judgments by different *qāḍīs* on *matā'* reported in the above two books. See, Muhammad Khalid Masud, "The Award of *Matā'* in the Early Muslim Courts" in Muhammad K. Masud, R. Peters, and David S. Powers, eds. *Dispensing Justice in Islam: Qadis and their Judgments* (Leiden/Boston: Brill, 2006), 353–370.

⁶ See, Émile Tyan, *Histoire de l'organisation judiciaire en pays d'Islam*, II edition (Leiden: E.J. Brill, 1960), 9.

⁷ *Matā'* is a gift that is given by a husband to his estranged wife upon his divorcing her. *Matā'* is unknown in Pakistani law but is known as post-divorce maintenance in India where it has been the subject of conflicting court rulings, state legislation and heated political debates. For an interesting discussion of *matā'*, see, Tahir Mahmood, *The Muslim Law of India*, 3rd edn. (Delhi: Butterworths, 2002), 117–125; Beauty Banday, "Maintenance of Muslim Divocee: An Analysis of Wakfs Role in India," *Kashmir University Law Review*, XI (2004), 170–187. Also see, *Mohd Azam Khan v. Shah Bano Begum*, AIR 1985 SC 362; *Danial Latifi v. Union of India* (2001), 7 SCC 740.

⁸ See, Masud, "The Award of *Matā'* in The Early Muslim Courts," 349–381.

⁹ According to Farḥāt Ziyādah, Abū Yūsuf Ya'qūb b. Ibrāhīm (d. 182/798) wrote the first *Adab al-Qāḍī* treatise. See, Abū Bakr Aḥmad b. 'Amr al-Khaṣṣāf, *Kitāb Adab al-Qāḍī*, with the commentary of Aḥmad b. 'Ali al-Rāzī al-Jaṣṣāṣ, ed. and Intro. Farḥāt Ziyādah (Cairo: American University Press, 1978).

least five books on *Adab al-Qāḍī* by Ḥanafī jurists and thirteen by Shāfi‘īs.¹⁰ The period between 1000 CE and 1500 CE is not well documented and those interested in this period have to rely on such sources as *fatawā* and manuals of legal formularies (*wathā’iq*). For example, *Dīwān al-Aḥkām al-Kubrā*, compiled by the Qāḍī Abū ‘l-Aṣṣbagh ‘Īsā ibn Sahl al-Asadī (d. 485/1093)¹¹ and *Madhāhib al-Ḥukkām fi Nawāzil al-Aḥkām* by Muḥammad b. ‘Iyād (d. 574/1179).¹² This book was intended to serve as a textbook for the training of judges and *mufṭīs* in al-Andalus. A comprehensive study of the institution of *qadā’* and the judgments of various *qāḍīs* from the rise of Islam to modern times is *Dispensing Justice in Islam*,¹³ which is a collective work.

A very good source for the Sultanate and the Mughal legal systems in India is *The Administration of Justice in Medieval India* by Muhammad Basheer Ahmad.¹⁴ Although the book was published quite a while ago, its arrangement as well as the author’s clarity of thought provide sufficient information as well as impetus for further research. The book also has an excellent bibliography for further research in the field. *The Administration of the Mughal Empire* by Ishtiaq Hussain Qureshi¹⁵ also provides some unbiased information regarding the Mughal judicial system. However, none of these books has anything to say on the status of precedent in Islam. The only manuscript with details of cases and judgments is *Bāqiyāt al-Ṣāliḥāt*, which contains fifty judgments during the period 1550–1850 CE.¹⁶

¹⁰ See, Ḥājī Khalifah, *Kitāb Kashf al-Zunūm* (Istanbul: Dār al-Sa‘ādah, 1893), 1: 22–23. Of the numerous books in this genre, the most popular are: Abū ‘l-Ḥasan ‘Alī b. Muḥammad al-Māwardī, *Adab al-Qāḍī*; Ibrāhīm b. ‘Abd Allāh Ibn Abī ‘l-Damm, *Kitāb Adab al-Qadā’*; Ibrāhīm b. ‘Alī Ibn Farhūn, *Tabṣirat al-Ḥukkām fi Uṣūl al-Aqḍiyah wa Manābij al-Aḥkām*; and Abū ‘l-Ḥasan ‘Alī b. Khalīl al-Ṭarābulūsī (d. 844/1440), *Mu‘īn al-Ḥukkām fi mā Yataraddad bayn al-Khaṣmayn min al-Aḥkām*.

¹¹ Qāḍī Abū ‘l-Aṣṣbagh ‘Īsā ibn Sahl al-Asadī, *Dīwān al-Aḥkām al-Kubrā*, ed. Yaḥyā Murād (Cairo: Dār al-Ḥadīth, 2007). This work has been analysed by Müller. See, Christian Müller, “Administrative Tradition and Civil Jurisdiction of the Cordoban *Ṣāḥib al-Aḥkām*” (I), *al-Qantara*, 21 (2000), 57–84 and his “Judging with God’s Law on Earth: Judicial Powers of the Qāḍī al-Jamā‘ah of Cordoba in the Fifth/Eleventh Century,” *Islamic Law and Society*, 7 (2000), 159–86.

¹² Muḥammad b. ‘Iyād, *Madhāhib al-Ḥukkām fi Nawāzil al-Aḥkām*, ed. M. Bencherifa (Beirut: N.p., 1989). Serrano has examined this work. See, Delfina Serrano, “Legal Practice in an Andalus-Maghribi Source from the Twelfth Century CE: The *Madhāhib al-Ḥukkām fi Nawāzil al-Aḥkām*,” *Islamic Law and Society*, 7 (2000), 187–234.

¹³ M. K. Masud, et al., eds. *Dispensing Justice in Islam*.

¹⁴ Muhammad Basheer Ahmad, *The Administration of Justice in Medieval India* (Aligarh: The Aligarh Historical Research Institute, 1941).

¹⁵ I. H. Qureshi, *The Administration of the Mughal Empire* (New Delhi: Atlantic Publishers, 1990).

¹⁶ See, M. Basheer Ahmad, *The Administration of Justice*, 37.

M. P. Jain's *Outlines of Indian Legal History*,¹⁷ and V. D. Kulshreshtha's *Landmarks in Indian Legal and Constitutional History*¹⁸ provide useful information about the judicial legal system of the East India Company. Although the sixth edition of M. P. Jain's book was published in 2006, it does not have any chapter on precedent as it evolved in the judicial practice of the East India Company.¹⁹

Martin Lau provides a very good account of the Pakistani legal system in his several articles most of which, with some modifications, have been put together in his book, *The Role of Islam in the Legal System of Pakistan*.²⁰ On the operation of precedent in Pakistan, Martin Lau's article is a starter.²¹ Although two articles have been written specifically on the topic of precedent in Islamic law: one by Muḥammad Muṭī' al-Raḥmān,²² and the other by 'Abd al-'Azīz Sa'd al-Daghīsar,²³ both authors fail to appreciate the complicated system of precedent in Islamic law. For a better understanding of this topic one needs to first comprehend precedent in common law and then undertake its study under Islamic law. Unfortunately, all the above sources offer no or little help as far as the status of precedent in Islamic law is concerned. Wael B. Hallaq offers a very good assessment of the role played by the doctrine of precedent in the Indian legal system of the 19th century.²⁴ However, the one author who knows the intricacies of Islamic law and applies the same to our legal system is undoubtedly Imran A. K. Nyazee, whose book *Islamic Jurisprudence*²⁵ is a must read to understand the very nature and system of Islamic law and its principles. The book, however, offers only some information on the status of

¹⁷ M. P. Jain, *Outlines of Indian Legal History* (Bombay: Tripathy, 1966).

¹⁸ V.D. Kulshreshtha, *Landmarks in Indian Legal and Constitutional History*, ed. B. M. Gandhi, 5th edn. (Lucknow: Eastern Book Co., 2005).

¹⁹ For a detailed study of the Mughal justice system, see my, "Precedent in Pakistani Legal System," unpublished doctoral dissertation submitted to the Faculty of Law, University of Karachi, November, 2008, 22–68.

²⁰ Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

²¹ Martin Lau, "Introduction to the Pakistani Legal System, with Special Reference to the Law of Contract," *Yearbook of Islamic and Middle Eastern Law*, 1 (1994), 3–28, especially 3–12.

²² See, Muḥammad Muṭī' al-Raḥmān, "Adālatī Naẓā'ir kī Shar'ī Ḥaythiyyat," *Fikr-o Nazar*, 40: 2 (2002), 37–72.

²³ See, 'Abd al-'Azīz Sa'd al-Daghīsar, "Ḥujjiyyat al-Sawābiq al-Qānūniyyah" (The Authority of Legal Precedents), *al-'Adl*, 34 (1428 AH), 174–200. This article is more about the practice in Saudi Arabia. The author opines that it was not required to follow the opinions of *fuqahā'*.

²⁴ See, Wael B. Hallaq, "What is Shari'a?," *Yearbook of Islamic and Middle Eastern Law*, 12 (2005–2006), 173–176.

²⁵ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: IIIT & Islamic Research Institute, 2000).

precedent in Islamic law. In the lines below, I will either build on his conclusions or differ a little bit from the same.

The Place of Islamic Legal Principles in Pakistani Legal System

(A) *Background to the Pakistani Legal System*²⁶

Before explaining the status of Islamic legal principles in the Pakistani legal system it seems appropriate to briefly discuss the Pakistani legal system itself. The British East India Company which came to India for trade in 1604 established itself initially in three Presidency towns — Calcutta, Madras and Bombay. The Company acquired authority over revenue collection of Bengal in 1765 and extended its control over the administration of justice. Since Bengal remained under the Mughal sovereignty the legal system was essentially Islamic and based upon the Ḥanafī law. According to the terms of the treaty with the Mughal Empire in 1615 the British could not change the position of the *Shari'ah* as the law of the land. The most conspicuous feature of the 18th century Indian legal history is that the *Shari'ah* was administered by British judges sitting on the *Shari'ah* courts. The Regulations of 1793 modified the law applicable to Muslims and Hindus. Previously, the Qur'ān and the Shaster were applicable to Muslims and Hindus, respectively. In 1793, the laws applicable to both the communities were 'Mohammadan Law' for the Muslims and 'Hindu Law' for the Hindus. From the very beginning the Company's Courts were administering Muslim and Hindu Law with the help of *muftīs*, *mawlavīs* (experts of Islamic law) and *pundits* (scholars versed in Hindu law).

Court hierarchy and law reporting started facilitating the doctrine of precedent. Moreover, the Mayor's Court in Madras in 1687 held that all causes shall be adjudged according to 'equity and good conscience.'²⁷ The same was reasserted in the Charter of 1726 and the later Charters, Regulations and Acts. The Privy Council held in 1886 that the formulas 'justice, equity and good conscience' or 'justice and right' implied the application of English law, if found applicable to Indian society and its circumstances.²⁸ In the sphere of family law, the British judges closely followed the interpretations of the classical *fiqh* books, which they consulted in translation. These judges, however, deviated a great deal from the *Shari'ah* in the name of 'justice, equity

²⁶ For details see my, "The Administration of Justice under Akbar, Jehāngīr and Awrangzēb: An Overview," *Hamdard Historicus*, forthcoming.

²⁷ See, J. D. M. Derrett, "Justice, Equity and Good Conscience" in J. N. D. Anderson, ed. *Changing Law in Developing Countries* (London: Allen & Unwin, 1963), 114-153.

²⁸ *Waghela Rajsanji v. Shekh Mashidin* [1886-1887] 14 L.R.I.A. 89.

and good conscience.’ In 1857 the Company was replaced by the Crown and most of the laws that are still applicable in India, Bangladesh and Pakistan were codified after 1857.

The theoretical primacy of the *Shari‘ah* in criminal cases was abolished by the introduction of the Indian Penal Code in 1861. In 1864 the position of the native law officers was abolished, and, henceforth, British judges had to find the relevant rules of the *Shari‘ah* themselves. In cases relating to family law the civil courts enforced both *Sunnī* and *Shī‘ī* doctrines.

Probably the introduction of the English doctrine of precedent into India was the most important factor in shaping the sources of law in India, Pakistan and Bangladesh, which was a more rigidifying process by the Anglo-Indian court, a system that, for many good reasons, could not evolve in Islamic law. In 1831 Dorin advocated that statutory force should be accorded to the English doctrine of precedent in India so that judgments of a court shall be considered as binding upon itself and upon courts lower down in the hierarchy.²⁹ The era of authentic law reporting began with the Indian Law Reports Act, 1875. Thus, the two indispensable requirements for the doctrine of precedent — hierarchy of courts and the emergence of authentic law reporting — were fulfilled in 1875. Hallaq argues that the doctrine of precedent deprived the Muslim *qāḍī* of a wide array of opinions to choose from in light of the facts presented in the case. Once a judge was bound by a previous decision, there was no place for the Muslim muftis-cum-author-jurists in the judicial process. Subsequently, they disappeared from the legal as well as intellectual life of the jural community. Once the Anglo-Muhammadan law was enshrined in a doctrine of binding precedent the sources of legal authority were transformed.³⁰ The implementation of the Ḥanafī substantive law by British judges resulted in the emergence of a novel and unique form of Islamic law, called *Anglo-Muhammadan Law*,³¹ which to this day remains enforced in India, Bangladesh and Pakistan. The distinctive feature of the judicial organization of these three countries is that Islamic law is applied by national, regular courts and not by specialized *Shari‘ah* courts. It is this permanent transformation that we are dealing with. Although the colonialists are long gone, yet the transformation they made in the legal system proved lasting.

²⁹ See, A. Lakshminath, *Precedent in Indian Law*, 2nd edn. (Lucknow: Eastern Book Company, 2005), 15; M. P. Jain, *Outlines of Indian Legal History* (Bombay: N. M. Tripathi Private Ltd., 1966), 726; and Kulshreshtha, *Landmarks*, 493.

³⁰ Hallaq, “What is Shari‘a?,” 176; also see, Scot Alan Kugle, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia,” *Modern Asian Studies*, 35:2 (May, 2001), 295.

³¹ For the different uses of this term, see my, “Marriage in Islam: A Civil Contract or a Sacrosanct?,” *Hamdard Islamicus*, XXXI:1 (2008), 82–83.

Precedent, therefore, played a significant role in the shaping of the legal systems to come in India, Pakistan and Bangladesh because the decisions of the English judges at the time were sometimes contrary to Islamic law. However, they remained binding precedents for the lower courts for generations.³²

(B) *The Place of Islamic Legal Principles in Pakistani Legal System*

To determine the place of Islamic legal principles in the legal system of Pakistan, we have to look briefly at the status of Islam in its Constitution, other statutes and especially case law. As mentioned above, the decisions of the superior courts involving questions of Islamic law before the establishment of Pakistan were considered as sources of law because of the doctrine of precedent. Pakistan adopted the Government of India Act 1935 section 212 of which laid down that the decisions of the Privy Council and the Federal Court would be binding upon the courts in India. The Privy Council, however, was not bound by its own previous decisions. Pakistan adopted the pre-independence Anglo-Indian law since its independence in 1947. In Pakistan the Federal Court was replaced by the Supreme Court on March 24, 1956 and in India on January 26, 1950. All Pakistani Constitutions from 1956 to 1973 contained provisions regarding the continuation of such laws. Article 268(1) of the present 1973 Constitution provides safeguard to such laws. Although Pakistan and India have been independent states since 1947 and are governed by laws made by their respective legislatures, yet the operation of the doctrine of precedent as was practiced by the Anglo-Indian courts remains largely unchanged. The bulk of Pakistani law is still Anglo-Indian although Islamic law has also become a source of law.

The 1973 Constitution declares Islam as the state religion³³ although it did not provide any definition of Islam.³⁴ The most significant yet controversial document regarding the place of Islam in Pakistani law is the Objectives Resolution passed by the first Constituent Assembly of Pakistan in 1949. The Resolution only had a guiding character when it was made, with slight changes, preamble to the 1956, 1962 and the 1973 Constitutions. However, in 1985 it was made an integral and operative part of the Constitution by

³² An example of a concept that was the invention of the Anglo-Indian judges and that still pre-occupies the minds of judges in India, Pakistan and Bangladesh is the notion that marriage in Islam is a 'civil contract.' See, *Abdul Qadir v. Salima* (1886) 8 All 149 (FB). For details see, my, "Marriage in Islam: A Civil Contract or a Sacrosanct?," 77-84.

³³ See, Article 2 of *The Constitution of Islamic Republic of Pakistan* (Islamabad: Ministry of Law and Justice, 2008).

³⁴ There are other Articles of 1973 Constitution such as Articles 227-231 regarding Islamic provisions of the Constitution, but they are not significant.

inserting it as Article 2-A in the Constitution.³⁵ Since the late 1960s, in any case, the Pakistani courts have increasingly relied on and recognised the principles of Islamic law. The most noteworthy example of this reliance is *Asma Jilani v. The Government of the Punjab* (1972)³⁶ which recognised Islam as the *Grundnorm*³⁷ of the Pakistani legal system.³⁸ Chief Justice Hamoodur Rahman referred to the first paragraph of the Objectives Resolution and said:

In any event, if a *Grundnorm* is necessary for us I do not have to look to the Western legal theorists to discover one. Our own *Grundnorm* is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by him a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the “corner stone of Pakistan’s legal edifice” ... it is one of the fundamental principles enshrined in the Qur’an.³⁹

Lau argues that Justice Rahman’s reliance on Islamic law is significant. “In spite of the fact that he [Justice Rahman] began his deliberations about Pakistan’s *Grundnorm* with an ‘if,’ he nevertheless formulated in very certain terms a constitutional theory in which basic principles of Islamic law were ‘immutable’ and ‘unalterable’ norms.”⁴⁰ Justice Sajjad Ahmad, another

³⁵ Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985).

³⁶ PLD 1972 SC 139.

³⁷ The *Grundnorm* or basic norm, Kelsen says, is formulated as follows: “Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short, one ought to behave as the constitution prescribes.)” Hans Kelsen, *The Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1967), 201. There are two important concepts in Kelsen’s pure theory of law: the concept of a basic norm and the concept of a chain of validity. Kelsen says, “To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes. If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. ... It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the *basic norm* of the legal order under consideration.” Hans Kelsen, *General Theory of Law and State* (New York: Russell & Russell, 1945), 115.

³⁸ For a discussion of *Grundnorm* in the Pakistani legal system see, Ahmer Fazeel, *The Constitution of the Islamic Republic of Pakistan* (Karachi: Pakistan Law House, 1997), 18–24. For criticism of Kelsen’s theory see, Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (Oxford: Clarendon Press, 1980), 93–120.

³⁹ *Asma Jilani v. The Government of the Punjab*, PLD 1972 SC 139 at 182.

⁴⁰ See, Lau, *The Role of Islam*, 15.

member of the bench, opined that the Objectives Resolution “embodies the spirit and the fundamental norms of the constitutional concepts of Pakistan.”⁴¹ However, for Justice Yaqub Ali the *Grundnorm* was democracy,⁴² whereas Justice Salahuddin Ahmed chose to ignore Islam as the *Grundnorm*. The overall effect of *Asma Jilani* case was that the Supreme Court strongly rejected Chief Justice Muhammad Munir’s radical positivism in *Dosso’s* case (1958) and his reliance on Kelsen’s theory.⁴³ In *Ziaur Rehman v. The State* (1972)⁴⁴ Justice Afzal Zullah of the Lahore High Court held that the Objectives Resolution was “a supra Constitutional Instrument” that “is so fundamental and contains such mandates that it cannot at all be repealed or abrogated and is permanent for all times to come.”⁴⁵ Justice A. R. Sheikh held that although the Objectives Resolution was the *Grundnorm*, it could not be used to test the *vires* of the constitution itself.⁴⁶ Justice M. A. Cheema ruled that the Objectives Resolution could not be used to determine the *vires* of any law, let alone the provisions of the Constitution itself.⁴⁷ Justice Sajjad Ahmad held that Islam, as expressed in the Objectives Resolution, constituted the *Grundnorm* in Pakistan.⁴⁸

In *Hussain Naqi v. D. M. Lahore* (1973)⁴⁹ Justice Muhammad Iqbal of the Lahore High Court ruled that the Objectives Resolution is only a guideline for the framing of the Constitution and not the *Grundnorm*.⁵⁰ The Supreme Court, while deciding *Ziaur Rehman v. State* (1972),⁵¹ put an end to the debate whether Islamic law and especially the Objectives Resolution formed the *Grundnorm* for Pakistan. Chief Justice Hamoodur Rahman rejected the elevation of the Objectives Resolution to the status of a supra constitutional instrument because it was “not incorporated in the Constitution.”⁵² In *Darvesh M. Arbey v. Federation of Pakistan* (1980)⁵³ Justice Kadri stated that the basic structure of Pakistan was the two nation theory and the ideology of Pakistan. In his opinion the source of the basic structure was the Objectives Resolution.

⁴¹ *Asma Jilani v. The Government of the Punjab*, PLD 1972 SC 139 at 258.

⁴² *Ibid.*, 237.

⁴³ *The State v. Dosso*, PLD 1958 SC 533.

⁴⁴ PLD 1972 Lahore 382. The full decision was reported 12 years after the judgment was given by a larger bench of the Lahore Court as *Ziaur Rahman v. The State*, PLD 1986 Lah 428.

⁴⁵ *Ziaur Rehman v. The State*, PLD 1972 Lahore 382 at 390.

⁴⁶ *Ibid.*, 486.

⁴⁷ *Ibid.*, 518.

⁴⁸ *Ibid.*, 602.

⁴⁹ PLD 1973 Lahore 164.

⁵⁰ *Ibid.*, 175.

⁵¹ PLD 1973 SC 49.

⁵² *Ibid.*, 71.

⁵³ PLD 1980 Lahore 206.

Lau argues that Justice Kadri's assertion only amounts to Islam being an additional source of law.⁵⁴ According to Justice Zakiuddin Patel, "the basic structure, framework and essential features have been fully given in the preamble of the Constitution, which is an integral part thereof ... and any amendment to change them would be void."⁵⁵ In *Begum Nusrat Bhutto v. Chief of the Army Staff* (1977)⁵⁶ the Supreme Court rejected the view that the Objectives Resolution was the *Grundnorm* of Pakistan.⁵⁷ Justice Cheema expressed the view that Islam was the ideological foundation of Pakistan⁵⁸ and Justice Akram ruled that the ideology of Pakistan "is firmly rooted in the Objectives Resolution with emphasis on Islamic laws and concept of morality. In our way of life we do not and cannot divorce morality from law."⁵⁹ The Supreme Court in *Islamic Republic of Pakistan v. Abdul Wali Khan* (1976)⁶⁰ visited the basic structure doctrine. Justice Gul Muhammad ruled that the supreme authority in Pakistan vests in the Holy Qur'ān.⁶¹

Since the incorporation of the Objectives Resolution in the Constitution in 1985 and till 1992 there have been at least 30 cases of High Courts or the Federal Shariat Court involving the consideration of Article 2-A.⁶² The most noticeable cases were those involving interest or certain provisions of the Muslim Family Law Ordinance 1961. In *Muhammad Bachal Memon v. Government of Sind* (1987)⁶³ Justice Naimuddin — Chief Justice of the Sindh High Court — rejected the view that the Constitution (Eighth Amendment),

⁵⁴ Lau, *The Role of Islam*, 23.

⁵⁵ PLD 1980 Lahore 206 at 297. Justice Patel relied on the Indian cases of *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 and *Kesavanda v. Baharati*, AIR 1973 SC 1461 to resurrect the basic structure doctrine. He gave examples of constitutional amendments which would amount to a violation of the basic doctrine: the deletion of Article 2 of the 1973 Constitution which states that Islam shall be the state religion of Pakistan, or a declaration that Pakistan was to be a secular state, or an attempt to change the democratic or federal character of the state would undermine the basic structure. The decision was reported three years after the judgment was given.

⁵⁶ PLD 1977 SC 657.

⁵⁷ *Ibid.*, 747; *per* Justice Qaiser Khan. The Supreme Court validated the action of General Zia-ul-Haq by applying the doctrine of necessity.

⁵⁸ *Ibid.*, 724.

⁵⁹ *Ibid.*, 733.

⁶⁰ PLD 1976 SC 57.

⁶¹ *Ibid.*, 176.

⁶² For a study of the effects of Article 2-A and case law see, A. M. Serajuddin, *Shari'a Law and Society: Tradition and Change in South Asia* (Karachi: Oxford University Press, 2001), 252–260; David Pearl & Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998), 360–373.

⁶³ PLD 1987 Kar 296.

Act 1985, which *inter alia* validated all actions taken during General Zia-ul-Haq's reign *vide* Article 270A, violated Article 2-A.⁶⁴

It is worth noting here that initially fiscal laws were excluded from the jurisdiction of the FSC. Justice Tanzilur Rahman expounded the theory that the jurisdiction of the High Courts and the Supreme Court has been enhanced by Article 2-A. In the *Bank of Oman Ltd v. East Trading Co. Ltd* (1987)⁶⁵ he ruled that "Any provision of the Constitution or law, found repugnant to them [the Objectives Resolution by virtue of Article 2-A], may be declared by a superior Court as void."⁶⁶ In *Irshad H. Khan v. Perveen Ijaz* (1987)⁶⁷ he opined that Article 2-A controlled the rest of the Constitution.⁶⁸ In *Mirza Qamar Raza v. Tahira Begum* (1988)⁶⁹ he ruled that section 7 of the Muslim Family Law Ordinance 1961 was repugnant to the injunctions of Islam by virtue of Article 2-A.⁷⁰

Another judge of the Sindh High Court who resorted to 2-A in his decisions was Justice Wajihuddin Ahmad. These cases were *Aijaz Haroon v. Inam Durrani* (1989),⁷¹ *Tyeb v. Alpha Insurance Co. Ltd* (1990)⁷² *Skina Bibi v. Federation of Pakistan* (1992)⁷³ and *Farhat Jalil v. Province of Sind* (1990).⁷⁴ There are a number of other cases in which judges resorted to or discussed their view on Article 2-A but the Supreme Court finally settled the issue in *Hakim Khan v. Government of Pakistan* (1992)⁷⁵ when it ruled that the order issued by the President under Article 45 of the 1973 Constitution, which allowed the President to commute sentences, was not repugnant to Islam.⁷⁶

⁶⁴ Ibid., 328–9.

⁶⁵ PLD 1987 Kar 404.

⁶⁶ Ibid., 445. He found section 58 of the Transfer of Property Act 1882 to be against the injunction of Islam but was unable to declare it void because he was bound by the FSC's decision which had already declared the said section to be in accordance with Islam. See, *Muhammad Sadiq Khan v. Federation of Pakistan*, PLD 1982 FSC 237.

⁶⁷ PLD 1987 Kar 466.

⁶⁸ In his view it controlled Article 189 of the Constitution regarding the binding nature of a Supreme Court's decision on the High Court. He held that he was not bound by the Supreme Court because Article 189 was against Article 2-A.

⁶⁹ PLD 1988 Kar 169.

⁷⁰ Section 7 of the said Ordinance provides that upon the pronouncement of *talāq* by the husband he must give a notice of it to the Chairman of the Union Council and that *talāq* will be effective 90 days after the receipt of such notice by the Chairman.

⁷¹ PLD 1989 Kar 304.

⁷² 1990 CLC 428.

⁷³ PLD 1992 Lahore 99.

⁷⁴ PLD 1990 Kar 342.

⁷⁵ PLD 1992 SC 595.

⁷⁶ The Supreme Court found that the death sentences had been awarded by way of *ta'zīr* and not as *ḥadd* punishments and that consequently the President was within his rights, even under

According to Justice Nasim Hasan Shah, the Objectives Resolution was equal in weight and status to the provisions of the Constitution and could not annul any existing constitutional provisions.⁷⁷ *Hakim Khan's* case ended the drive of a handful of judges to Islamise the laws through the judiciary but the judicial debate about the basic structure would continue. In *Mahmood Khan Achakazi v. The Federation of Pakistan* (1997)⁷⁸ the Supreme Court ruled that the legal system in Pakistan has a basic structure which cannot be changed. Chief Justice Sajjad Ali Shah opined that the Objectives Resolution “in the shape of Article 2-A when read with other provisions of the Constitution reflects salient features of the Constitution highlighting federalism, parliamentary form of Government blended with Islamic provisions.”⁷⁹ He held that the power to amend the Constitution did not extend to amending its salient features. However, Justices Saleem Akhtar and Raja Afrasiab Khan were reluctant to accept the Objectives Resolution as the basic structure for Pakistan.⁸⁰ In *Zafar Ali Shah v. Pervez Musharraf* (2000)⁸¹ the Supreme Court ruled that the basic features of the Constitution, i.e. independence of judiciary, federalism and parliamentary form of government blended with Islamic Provisions cannot be altered by the Parliament.⁸² Thus, the judiciary has reduced what it earlier called the *Grundnorm* or the basic structure for Pakistan to the basic features of the 1973 Constitution.

However, while Islamisation of laws through the High Courts and the Supreme Court may be over, but the creation of FSC was meant for Islamisation, FSC being the constitutional court to enunciate Islamic laws. The impact of some of the rulings of the FSC is further examined below.

The practice of precedent in Pakistan reveals that the lower Courts are bound by the decisions of the higher Courts but the higher Courts are free to resort to *ijtihad* for deriving new rules from the Qur’ān, the *Sunnah*, *ijmā’*, *qiyās* (analogy), *maṣlaḥah*, custom and other secondary sources of Islamic law. In resorting to *ijtihad*, Courts are not required to confine to a particular school

Islamic law, to commute them to life imprisonment without the consent of the heirs of the deceased. In other words, the Supreme Court meant *siyāsah* (the administration of justice according to the *Shari’ah*) without naming it. The Supreme Court also discussed *siyāsah* implicitly in *Sakhawat v. The State*, 2001 SCMR 244.

⁷⁷ *Hakim Khan v Government of Pakistan*, PLD 1992 SC 595, at 617.

⁷⁸ PLD 1997 SC 426.

⁷⁹ *Ibid.*, 458.

⁸⁰ In *Wukala Mahaz Barai Tahafuz Dastoor v. Federation of Pakistan*, PLD 1998 SC 1263, Raja Afrasiab Khan upheld the basic structure doctrine (At 1423). He was also supported by Justice Mamoon Kazi.

⁸¹ PLD 2000 SC 869.

⁸² *Ibid.*, 1281.

of law. As I have mentioned elsewhere,⁸³ in Pakistan the Enforcement of *Shari'ah* Act, 1991, section 2 mentions that '*Shari'ah*' means the injunctions of Islam as laid down in the Holy Qur'ān and [the] *Sunnah*. The explanation provided to section 2 states that:

While interpreting and explaining the *Shari'ah* the recognized principles of interpretation and explanation of the Holy Qur'ān and *Sunnah* shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration.⁸⁴

Tahir Mahmood points out that it is unclear what is meant by the word "prevalent." Does it mean prevalent in Pakistan or prevalent in the whole world?⁸⁵ This provision allows judges to resort to *ijtihad* and not stick to just one school of thought. Courts in Pakistan are yet to use this freedom. The net result of the Act is that statutes shall be interpreted in the light of Islamic law — a principle first developed by Justice Afzal Zullah.⁸⁶ Section 3(1) the Enforcement of Shariah Act, 1991 has declared the Holy Qur'ān and the *Sunnah* as the supreme law of the country. However, the bulk of the Anglo-Indian law is still applicable in Pakistan.

***Stare Decisis* in Pakistani Law with Special Reference to The Federal Shariat Court (FSC)**

(A) *Stare Decisis in Pakistani Law*⁸⁷

As stated above, Pakistan inherited the Government of India Act 1935 section 212 of which expressly mentioned that the law declared by the Privy Council as well as the Federal Court is binding on all courts in the territory of India.⁸⁸ Pakistan put this provision, with slight changes, in the 1956⁸⁹ and 1962⁹⁰

⁸³ See, my, "Stipulations in a Muslim Marriage Contract with Special Reference to *Talaq Al-Tafwid* Provisions in Pakistan," *Yearbook of Islamic and Middle Eastern Law*, 12 (2005–2006), 248.

⁸⁴ See, section 2 of the Shari'ah Enforcement Act, 1991 (Act X of 1991).

⁸⁵ See, Tahir Mahmood, "Legislation and Case Law in Pakistan, 1991–1996: Enforcement of Shari'ah and Appointment of Judges," *Islamic and Comparative Law Review*, XV–XVI (1995–96), 90.

⁸⁶ Justice Zullah ruled in *Nizam Khan v. Additional District Judge*, PLD 1976 Lahore 930, that 'justice, equity and good conscience' meant Islamic law to the exclusion of all other laws.

⁸⁷ There is no specific quality work on precedent in Pakistani law and the basis for this section is my PhD thesis, "Precedent in Pakistani Legal System," 207–323.

⁸⁸ See, *ibid.*, 70–71.

⁸⁹ Article 163(1) of the 1956 Constitution stated that: "The law declared by the Supreme Court shall be binding on all courts in Pakistan." See, A. K. Brohi, *Fundamental Law of Pakistan* (Karachi: Din Muhammad Press, 1958), 605.

Constitutions.⁹¹ In the present Constitution, by virtue of Article 189, the decisions of the Supreme Court are binding on all other Courts in Pakistan.⁹² However, the superior courts have yet to appreciate and expound the phrases used in Article 189 such as ‘it decides a question of law,’ or ‘enunciates a principle of law,’⁹³ and ‘is based upon ... a principle of law.’⁹⁴ I have concluded in another work of mine that the over all effect of Article 189 is that only the *ratio* (the reason for the decision) of the Supreme Court is binding on the High Courts and the lower courts but not its *dicta* (remarks made by judges along the way). However, in *Province of the Punjab v. Dr. S. Muhammad Bukhari* (1997)⁹⁵ the Supreme Court has ruled that even its *dicta* are binding on the High Courts and any decision contrary to the *dictum* laid down by it, was a judgment *per incuriam*.⁹⁶ In *Zabeer Behzad v. The State* (2003)⁹⁷ Justice Aslam Jafri of the Sindh High Court categorically reaffirmed this principle and ruled:

There can be no two opinions that the rule laid down and the law declared by the Supreme Court by virtue of Article 189 of the Constitution is binding on all Courts and authorities in Pakistan. Any judgment passed by any authority or Court contrary to the law laid down by the Supreme Court shall be a judgment *per incuriam*.⁹⁸

⁹⁰ Article 63 of the 1962 Constitution.

⁹¹ In India Article 141 of the Constitution of 1950 retains, more or less, the wording of the Government of India Act, 1935 when it states, “The law declared by the Supreme Court shall be binding on all courts within the territory of India.”

⁹² Article 189 says, “Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan.” Article 42 B of the Interim Constitution Act 1974 of Azad Jammu and Kashmir as modified by Act VIII of 1976 retains the wording of Article 189 of the Pakistani Constitution in verbatim. For the text see, Ameerullah Khan Mughal, *The Judicial System in Azad Jammu and Kashmir*, 2nd edition (Mirpur: Kashmir Law House, 2006), 11.

⁹³ A careful analysis of Article 189 of the 1973 Constitution of Pakistan reveals that if the Supreme Court is faced with a new situation which has not happened before or on which neither statute nor previous cases provide clear guidance, then it has to create an ‘*original precedent*.’ This is clear from the phrases, ‘it decides a question of law’ (which should mean a ‘new question of law’) or ‘enunciates a principle of law.’ See, my, “Precedent in Pakistani Legal System,” 216.

⁹⁴ It would simply mean that if an earlier decision is declared to be a ‘good authority’. It may be called a ‘*declaratory precedent*.’ For details see, my, “Precedent in Pakistani Legal System,” 131–158.

⁹⁵ PLD 1997 SC 351.

⁹⁶ *Ibid.*, 364–65 (I) & (J); *per* Justice Khalil ur Rahman Khan speaking for the four members bench.

⁹⁷ 2003 YLR 1582.

⁹⁸ *Ibid.*, 1590 (B).

Both these decisions are self-contradictory and constitute very bad precedents because the phrases ‘the law laid down by the Supreme Court,’ and ‘by virtue of Article 189’ are two different things and cannot be reconciled with each other. The former phrase was part of the Government of India Act 1935, and the 1956 and 1962 Constitutions but is not a part of the 1973 Constitution. The phrase ‘law laid down’ is broader and also includes the *dictum* whereas the text of Article 189 is narrow and refers only to the *ratio*.⁹⁹ The former is superseded by the later yet, surprisingly, it is resorted to by our judges.

The superior courts have established certain principles called judicial customary principles under which a larger bench binds a smaller bench both in the High Courts as well as the Supreme Court. In addition, the Supreme Court and the High Courts may overrule their own previous decisions. The Supreme Court has overruled its own decisions on many occasions. For example, in *Asma Jilani v. The Government of the Punjab* (1972),¹⁰⁰ the Supreme Court overruled *State v. Dosso* (1958).¹⁰¹ In *Bashir v. State* (1991)¹⁰² the Supreme Court overruled *Javaid Shaikh v. The State* (1985);¹⁰³ *Juma Khan v. The State* (1986);¹⁰⁴ *Muhammad Ittefaq v. The State* (1986)¹⁰⁵ and *Khan Zaman v. The State* (1987).¹⁰⁶

By virtue of Article 201 of the 1973 Constitution, the decisions of a High Court are binding on all Courts subordinate to it.¹⁰⁷ It would mean that only the *ratio* of a High Court decision is binding and not its *dictum*. By virtue of Article 203GG of the Constitution, the decisions of the FSC under its exclusive jurisdiction are binding on all the High Courts as well as lower Courts in Pakistan. Similarly, a larger Bench of a High Court can overrule its own previous decisions but an equal Bench is bound by the decision of an equal Bench. If a contrary view is to be taken, then a request will be made for a larger Bench. This judicial principle has attained the status of *ijmā‘* (to use the terminology of Islamic law), from which deviation is not allowed. There are plenty of decisions on this point starting from *Province of East Pakistan v.*

⁹⁹ For more criticism see, my, “Precedent in Pakistani Legal System,” 221.

¹⁰⁰ PLD 1972 SC 139.

¹⁰¹ PLD 1958 SC 533.

¹⁰² PLD 1991 SC 1145.

¹⁰³ 1985 SCMR 153.

¹⁰⁴ 1986 SCMR 1753.

¹⁰⁵ 1986 SCMR 1627.

¹⁰⁶ 1987 SCMR 1382. All the cases were regarding the interpretation of Section 35(2) of the Code of Criminal Procedure.

¹⁰⁷ The wording of Article 189 and 201 is similar.

Dr. Azizul Islam (1963).¹⁰⁸ The Shariat Appellate Bench of the Supreme Court also overrules its own previous decisions. For example, *Federation of Pakistan v. Mst. Farishtha* (1981)¹⁰⁹ was overruled by Shariat Appellate Bench in *Dr. Mahmood-ur-Rahman Faisal v. Government of Pakistan* (1994).¹¹⁰ The net result of the above three Articles, i.e. 189, 201 and 203GG is that precedent in Pakistan is institutionalised and that the decisions of the higher courts, including those involving Islamic law, are binding on courts lower in the hierarchy and in some cases on the higher courts themselves.

(B) *Stare Decisis and Federal Shariat Court*

The FSC was created in 1980¹¹¹ and the powers exercised by the four Shariat Benches in the four High Courts of the country were transferred to it. Under Article 203D of the Constitution it was given jurisdiction to examine itself or on the request of any citizen of Pakistan whether or “not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur’ān and the Sunnah of the Holy Prophet.”¹¹² It also has appellate jurisdiction in *Hudood* cases decided by Sessions Courts. However, its jurisdiction in *Hudood* cases is being eroded by the recently passed enactment — The Protection of Women Act, 2006, which took some offences of the *Hudood* from the *Hudood* Ordinances and put them in the Pakistan Penal Code.¹¹³ The leading cases decided by the FSC and only one of its four predecessors, i.e. the Shariat Bench of the Peshawar High Court, include *Gul Hassan Khan v. Govt. of Pakistan and another* (1980),¹¹⁴ *Naimatullah Khan v. Government of Pakistan* (1979),¹¹⁵ *Allah Rakha v. Federation of Pakistan* (2000)¹¹⁶ and *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law* (1992).¹¹⁷

¹⁰⁸ PLD 1963 SC 296.

¹⁰⁹ PLD 1981 SC 120.

¹¹⁰ PLD 1994 SC 607.

¹¹¹ Vide Constitution (Amdt.) Order, 1980 (P. O. No. 1 of 1980). See, *The Constitution of the Islamic Republic of Pakistan* (Islamabad: Law and Justice Division, Government of Pakistan, 2008), 108, n. 1.

¹¹² *Ibid.*, Article 203 D.

¹¹³ For details see, my, “Is *Zinā bi ’l-Jabr Ḥadd, Ta’zīr* or *Siyāsah* Offence: A Reappraisal of the Protection of Women Act 2006 in Pakistan,” *Yearbook of Islamic and Middle Eastern Law*, 14 (2007–2008), forthcoming.

¹¹⁴ PLD1980 Pesh 1. The *Gul Hassan* case effectively introduced the Islamic law of *qīṣāṣ* and *diyyat* in Pakistan.

¹¹⁵ PLD 1979 Pesh 104. This case declared the right of landless tenant renting agricultural land from his landlord to exercise a first right of pre-emption should the land be sold.

¹¹⁶ PLD 2000 FSC 1 in which the FSC declared sections 4, 7(3) and 8(5) of the Muslim Family Law Ordinance 1961 repugnant to the injunctions of Islam. The case is pending in the Shariat Appellate Bench of the Supreme Court till the writing of this work.

These were mostly cases in which certain statutory laws were held repugnant to Islam. In addition, the FSC has decided many cases under its appellate jurisdiction. Significant examples include *Jehan Mena v. The State* (1983)¹¹⁸ and *Safia Bibi v. The State* (1985).¹¹⁹ In both cases, the complainants (women) were convicted by the lower courts in spite of being victims themselves, but were finally acquitted by the Federal Shariat Court.

Under Article 203GG of the Constitution of Pakistan, 1973, the decisions of the FSC, in exercise of its jurisdiction under Chapter 3 A, “shall be binding on a High Court and on all courts subordinate to a High Court.” According to the language of Article 203GG any decision of the FSC is binding on High Courts as long as the decision is within its jurisdiction. Under Article 203 G, other courts such as the High Courts and the Supreme Court cannot exercise any power or jurisdiction regarding any matter if it falls within the exclusive jurisdiction of the FSC. In other words, its jurisdiction is exclusive and not shared with other constitutional courts and appeals lie against its decisions only to the Shariat Appellate Bench of the Supreme Court.¹²⁰ The crucial points that are necessary to discuss below are: firstly, the FSC has limited but important jurisdiction as compared to a High Court or the Supreme Court; secondly, decisions of the FSC are binding on the High Courts and all courts subordinate to the High Courts; thirdly, its jurisdiction is limited but exclusive.¹²¹ The crucial question that arises for the purpose of this work is whether the Supreme Court (not the Shariat Appellate Bench) is bound by the decisions of the Federal Shariat Court or not? In *Zabeer-ud-Din v. The State* (1993),¹²² the Supreme Court decided that “[T]he findings of the Federal Shariat Court, if the same is either not challenged in the Shariat Appellate

¹¹⁷ PLD 1992 FSC 1. In this case the FSC combined 115 Shariat petitions challenging a considerable number of laws providing for the payment of interest. The Shariat Appellate Bench of the Supreme Court upheld the decision of the FSC but several extensions were granted to the government to adjust the country’s economic system. Finally, the then government of Gen. Musharaff reconstituted the Shariat Appellate Bench of the Supreme Court and requested it to review the case. The Bench suspended the case and remanded it back to the FSC.

¹¹⁸ PLD 1983 FSC 183.

¹¹⁹ PLD 1985 FSC 120.

¹²⁰ The Shariat Appellate Bench of the Supreme Court has two *Ulema* [sic] appointed by the President “to attend sittings of the Bench as *ad hoc* members thereof” working along with three other Muslim judges of the Supreme Court. See Article 203F (3) (b) of the 1973 Constitution.

¹²¹ Masud, *et al.* argue that Federal Shariat Court “[A]ppears to restore special shariah jurisdiction, this is not in fact the case; the court was created to supervise the Islamization of the legal system, not to adjudicate disputes in accordance with the shariah.” M. Khalid Masud, R. Peters and David S. Powers, “Qāḍis and Their Courts: An Historical Survey,” in Masud, *et al.* ed. *Dispensing Justice in Islam*, 42.

¹²² 1993 SCMR 1718.

Bench of the Supreme Court or challenged, but maintained, would be binding even on the Supreme Court.”¹²³ In practice, it is almost impossible to find a decision of the FSC, declaring a piece of legislation to be against the injunctions of Islam that is not challenged by the government in the Shariat Appellate Bench of the Supreme Court. Secondly, as we have mentioned above, such a matter cannot come to the Supreme Court anyway, as it has no jurisdiction in the matter.

In *Hafiz Abdul Waheed v. Mrs. Asma Jehangir* (1997),¹²⁴ the Lahore High Court, while deciding that the consent of the guardian or parents is not required for the validity of *nikāḥ*, had based its decision on the Federal Shariat Court’s decision of *Mohammad Imtiaz v. The State* (1981).¹²⁵ Justice Ihsan ul Haq of the Lahore High Court, in his minority speech mentioned that the Lahore High Court is not bound by the decision of the Federal Shariat Court which had ruled that the consent of the guardian is not essential for the validity of *nikāḥ*. The majority of the High Court, however, rejected the argument that since the FSC’s decision was delivered in the exercise of appellate jurisdiction, it should have no binding effect for the High Courts under 203GG. The Lahore High Court ruled that it was bound by the decision of the FSC whether the same was given in exercise of appellate or revisional jurisdiction.

This view was endorsed by the Supreme Court when it decided *Hafiz Abdul Waheed v. Mrs. Asma Jehangir* (2004)¹²⁶ on appeal. Justice Karamat Nazir Bhandari, speaking for the Full Bench of the Supreme Court, observed that, “The repeated pronouncements of Federal Shariat Court are required to be followed by the High Court, and by all Courts subordinate to a High Court by virtue of Article 203 GG.”¹²⁷ He further opined that, “The expression “decision” in Article 203 GG will include the judgment, order or the sentence if any passed by the Federal Shariat Court and all these will remain binding on the High Courts and Courts subordinate to the High Courts.”¹²⁸ The FSC had ruled in *Muhammad Imtiaz v. The State* (1981),¹²⁹ *Arif Hussain and Azra Parveen v. The State* (1982),¹³⁰ *Muhammad Ramzan v. The State* (1984)¹³¹ and

¹²³ Ibid., 1756; also see, *Allah Rakha v. Federation of Pakistan*, PLD 2000 FSC 1, at 29 and *Avrangzeb v. Massan*, 1993 CLC 1020 at 1023 (A).

¹²⁴ PLD 1997 Lah. 301.

¹²⁵ PLD 1981 FSC 308.

¹²⁶ *Hafiz Abdul Waheed v. Mrs. Asma Jehangir* PLD 2004 SC 219.

¹²⁷ Ibid., at 230.

¹²⁸ Ibid., at 233 (F).

¹²⁹ PLD 1981 FSC 308.

¹³⁰ PLD 1982 FSC 42.

¹³¹ PLD 1984 FSC 93.

Muhammad Yaqoob v. The State (1985)¹³² that the consent of the *wali* is not necessary for the validity of *nikāḥ*.¹³³

In all other matters, the FSC is bound to follow the statutory law as interpreted by the Supreme Court and the High Courts, because of Article 189.¹³⁴ Since the FSC is bound to follow statutory law as interpreted by the Supreme Court and in its absence that of the High Court, it would follow that it would also abide by their interpretation in non-statutory matters that do not fall under its exclusive jurisdiction. However, I could not find any case law on this point. An interesting jurisdiction conferred on the FSC is its power to review its own decisions under Article 203 E (9) of the Constitution.

In its very first decision, that is, *Muhammad Riaz v. Federal Government* (1980)¹³⁵ the FSC was confronted with the question whether it was bound by the earlier decision of the Shariat Bench of the Peshawar High Court which was one of the four such Benches in all the four High Courts at that time, *Gul Hassan v. Government of Pakistan* (1980).¹³⁶ Both cases were concerned with the contentious laws of *qiṣāṣ* and *diyyat*. The majority of the members of the Bench decided that they were bound by the decision of the Shariat Bench of the Peshawar High Court because the FSC was a successor of the former. Aftab Hussain, J as he then was of the FSC, in his minority decision had opined that the Shariat Bench of the Peshawar had limited territorial jurisdiction, whereas the FSC had no such territorial limitations; therefore, the decision of the former was not binding on the latter.¹³⁷

As explained above, the FSC is bound in ordinary cases by the Supreme Court or, in the absence of its decision, by the High Courts. This would mean that since the FSC is a subordinate court (to the Shariat Appellate Bench of the Supreme Court), it has to follow the Supreme Court. Consequently, it has the freedom to overrule its own previous decisions like the Supreme Court. Moreover, its larger Bench binds a smaller Bench. This is so only by analogy as we shall keep our eyes open. Since this is a matter of general law in which it has to follow the Supreme Court and in the absence of its decision, the High Courts. The well settled principle is that one Division Bench of a Higher Court will not give a contrary decision to another Division Bench: be that a

¹³² 1985 PCr. LJ 1064.

¹³³ The Supreme Court had decided the same point in *Mauj Ali v. Syed Safdar Hussain Shah*, 1970 SCMR 437. For details see, my, "Protecting Women: Assessing State Legislation and the Role of Superior Judiciary in Pakistan with special Reference to Family Law Cases from 2004–2006," *Journal of Social Science*, 2: 2 (2007), 31–32.

¹³⁴ *Muhammad Sarwar v. The State*, PLD 1988 FSC 42 at 50–51.

¹³⁵ PLD 1980 FSC 1.

¹³⁶ PLD 1980 Pesh 104.

¹³⁷ PLD 1980 FSC 1 at 10.

Bench of the Supreme Court,¹³⁸ a High Court¹³⁹ or the FSC. The idea behind this is probably that an equal Bench binds an equal Bench because otherwise it will not be proper judicial behaviour. In the case of the FSC, this idea is also strengthened by the Rules of the FSC. Under Rule 4(6), when two judges out of four disagree with a decision, the case is referred to a larger Bench. The judicial norm that its larger Bench binds a smaller Bench is supported by the FSC in *Mst. Nek Bakht v. State* (1986).¹⁴⁰

Precedent and Islamic Legal Theory

As we know, the doctrine of *stare decisis* is a characteristic of the common law system. To determine the status of the notion of precedent in Islamic law, we have to discuss the relevant Islamic legal history to explore/trace its historical roots. Islamic legal history is generally divided into seven periods¹⁴¹ starting

¹³⁸ In *Mohammad Saleem v. Fazal Ahmad*, 1997 SCMR 315, the Supreme Court three members Bench followed the earlier decision of *Mohammad Rafiq v. The Border Area Committee Lahore*, 1990 SCMR 817, which was given by a five members Bench. A similar case on this point is *Azmatullah v. Mst. Hamida Bibi*, 2005 SCMR 1201, in which the Supreme Court ruled that it is a well settled principle enunciated by the Supreme Court that the judgment of a larger Bench is binding on a smaller Bench. A full Bench of the Supreme Court has laid down the law in *Fazal Muhammad Chaudhry v. Ch. Khadim Hussain*, 1997 SCMR 1368, that “When there is conflict between two decisions of this Court, then the decision of the larger Bench would prevail.” *Ibid.*, at 1370 (A). In *Babar Shehzad v. Said Akbar*, 1999 SCMR 2518, the Supreme Court confirmed the above principle and held that when the view of five members Bench was contrary to the view of two members of Bench, the view of five members Bench would prevail. *Ibid.*, at 2522.

¹³⁹ In *Multiline Associates v. Ardesbir Cowasjee*, PLD 1995 SC 423; 1995 SCMR 362, the Supreme Court held that, “[T]he earlier judgment of [an] equal Bench in the High Court on the same point[,] is binding upon the second Bench and if a contrary view had to be taken, then request for constitution of a larger Bench should have been made.” *Ibid.*, at 435. Other cases on this point are: *Chaudhry Muhammad Saleem v. Fazal Ahmad*, 1997 SCMR 314. Moreover, the Supreme Court has ruled in *All Pakistan Newspapers Society v. Federation of Pakistan*, PLD 2004 SC 600, that a Bench of similar number of a High Court binds another Bench of the same number. *Ibid.*, at 614. This position was also reaffirmed in *Shahzad Dreho v. Khalid Mahmood Soomro*, 2003 PCr. LJ 319.

¹⁴⁰ PLD 1986 FSC 174 at 177 (B).

¹⁴¹ The different periods of Islamic legal history are divided as: 1st period, 13 BH–11 AH/610–632; the 2nd period, 11–41/632–661; 3rd period, 41–132/661–749; 4th period, 132–350/749–961; 5th period, 350–8th–9th/961–14th century; 6th period, 8th–11th/14th–17th century; and the 7th period, 11th/17th — to the present. The above is only a tentative periodization for convenience of understanding the early history of *fiqh*. For details of each periods; how Islamic law developed during each phase; what were its sources and so on, see, Imran A. K. Nyazee, *Outlines of Islamic Jurisprudence*, 2nd edn. (Islamabad: Centre for Islamic Law & Legal Heritage, 2002), 349–358; N. J. Coulson, *A History of Islamic Law* (Edinburg: Edinburgh University Press, 1964; reprint Delhi: Universal Law Publishing Co., 1997), 21–73; Hussain Hamid Hassan, *An Introduction to the Study of Islamic Law*, trans. Ahmad Hasan (Islamabad: International Islamic University, 1997), 16–122; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: The

from 13 BH/610 CE to the present. The first period begins with revelation to the Prophet (peace be on him) and ends with his death. In the second period of the growth of Islamic law, the foundations of Islamic legal system were refined and developed.¹⁴² A large number of legal principles were laid down and established through the decisions of the Companions of the Prophet (peace be on him). These opinions became precedents for later times.¹⁴³ During the third and fourth periods of growth, that is, 41–132/661–749 and 132–350/749–961 respectively, various schools of thought emerged, based on adherence to different methodologies of interpretation. The four major Sunnī Schools that continue to be effective are the Ḥanafī,¹⁴⁴ Mālikī,¹⁴⁵ Shāfi‘ī,¹⁴⁶ and Ḥanbalī¹⁴⁷ schools. Besides these, the most important school is that of the Shī‘ah.¹⁴⁸ There were also other schools of law, but they died down and now have very few followers.¹⁴⁹

Clarendon Press, 1964; reprint Delhi: Universal law Publishing Co., 1997), 15–75; Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, ed. Tahir Mahmood, 5th edn. (New Delhi: Oxford University Press, 2008), 20–28.

¹⁴² Nyazee, *Outlines of Islamic Jurisprudence*, 351.

¹⁴³ *Ibid.*

¹⁴⁴ The Ḥanafī school of thought was founded by Imām Abū Ḥanīfah Nu‘mān b. Thābit (d. 150/767).

¹⁴⁵ The Mālikī school was founded by Imām Mālik b. Anas (d. 179/795).

¹⁴⁶ The Shāfi‘ī school of thought was founded by Imām Muḥammad b. Idrīs al-Shāfi‘ī (d. 204/819).

¹⁴⁷ The Ḥanbalī school was founded by Aḥmad b. Ḥanbal (d. 241/855).

¹⁴⁸ The basic difference between Shī‘ahs and Sunnis goes back to the election of Abū Bakr as caliph in the assembly at Thaḳīfah after which though almost all the companions gave their pledge of allegiance to Abū Bakr, a few companions (highest recorded number to be thirteen) withheld their pledge considering ‘Alī b. Abī Ṭālib to be more suitable to be the caliph, however they all, one by one, gave their pledge to Abū Bakr in few months time. However, later in history after martyrdom of Ḥusayn b. ‘Alī when Shī‘ah started to become a distinct community theory that the Imām is designated by God and not by people was developed. So Shī‘ah deny the principle of election in the matter of the Imamate, and hold that the Prophet (peace be on him) had designated ‘Alī as his successor on a certain occasion. For a detailed account of the origins and evolution of Shī‘ah Islam, see, S. H. M. Ja‘farī, *The Origins and Early Development of Shi‘a Islam* (Karachi: Oxford University Press, 2000). The Shī‘ah, however, are divided into a large number of sub-schools. See, Fyzee, *Outlines of Muhammadan Law*, 39–40.

¹⁴⁹ Some of these are: the Awzā‘ī school which was founded by Imām ‘Abd al-Raḥmān al-Awzā‘ī (d. 157/774); the Zāhirī school, founded by Dāwūd b. ‘Alī al-Iṣfahānī, better known as Abū Sulaymān al-Zāhirī (d. 270/883); and the Ṭabarī school, founded by Muḥammad b. Jarīr al-Ṭabarī (d. 310/922). The last three schools are extinct; however, the Zāhirī school has some followers in Iraq. Some less important schools, that have survived, are: Zaydīs in Yemen. Imām Zayd (d. 122/740) was the first son of ‘Alī Zayn al-‘Ābidīn (d. 94/713) — “the fourth Imām of the Shī‘ah” but he is considered Imām by only the Zaydīs of Yemen while the Shī‘ah (Twelvers) considered his younger brother Muḥammad al-Bāqir (d. 113/731) as their fifth Imām. The last school to mention is the Ibāḍī school in Oman and Zanzibar. This school is the remanence of

As is well known, Imām Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804) was the first person who wrote the first major works on Islamic law.¹⁵⁰ These include *Kitāb al-Aṣl* or *al-Mabsūt*, *al-Jāmi‘ al-Ṣaghīr*,¹⁵¹ *al-Jāmi‘ al-Kabīr*,¹⁵² *al-Siyar al-Ṣaghīr* and *al-Siyar al-Kabīr*.¹⁵³ These books were referred to as the *Zāhir al-Riwāyah* or the preferred rules from among the different narrations of the rules. Shaybānī’s works include the rulings of Abū Ḥanīfah Nu‘mān b. Thābit (d. 150/767), Abū Yūsuf Ya‘qūb b. Ibrāhīm (d. 183/798) and of Shaybānī himself as well as Zufar b. al-Hudhayl b. Qays (d. 157/774), ‘Abd al-Raḥmān al-Awzā‘ī (d. 157/774) and other jurists of his time. Nyazee argues that “a system of law that presents such a variety of opinions is difficult to follow, unless some rules are chosen for practice.”¹⁵⁴ This is why after recording the rulings of different jurists, Shaybānī identified some of those rules that were to be followed by people. These rules were referred to as *Zāhir* rules or the rules preferred for compliance. In *al-Jāmi‘ al-Ṣaghīr*, Imām Shaybānī focused entirely on the preferred rules that were to be followed by common people as well as *qāḍīs*.¹⁵⁵ *Al-Siyar al-Ṣaghīr* or the *Shorter Book of Muslim International Law* was the summary of preferred rules that are to be followed by the Muslim Caliphs during war and peace with other states.¹⁵⁶ The *fuqahā’* of various schools, especially the Ḥanafī School, compiled the preferred rules after Shaybānī. These treatises include *Mukhtaṣar*¹⁵⁷ *al-Taḥāwī* by Imām Abū Ja‘far Aḥmad b. Muḥammad al-Taḥāwī (d. 321/933), *al-Kāfi fī*

Khārijīte. The ‘*Khārijītes*’ or ‘seceders’ demonstrated their hostility to both Mu‘āwiyah and ‘Alī during the civil war. They assassinated ‘Alī and attempted to assassinate Mu‘āwiyah. See, Coulson, *A History of Islamic Law*, 103–104.

¹⁵⁰ *Al-Muwatta’* of Imām Mālik is prior in time but it is not considered a book of Islamic law proper. In reality, it was a record of the then current law and practice in Madīnah and is “not primarily concerned to establish the origins of that law.” See, Coulson, *A History of Islamic Law*, 66. Moreover, *Kitāb al-Āthār* of Imām Abū Yūsuf Ya‘qūb b. Ibrāhīm cannot be treated as a book of Islamic law proper. See, Imran A. K. Nyazee, “Introduction” to *al-Hidāyah*, trans. Imran A. K. Nyazee (Bristol: Amal Press, 2006), xiii, n. 10.

¹⁵¹ Muḥammad b. al-Ḥasan al-Shaybānī, *al-Jāmi‘ al-Ṣaghīr*, ed. ‘Abd al-Ḥayy al-Laknawī (Hyderābād: n.d.; reprint Karachi: Idārat al-Qur’ān wa ‘Ulūm al-Islāmiyyah, 1987).

¹⁵² Muḥammad b. al-Ḥasan al-Shaybānī, *al-Jāmi‘ al-Kabīr* (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1979).

¹⁵³ This is the *magnum opus* study of international law. The book is not available separately and is published with commentary. See, Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, commentary by Imām Abū Bakr Muḥammad b. Aḥmad al-Sarkhasī, ed. Muḥammad Ḥasan Ismā‘īl al-Shāfi‘ī, 5 vols. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997).

¹⁵⁴ Nyazee, “Introduction” to *al-Hidāyah*, xiii.

¹⁵⁵ *Ibid.*

¹⁵⁶ Muḥammad b. al-Ḥasan al-Shaybānī, *The Shorter Book of Muslim International Law*, ed. and trans. M. A. Ghāzī (Islamabad: Islamic Research Institute, 1998).

¹⁵⁷ The term *Mukhtaṣar* (literally, summary) seems to be used for a rule book.

Furū' al-Ḥanafīyyah by al-Ḥakīm al-Shahīd al-Mirwazī (d. 334/945), *Mukhtaṣar al-Karkhī* by Imām 'Ubayd Allāh b. al-Ḥasan al-Karkhī (d. 340/951), *Tuḥfat al-Fuqahā'* by Abu Bakr 'Alā' al-Dīn b. Aḥmad al-Samarqandī (d. 538/1143) and *Bidāyat al-Mubtadī* by Burhān al-Dīn 'Alī b. Abū Bakr al-Marghīnānī (d. 539/1144). The famous Ḥanafī work *al-Hidāyah* is a commentary on *Bidāyat al-Mubtadī*. There are also many other books in this series.¹⁵⁸ The *Mukhtaṣars* form a linked chain as each *Mukhtaṣar* borrows from the one that precedes it. Nyazee opines:

In this chain, preference is usually given to those opinions that came first. The attempt being to commence the statement of the rules with the opinions of earlier Imāms.¹⁵⁹ This conforms with the system of precedents in Islamic law. *In Islamic law, the precedents assigned priority are those that were laid down first and not those that came later.*¹⁶⁰ ... The presumption in Islamic law is that the decisions arrived at earlier are closer to the *uṣūl*,¹⁶¹ while those that came later are to be handled with caution.¹⁶²

This system of precedents attaches significance to chains coming down from the earlier Imāms, so as to distinguish the authentic from the less authentic.¹⁶³ The reverse order is followed in the common law, that is, the

¹⁵⁸ For details see, Nyazee, "Introduction" to *al-Hidāyah*, xiv–xv.

¹⁵⁹ Nyazee is trying to say that the opinions of earlier Imāms are given preference over the opinions of latter Imāms.

¹⁶⁰ Nyazee, "Introduction" to *al-Hidāyah*, xvi.

¹⁶¹ *Ibid.*, xvi, n. 15. That is, they were derived by those who had greater knowledge of the evidences, as they were closer to the period of the Prophet (peace be on him) and were more proficient in the use of the *uṣūl* that they had laid down themselves.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, xvi. Apart from the issue of 'later' and 'earlier,' there is also the important question of the status of a jurist. For instance, the opinion of Muḥammad b. Muḥammad al-Bazzāzī (d. 819/1424) cannot overrule the opinion of Abū 'l-Ḥusayn Aḥmad b. Muḥammad al-Qudūrī (d. 428/1037) not only because al-Bazzāzī came later than al-Qudūrī but also because al-Bazzāzī was among the *aṣḥāb al-fatāwā* and al-Qudūrī was among the *aṣḥāb al-mutūn*. Thus, there may be a hypothetical possibility that the opinion of a later jurist may overrule the opinion of an earlier jurist, provided the later jurist is of a higher grade than the earlier jurist. As a remote possibility, a 'new' *mujtahid muṭlaq* may also become the founder of a new school. Professor Nyazee has based his statement regarding precedents in Islamic law on the presumption that a person strictly follows only one school of thought. As such there is no room, in his theory, for *talfīq* (the construction of an opinion by combining part of a doctrine of one school with a part from another). However, *takhyīr* (choosing opinions from one jurist or the other) within one school is possible and this exactly is the task of the *aṣḥāb al-tarjīḥ*. There may be a situation in which a jurist of any school of thought, such as the Ḥanafī School, revokes his earlier *fatwā* that was in accordance with the classical view of the school and gives a new *fatwā* which may oppose the classical view. A jurist is allowed to do this provided he follows the established principles for preferring one opinion to the other within a school. A typical example is that of Mawlānā

latest decision is given precedence over the earlier. In other words, in the common law system, an earlier decision can be overruled by a subsequent Court or even by a larger Bench of the same Court. Once a case is overruled, it is considered a bad authority and is not cited by lawyers to support a point. Lawyers are even reprimanded for citing overruled cases,¹⁶⁴ whereas in Islamic law the earlier the opinion, the better it is. In common law the latest the decision, the better it is and the earlier decision has no value for the case at bar.

The Ḥanafī jurists poffer many hypothetical cases to answer questions should they arise but the details of the decisions given by courts are not reported. The reason for this could be that since these did not constitute binding precedents for the same or different, lower or equal courts, these were not preserved. Abū Bakr al-Khaṣṣāf (d. 260/874) of the Ḥanafī School of law in his book *Adab al-Qāḍī* mentions that the *qāḍī's dīwān* or archive includes all the records kept by the judge, filed in a book case. The two primary components of the *dīwān* are *mahḍars* and *sijills*. The *mahḍar* is the record of the actions of, and claims by, litigants, made in the presence of the *qāḍī*, as recorded by his scribe. The *qāḍī* bases his judgment on the contents of the *mahḍar*. The *sijill* is the witnessed record of the contents of each *mahḍar* together with the *qāḍī's* judgment in each case.¹⁶⁵ It is important to note that Muslim *mujtahids* and *fuqahā'*, including those of the earlier times, are not automatically judges; rather, they are independent '*ulamā'*'. Their opinions, not decisions or judgments as normally issued by the *qāḍīs* on particular cases, are

Ashraf 'Alī Thānawī (d. 1362/1943) who revoked his earlier *fatwā* given in 1913 regarding the dissolution of marriage in case the wife becomes apostate. The Mawlānā based his subsequent *fatwā* given in 1933 on the opinion of latter Ḥanafī jurists of Samarkand and Bukhara who asserted that the *nikāḥ* of a Muslim woman is not dissolved automatically. In other words, the Mawlānā overruled his earlier opinion. For details see, Ashraf 'Alī Thānawī, *al-Ḥilat al-Nājizah li 'l-Ḥalīlah al-'Ajizah* [A Successful Legal Device for the Helpless Wife] (Lahore: al-Fayṣal Nāshirān wa Tajirān-i Kutub, 1996); and Khalid Masud, "Apostacy and Judicial Separation in British India," in Khalid Masud, David Powers and Brinkley Messick, eds. *Islamic Legal Interpretation: Muftis and Their Fatwās* (Cambridge: Harvard University Press, 1996, repr. Karachi: Oxford University Press, 2005), 193–203.

¹⁶⁴ In *Syed Munawwar Ali v. Mehta W. N. Kohli*, 1980 CLC 1561, an experienced advocate got his appeal admitted on the basis of an overruled judgment. Chief Justice Mir Khuda Bakhsh Marri of the Baluchistan High Court regretted the conduct of the advocate and warned him to be careful in future. *Ibid.*, at 1563 A.

¹⁶⁵ Besides these the *Qāḍī's dīwān* includes: a record of witnesses whose character had been confirmed by the witness investigators; names of endowment supervisors and their salaries, guardians of orphans, divorcees, and widows; accounts sheets, a register of bequests; copies of written documents, acknowledgments and gifts; and copies of letters sent to and received from other *qāḍīs*. See, Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2004), 93–94.

thus obviously not precedents. They resemble what we know throughout Islamic history as the *fatāwā* of the *muftīs*.

Basheer Ahmad argues that in medieval India Awrangzēb ‘Ālamgīr (1068–1118/1658–1707) had ordered to maintain ‘*mahzarnāmahs*’ (Persian for *mahḍars*) or records of judgments of higher courts for circulation among *qāḍīs* and *muftīs*.¹⁶⁶ He further states that during the entire Mughal period the *muftīs* were enjoined to copy out precedents and to read and place them before the *qāḍīs*.¹⁶⁷ There is no evidence to prove that such judgments were binding for other courts. According to *al-Fatāwā al-‘Ālamgīriyyah*,¹⁶⁸ the most exhaustive and authoritative book of the Ḥanafī jurisprudence written on the orders of Awrangzēb by a group of scholars,¹⁶⁹ the record of cases was not to be destroyed and was to be made available if requisitions were made by other courts.¹⁷⁰ The *Fatāwā* was followed by the later Mughal rulers.¹⁷¹ Basheer Ahmad has found a manuscript called *Bāqiyāt al-Ṣāliḥāt* which contains 50 recorded cases from the Mughal era and states that every case describes the facts as well as the reasons for the decisions and is duly signed and stamped. This book was unpublished till 1941.¹⁷² Judgments were not regarded as binding precedents on the points with which they dealt. This is the main reason that we do not find law reports in the early and medieval periods of Islam corresponding with those of modern common law countries.

¹⁶⁶ Ahmad, *The Administration of Justice in Medieval India*, 188.

¹⁶⁷ *Ibid.*

¹⁶⁸ Shaykh Niẓām, *et al.*, *al-Fatāwā al-‘Ālamgīriyyah* (Cairo: Bulaq, 1310). The book was in six volumes, and was also published elsewhere also. It was translated in parts in N. E. Baillie’s *Digest of Moohummudan Law on the Subjects to which it is Usually Applied in British Courts of Justice in India*, 2nd edn. (London: 1875). Also translated in part in N. E. Baillie, *Mohammadan Laws on Land Tax According to the Moohummudan Law: Translated from the Fatāwā Alumgeeree*, (Lahore: 1979). It is also known as *Fatāwā Hindiyyah*.

¹⁶⁹ It was compiled by a Royal Commission of ‘*Ulamā*’ under the supervision of Shaykh Niẓām — a celebrated jurist from Lahore. He was assisted by six more scholars. However, the names of only four of them are available. They are Muḥammad Jamīl, ‘Ziā’ al-Dīn, Jalāl al-Dīn Ḥusayn and Muḥammad Ḥusayn. See, Ahmad, *The Administration of Justice*, 42. The Code was the great Corpus Juris of Awrangzēb’s reign and is more or less an exposition of the substantive law then prevailing in India.

¹⁷⁰ Shaykh Niẓām, *et al.*, *al-Fatāwā al-‘Ālamgīriyyah*, 6: 249.

¹⁷¹ The *Fatāwā* was not only used by the *qāḍīs* of ‘Ālamgīr but also by other Emperors till the end of the Mughal dynasty. The *Fatāwā* replaced *Fiqh-i Firūz Shāhī*, which was a Code of Civil Procedure compiled at the time of Firūz Shāh Tughlaq (d. 790/1388). This book remained the basis of the judicial system under the Delhi rulers until replaced by the *al-Fatāwā al-‘Ālamgīriyyah*. See, Ahmad, *The Administration of Justice*, 41–42. *Fiqh-i Firūz Shāh* was based on material collected by Ya‘qūb Muẓaffar Kirāmī and is available as MS. in India Office Library, 2987. See, Qureshi, *The Administration of the Mughal Empire*, 267.

¹⁷² In 1941, Basheer Ahmad intended to publish it but I have not heard of its publication. If it is published, then I request to be informed.

Ijtihād and *Taqīd* in Islamic Law and the Doctrine of *Stare Decisis* in Pakistani Law

Having explained precedent in Islamic legal theory, we now turn our attention to see whether the practice of precedent in Pakistan, that is, in the higher Court which binds the lower Courts, is accepted in Islamic law? To understand the place of the Pakistani/common law practice, we have to explain some relevant doctrines that are essential in our discussion. These doctrines are *ijtihād* and *taqīd*. In Islamic legal theory, a *mujtahid* is a person who exercises his utmost effort to extract a rule from the subject matter of revelation while following the principles and procedures established in legal theory.¹⁷³ The process of this reasoning — the effort itself — is known as *ijtihād*. It literally means exerting one's self to the utmost to attain an object. Technically, it is exerting one's self to form an opinion in a case or as regards a question of law. It is also defined as the "effort made by the *mujtahid* in seeking knowledge of the *ahkām* (rules) of the *Sharī'ah* through interpretation,"¹⁷⁴ and the "effort of the jurist to derive the law on an issue by expending all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue by the judge."¹⁷⁵ Thus the *'illah*, the underlying legal cause of a *ḥukm* (rule), in the previous case, its *ratio decidendi*, may be the same, on the basis of which the accompanying *ḥukm* (rule) is extended to other cases.¹⁷⁶ *Ijtihād* is the process for the derivation of the law. The result of the *ijtihād* is a source as it is the *precedent* required for later cases.¹⁷⁷

Certain areas are excluded from the *mujtahid's* sphere of *ijtihād*. These are texts which unambiguously state the legal rules. The certainty (*qaṭ'*) generated by these texts *ab initio* precludes any need for reinterpretation.¹⁷⁸ Relevant examples are the prohibition of adultery, fornication, drinking of alcohol, theft, *ḥirābah* and other *ḥudūd* offences. Also excluded are those cases which are subject to consensus.¹⁷⁹ In all other spheres of the law, *ijtihād* is simply a collective duty (*farḍ kifāyah*) of Muslims.

A *mujtahid* is required to fulfil all the conditions¹⁸⁰ necessary for *ijtihād* if

¹⁷³ See, Wael B. Hallaq, *A History of Islamic Legal Theory: An Introduction to Sunnī Uṣūl al-Fiqh* (Cambridge: Cambridge University Press, 1997; reprint, 1999), 117.

¹⁷⁴ Nyazee, *Islamic Jurisprudence*, 263.

¹⁷⁵ *Ibid.*, 395.

¹⁷⁶ See, *ibid.* This is in the case of *qiyās* (analogy).

¹⁷⁷ See, *ibid.*, 341.

¹⁷⁸ See, *ibid.*

¹⁷⁹ See, *ibid.*, 266–67.

¹⁸⁰ He must have sufficient knowledge of all the verses of the Qur'ān in which the rules of

he wants to exercise *ijtihād*. Once a person fulfils these conditions, being a *mujtahid* he cannot follow the *ijtihād* of others. Whenever he is presented with a case, he must find for it a solution if he is capable of doing so. The reason for this is that no *mujtahid* is infallible, and that his opinion extracted through *ijtihād* is as valid as that of another.¹⁸¹ Moreover, a *mujtahid* must never follow the opinion of a lesser *mujtahid*. According to ‘Abū ‘l-Walīd Sulaymān b. Khalaf al-Bājī (d. 747/1081), if a *mujtahid* is incapable of solving a particular case, he can resort to the opinion of another *mujtahid*.¹⁸² It is permitted for a jurist to practice *ijtihād* in a particular branch of the law when he is unable to practice it in others. In the first three centuries of Islamic history, there were many *mujtahidūn* or those who exercised independent judgment. Later on, most of the *mujtahidūn* did not exercise independent *ijtihād*, but followed one of the established *madhhabs* or schools of thought. Such a *mujtahid* was known as *mujtahid fi ‘l-madhhab* (*mujtahid* within a school of law). In our times in countries like Pakistan *ijtihād* is a legislative function because it lays down the law for the first time and the state has monopoly over legislation.¹⁸³

According to the majority view within the Ḥanafī school of law, *ijtihād* is not a necessary condition for a *qāḍī*: however, for the Mālikī, the Shāfi‘ī, and the Ḥanbalī schools of law, it is a necessary condition.¹⁸⁴ Abū Bakr b. Mas‘ūd al-Kāsānī (d. 587/1191), who argues that *ijtihād* is not a condition, mentions at the same time that in cases for which there exists no authoritative text or *ijmā‘*, the *qāḍī* must follow his *ijtihād*.¹⁸⁵ He asserts that if a *qāḍī*, who is a *mujtahid*, decides according to the view of another school and his judgment is valid by consensus¹⁸⁶ and if two different decisions based on *ijtihād* are given by the same *qāḍī* in two similar cases, the first decision is not invalidated.¹⁸⁷ What we understand from these statements is that in the majority of cases, a

Islamic law are found; he must be familiar with *ḥadīth* collections as well as the science of *ḥadīth* criticism; must know the Arabic language very well; must know the theory of abrogation; he must know all those cases that are subject to consensus; and he must have the knowledge of the *Maqāṣid al-Sharī‘ah*. See, Nyazee, *Islamic Jurisprudence*, 271–72. Beside the above conditions a *Qāḍī* should be wise, patient, honest, humble, learned and inquisitive.

¹⁸¹ See, Hallaq, *A History of Islamic Legal Theory*, 118–119.

¹⁸² Abū ‘l-Walīd Sulaymān b. Khalaf al-Bājī, *Kitāb al-Ḥudūd fi ‘l-Uṣūl*, ed., Nazīh Ḥammād (Beirut: Mu‘assasat al-Zu‘bī li ‘l-Ṭība‘ah wa ‘l-Nashr, 1973), 723

¹⁸³ Nyazee opines that in Pakistan, the Council of Islamic Ideology cannot be deemed to have the qualifications of a *mujtahid* and its status is more like that of a *muftī* — jurist-consult, whose opinions are not binding. Nyazee, *Islamic Jurisprudence*, 272–273.

¹⁸⁴ See, Abū Bakr b. Mas‘ūd al-Kāsānī, *The Unprecedented Analytical Arrangement of Islamic Laws*, trans. Imran A. K. Nyazee (Islamabad: Advanced Legal Studies Institute, 2007), 21.

¹⁸⁵ See, *ibid.*, 33.

¹⁸⁶ See, *ibid.*, 38.

¹⁸⁷ See, *ibid.*, 39.

qāḍī has to be a *mujtahid*: thereby, he is not allowed to follow the *ijtihād* of a fellow *mujtahid*/judge. Now it is easy for us to assert, on the basis of what has been explained above, that in Islamic law a court is not bound by the decision of another court, whether the latter court is of equal rank or higher in the hierarchal organization.

After considering the doctrine of *ijtihād* it would be worthwhile to consider the parallel doctrine of *taqlīd*.¹⁸⁸ Every Muslim has to follow the law but every one is not learned enough in the rules of the *Sharī‘ah*; In that case, he is supposed to follow the opinions of those who know better. Thus, the non-*mujtahids* are commonly known as the ‘followers’ or ‘imitators’ (*muqallidūn*; sing. *muqallid*) of *mujtahids*. Every person who is not a *mujtahid* is *ipso facto* a *muqallid* and is required to follow the opinions of *mujtahids*.¹⁸⁹ Imām Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī (d. 505/1111) puts forward a two-fold argument for proving that *taqlīd* is obligatory:

1. That the Companions of the Prophet had *ijmā‘* (consensus) that the legal experts were to guide the laymen in legal issues and that the laymen were not required to attain the status of *ijtihād*.
2. That there is also consensus on the obligation of every layman to follow the law and it is more than obvious that not every person is capable of becoming an expert in law: Making it obligatory upon a layman to attain the status of *ijtihād* is asking him to do the impossible because it will lead people to abandon their respective professions as well as making families and the whole system will collapse because everyone would devote his skills to acquire the knowledge of law. Moreover, it will also lead the scholars to leave the intellectual work and turn to the worldly affairs. Resultantly, the knowledge of law will vanish.¹⁹⁰

The *muqallidūn* are subdivided into those who are jurists and those who are laymen. Imām Mālik b. Anas is said to have permitted fourteen cases of *taqlīd*.¹⁹¹ The conclusion is that *taqlīd* is unavoidable, that it “is part of our

¹⁸⁸ *Taqlīd*, literally imitation, means following the opinion of another person without knowledge of the authority for such opinion.

¹⁸⁹ See, Hallaq, *A History of Islamic Legal Theory*, 122.

¹⁹⁰ Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mustasfā min ‘Ilm al-Uṣūl* (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, n.d.), 2: 203. Hallaq gives similar arguments in support of *taqlīd* and says: “This obligation is deemed necessary because it cannot be expected of all members of the community to rise to the level of *mujtahids*, for this would require that they devote all their energies and time to attain a sophisticated knowledge of the law which would in turn mean that no one would be able to acquire any other skill. As a consequence, society, whose functioning depends on all sorts of professions, would become impossible.” Hallaq, *A History of Islamic Legal Theory*, 122.

¹⁹¹ See, Shihāb al-Dīn Abu ‘l-‘Abbās Aḥmad b. Idrīs al-Qarāfi, *Sharḥ Tanqīḥ al-Fuṣūl fī Ikhtisār al-*

daily lives and we are indulging in some form of *taqlid* at each step.”¹⁹² For example, a layman is permitted to accept the opinion of a doctor; it is permitted to accept the opinion of an expert such as the opinion of a trader in the valuation of property; and the statement of child bringing permission to the guest at the door that he is allowed to enter may be accepted by the guest, and so on.¹⁹³

As stated above, since *ijtihād* is a *farḍ kifāyah*, a duty to be fulfilled by only a limited number of qualified persons, all laymen and non-*mujtahid* jurists are under the obligation to follow the guidance of the *mujtahids*. This obligation is further justified by reference to the Qur’ān 16:43 which states: “You people can ask those who have knowledge if you do not know.”¹⁹⁴ Here, “those who have knowledge” is taken to refer to the *mujtahids*. Some of the Companions, who were less proficient in legal matters, used to ask for the opinions of those who were more learned regarding legal issues. This practice had never been condemned and is considered to have the status of *ijmā’* (consensus).¹⁹⁵

Taqlid is the basis for the Islamic theory of adjudication and its purpose is to lay down a methodology for the *faqih* for discovering and applying the law in the light of the already settled law.¹⁹⁶ This was the function of the *mujtahids* within a school of thought and this is the “function of the modern judge too, who discovers the law from the statutes and precedents to settle the disputes brought to him.”¹⁹⁷ Nyazee argues that “In Islamic law, the task of the *faqih* appears to be the same as that of the modern judge who is settling issues of law and fact.”¹⁹⁸ The doctrine of *taqlid* furnishes us the basic material for developing an Islamic theory of adjudication.

Let us examine Articles 189, 201 and 203GG, of the 1973 Constitution of the Islamic Republic of Pakistan. As we know, these Articles bind the lower Courts to follow the decisions of the higher Courts. The law of binding precedent under Articles 189, 201 and 203GG means that in Pakistan *taqlid* is

Maḥṣūl fi ’l-Uṣūl (Cairo/Beirut: Dār al-Fikr, 1973), 430–434; Nyazee, *Islamic Jurisprudence*, 331–32.

¹⁹² Ibid., 332.

¹⁹³ See, *ibid.*

¹⁹⁴ The translation of this verse is taken from M. A. S. Abdel Haleem, *The Qur’an: A New Translation* (Oxford: Clarendon University Press, 2004, reprint, 2005), 168.

¹⁹⁵ See, Abū Hāmid Muḥammad b. Muḥammad al-Ghazālī, *al-Mankkḥūl min Ta’liqāt al-Uṣūl*, ed. Muḥammad Ḥasan Haytū (Damascus: Dār al-Fikr, 1980), 472–73, 488–94; Abū Ishāq Ibrāhīm al-Shīrāzī, *al-Luma’ fi Uṣūl al-Fiqh*, ed. Muḥammad al-Na’sānī (Cairo: Maṭba’at al-Sā’adah, 1908), 84–85.

¹⁹⁶ See, Nyazee, *Islamic Jurisprudence*, 328.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

institutionalized.¹⁹⁹ Thus, on the one hand, precedent is binding and on the other hand, Islamic law is enforced by the national courts. The result is that the decisions of the superior courts concerning Islamic law become precedents. This is a unique blend found in Pakistani law. The same is true of Bangladesh and India where Islamic law is enforced by the national courts.

Since the superior courts in Pakistan can overrule their own previous decisions, let us see whether the same is possible under Islamic law or not and whether a decision can be overruled by a different court later in time. The answer is in the affirmative. As mentioned earlier, under Islamic law, a judge is supposed to be a *mujtahid*. This is supported by the Qur'an 4:105 which states: "We have sent down the Scripture to you [Prophet] with the truth so that you can judge between people in accordance with what God has shown you." 'Amr b. al-'Āṣ is reported to have heard the Prophet (peace be on him) saying that when a judge resorted to *ijtihad* and decided a case, then if his *ijtihad* is correct, he is rewarded twice; and if it be wrong he will receive one reward.²⁰⁰ In the famous *ḥadīth* of Mu'ādh b. Jabal (d. 18/639), the Prophet (peace be on him) endorsed Mu'ādh's saying that he will resort to *ijtihad* to determine a matter if he could not find its answer in the Qur'an and the *Sunnah*.²⁰¹ If a judge is bound by the *ijtihad* of other judge(s), then he will be prevented from undertaking *ijtihad*,²⁰² and as is known, one *mujtahid* is not bound to follow another *mujtahid*. As a general principle of Islamic law, if a judge later finds that the previous judgment was not correct, that is, if the *ijtihad* in the earlier case was wrong, he will change his *ijtihad* and decide the new case accordingly. 'Umar b. al-Khaṭṭāb (d. 23/644), the second Caliph, emphasized this principle when he wrote his famous letter, on the administration of justice to Abū Mūsā al-Ash'arī (d. 44/665). He said:

Let not a judgment you rendered yesterday, and that you have (later) reflected

¹⁹⁹ See, Nyazee, *Outlines of Islamic Jurisprudence*, 168; idem, *Islamic Jurisprudence*, 332.

²⁰⁰ See, Muslim b. al-Ḥajjāj, *Saḥīḥ Muslim*, Kitāb al-Aqḍiyah, Bāb Bayān Ajr al-Ḥākim idhā Ijtahada fa Aṣāba aw Akḥṭa'a; Abū 'Abd al-Raḥmān al-Nisā'ī, *Sunan al-Nisā'ī*, Kitāb Ādāb al-Qaḍā', Bāb al-Iṣābah fī 'l-Ḥukm; Muḥammad b. 'Īsā al-Tirmidhī, *Sunan al-Tirmidhī*, Kitāb al-Aḥkām, Bāb mā Jā' fī 'l-Qaḍī Yuṣīb wa Yukḥṭī'.

²⁰¹ See, Abū Dāwūd Sulaymān b. Ash'ath al-Sijistānī, *Sunan Abī Dāwūd*, Kitāb al-Aqḍiyah; Muḥammad b. 'Īsā al-Tirmidhī, *Sunan al-Tirmidhī*, Kitāb al-Aḥkām, Bāb mā Jā' fī al-Qaḍī Kayfa Yaqḍī; Abū Muḥammad 'Abd al-Raḥmān al-Dārimī, *Sunan al-Dārimī*, al-Muqaddimah, Bāb al-Futyā wa mā fih min al-Shiddah.

²⁰² 'Abd al-'Azīz Sa'd al-Daghīsar, "Ḥujjiyyat al-Sawābiq al-Qānūniyyah" (The Authority of Precedents) *al-'Adl*, 34 (1428/2007), 191. This article is more about the practice in Saudi Arabia. The author opines that we are not supposed to follow the opinions of *fuqahā'*. This doctrine exalts full Qaḍī freedom of *ijtihad* and the proof-evaluation theory, requiring that a judge rule only by what to him is truth. See, Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), 94–95.

upon receiving guidance towards the correct view, prevent you from restoring a right. Rights are ancient and cannot be annulled. Restoring a right is by far better than persisting in a manifest error. Ponder over the matter, ponder over what is causing you concern in your heart and is something that has not reached you from the Noble Qur'ān and the *Sunnah*. Thereafter, identify the precedents and resembling cases and undertake analogy when such cases are found. Then rely on what appears to be more appropriate and pleasing to Allah, the Exalted, and what is most suitable as the truth.²⁰³

‘Umar personally practiced what he asked his deputies to do. It is reported that he changed his previous view regarding difference in compensation in the case of fingers when he was told that the *Sunnah* states that these are equal.²⁰⁴ He also changed his view in the famous case of inheritance. It is reported that he was asked to decide a case in which a woman was survived by her husband, mother, uterine brothers and full brothers. ‘Umar gave one third to the uterine and the full brothers. Someone told him that he did not give shares to both of them last time when he had decided a similar case. To this ‘Umar replied: “That was what we decided [at that time] and this is what we decide [today].”²⁰⁵ It is clear from the above that a judge in Islamic law is not bound by his previous decision and is free to overrule it if he thought that the previous decision was wrong. However, the decision so given shall have prospective effect between the parties only and similar cases decided earlier not be reopened.

There remains a parallel question to answer: can the decision of a judge which is based on his *ijtihad* be reversed on appeal? There were no fixed institutions or procedures for appeal in the classical Islamic judicial institution. However, persons disappointed by a judgment often sought its review, either by another *qāḍī* or by the ruler, or by his agents under the *al-Mazālīm* courts. There are some practices about appeals or reviews of cases in the early history

²⁰³ ‘Alī b. ‘Umar al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, commentary, Muḥammad Shams al-Ḥaqq (Multān: Nashr al-Sunnah, n.d.), 4: 206; Aḥmad b. ‘I-Ḥusayn al-Bayhaqī, *al-Sunnan al-Kubrā* (Beirut: Dār al-Fikr, n.d.), 10: 150; also see, ‘Alā’ al-Dīn Abū Bakr b. Mas‘ūd al-Kāsānī, *The Unprecedented Analytical Arrangement of Islamic Laws*, 58.

²⁰⁴ Imām al-Shāfi‘ī states that ‘Umar made the decision that fifteen camels should be given as compensation for the loss of a thumb, and prescribed different number of camels as compensation for the loss of other fingers. ‘Umar then found a written *ḥadīth* which said that ten camels should be given for every finger. He immediately withdrew his decision and followed the one mentioned in the *ḥadīth*. See, Muḥammad b. Idrīs al-Shāfi‘ī, *al-Risālah* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1969), 183; Abū Bakr Aḥmad b. ‘Alī al-Khaṭīb al-Baghdādī, *al-Faqīh wa ‘l-Mutafaqqih* (Beirut: Dār Iḥyā’ al-Sunnah al-Nabawiyyah, 1339 AH), 1:134–35; Abū Bakr ‘Abd Allāh b. Abī Shaybah, *Muṣannaf* (Karachi: Idarat al-Qur’ān, n.d.), 9: 191.

²⁰⁵ See, *ibid.*, 11: 255; and al-Bayhaqī, *al-Sunan al-Kubrā*, 6: 255.

of Islam. For example, when ‘Alī b. Abī Ṭālib (d. 40/661) was working in Yemen as the Prophet’s *qāḍī*, he told the parties in a difficult case that they may, if they were not happy with his decision, to report the case to the Prophet (peace be on him). On performing the Pilgrimage, the dissatisfied parties put their case before the Prophet (peace be on him). After listening to them, the Prophet (peace be on him) validated ‘Alī’s decision and is reported to have said: “It is what has been adjudged between you (*buwa mā quḍiya baynakum*).”²⁰⁶ In another important case, a litigant reported to the second caliph ‘Umar b. al-Khaṭṭāb a decision given by two Companions in his case. ‘Umar said, “If it had been me, I would have decided [differently].” The litigant then asked, “What prevents you, when the command is yours?” ‘Umar responded, “If I could refer you to a text of the Qur’ān, or to a *Sunnah* of the Prophet, I would do so. But I refer you to an opinion, and opinion is held in common.”²⁰⁷ What is deduced from this account is that a judgment may not be reversed on appeal if it is based on *ijtihād*. In other words, a judgment may be reversed only if it conflicts with an indisputable proof from the primary sources of the law, that is, the Qur’ān, the *Sunnah* and *ijmā’*. Thus, a rule based on *ijtihād* may not be reversed.²⁰⁸ This rule is based on the assumption that all *qāḍīs* are qualified to perform *ijtihād*.

There is one interesting Pakistani case regarding precedent in Islamic law which is worth quoting. In *Mr. Badi-uz-Zaman Kaikaus v. President of Pakistan*,²⁰⁹ the petitioner — a retired judge of the Supreme Court — moved a writ petition in the Lahore High Court, seeking a declaration *inter alia* that the 1973 Constitution itself and the legal system under it were un-Islamic. In his submissions, B. Z. Kaikaus had anticipated the fact that the High Court was bound by the Supreme Court’s decisions under Article 189 and had argued that the doctrine of binding precedent was un-Islamic and the High Court was not bound by an un-Islamic but otherwise binding precedent²¹⁰ in *Ziaur Rahman v. State* (1973)²¹¹ — a Supreme Court decision. It must be noted that some of the questions raised by the petitioner were raised by the Supreme

²⁰⁶ See, Shams al-Dīn Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyyah, *Zād al-Ma‘ād fi Hady Khyr al-‘Ibād*, ed. Shua‘yb al-Arnawūṭ and ‘Abd al-Qādir al-Arnawūt (Beirut: Mu‘assasat al-Risālah, 1979), 5: 13–14.

²⁰⁷ Abū ‘Umar Yūsuf al-Namārī Ibn ‘Abd al-Barr al-Qurṭubī, *Jāmi‘ Bayān al-‘Ilm wa Fadlīh wa mā Yanbaghī fi Riwāyatih wa Ḥamlīh* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1978), 2: 59.

²⁰⁸ See, Zayn al-Dīn b. Ibrāhīm Ibn Nujaym, *al-Ashbāh wa ‘l-Nazā‘ir ‘alā Madhhab Abī Ḥanīfah al-Nu‘mān* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1980), 105–8.

²⁰⁹ PLD 1976 Lah 1608.

²¹⁰ Kaikaus’s petition challenged the entire legal system of Pakistan as being un-Islamic and argued that all Muslims, including the judges of the High Courts, were under an obligation to follow Islamic law. *Ibid.*, 1615.

²¹¹ PLD 1973 SC 49.

Court in *Ziaur Rahman's* case. Justice Sardar M. Iqbal concluded that the 1973 Constitution was neither an un-Islamic nor an infidel text. The judgment avoided discussion on the question of binding precedent. On appeal against the decision of the Lahore High Court, the Supreme Court followed the reasoning of the High Court²¹² and did not discuss the question of whether the practice of binding precedent was Islamic or not. Martin Lau argues that the Supreme Court could have avoided any discussion about the Islamic character of the legal system by simply declining jurisdiction on the grounds that there was a specialist court [the Federal Shariat Court] invested with the power to determine any alleged repugnance of a law to Islam. The Supreme Court did not mention the Federal Shariat Court at all.²¹³ In *Hakim Khan v. Government of Pakistan* (1992),²¹⁴ however, the Supreme Court adopted this approach.²¹⁵ It must be noted that since Article 189, 201, and 203 GG are Constitutional provisions, the Federal Shariat Court has no jurisdiction to discuss the question of their repugnancy to Islam. However, other judicial norms, such as that an equal Bench cannot overrule an equal Bench are probably outside the jurisdiction of the Federal Shariat Court because these norms are based on judicial experience and are hallowed by time. Such judicial norms are repeatedly upheld by the Supreme Court and the High Courts. In addition, judicial norms might not be in the FSC's jurisdiction as it can determine whether a certain law is in conformity with the injunctions of Islam or not. The term law would mean codified law and not judicial norms. Bringing in judicial norms in the jurisdiction of the FSC would mean re-opening and possibly overruling many decisions of the Supreme Court as well as the High Courts. In other words, this would be beyond the FSC's jurisdiction and would possibly bring in confrontation with other Constitutional courts which, obviously, needs to be avoided.

There is no denying the fact that the doctrine of precedent restricts judges from undertaking *ijtihad*; secondly, it somewhat restricts the independence of the judiciary.

The Saudi Legal System and Precedent

We will now discuss the legal system in vogue in the Kingdom of Saudi Arabia to see the position of precedent in that system. The reason for choosing that system is that it is based on Islamic law. Some salient features of the Saudi legal system will also be explained along the way. In Saudi Arabia, by virtue of

²¹² *B. Z. Kaikaus v. The President of Pakistan*, PLD 1980 SC 160.

²¹³ Lau, *The Role of Islam*, 35.

²¹⁴ PLD 1992 SC 595.

²¹⁵ Lau, *The Role of Islam*, 35, n. 144.

Article 48 of the Basic Regulation, the courts shall apply in cases brought before them the rules (*ahkām*) of the Islamic *Shari'ah* in agreement with the indications [or proofs] in the Book and the *Sunnah* and the regulations issued by the ruler (*walī al-amr*) that do not contradict the Book or the *Sunnah*.²¹⁶ If no answer is found in officially sanctioned sources, resort may be made to *ijtihad*.²¹⁷ However, *ijtihad* of the judge in the Kingdom is officially confined to the Ḥanbalī school of thought.²¹⁸ Initially, it was decreed that judges will be bound to rule by the Ḥanbalī School's opinion "on which *fatāwā* are given."²¹⁹ A subsequent order explained this by requiring that judgments follow two particular late commentaries written by Maṣṣūr b. Yūnus al-Bahūtī (d. 1051/1641).²²⁰ In case there was contradiction or unavailability or the absence of opinion in these two books, then the decision should be made according to two other books,²²¹ and failing these, any books of the Ḥanbalī school, with a preference for the simplest of them.²²²

²¹⁶ See, "Al-Nizām al-Asāsī li 'l-Mamlakat al-'Arabyyah al-Sa'ūdiyyah" (Basic Regulations of the Kingdom of Saudi Arabia), 1992 available at: <http://www.mideastinfo.com/documents/Saudi_Arabia_Basic_Law.htm> (last visited: 29-08-2008). According to 'Abd al-Raḥmān al-Shalhūb, Article 48 of the Basic Regulations is not confined to any particular school of thought. See, 'Abd al-Raḥmān al-Shalhūb, *al-Nizām al-Dastūrī fi 'l-Mamlakah al-'Arabyyah al-Sa'ūdiyyah bayn al-Shari'ah al-Islāmiyyah wa 'l-Qānūn al-Maqārīn* (Riydh: Maṭba'at al-Safir, 2005), 241. For a detailed study of the legal system of Saudi Arabia, see, Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*; Abdullah F. Ansary, "A Brief Overview of the Saudi Arabian Legal System," available at: <http://www.nyulawglobal.org/globalex/saudi_arabia.htm> (last visited 01/05/2009).

²¹⁷ Beside Islamic law other legal materials in the Kingdom are composed of Royal Decrees, regulations, executive regulations, lists, codes, rules, procedures, international treaties, ministerial resolutions, ministerial decisions, circular memoranda, explanatory memoranda, and documents.

²¹⁸ In Saudi Arabia, there is no formal code, legislation, or act which codifies criminal law, family law, inheritance and many aspects of the Islamic law. In general, under Article 67 of the Basic Regulation the adaptations of modern statutory provisions are lawful as long as they do not contravene divine law. Such laws are introduced through the doctrine of public interest (*al-maṣlahah al-mursalah*) as a basis for rule making. Saudi Arabia uses the word '*nizām*' which means 'Regulation' in reference to statutory laws. "The Arabic word [qanun] which means 'law' is not used in Saudi Arabia, because [it] represents secular or temporal law and is therefore prohibited by the Shari'ah." Maren Hanson, "The Influence of French Law on the Legal Development of Saudi Arabia," *Arab Law Quarterly*, 2: 3 (1987), 290.

²¹⁹ Al-Hay'ah al-Qaḍā'iyyah (Judicial Council), Decision No. 3, 7 Muḥarram, 1347 (June 25, 1928). Confirmed by the King on 24 Rabi' I, 1347 (Sept. 9, 1928). Reprinted in *Majmū'at al-Nuzum* (Riydh: Institute of Public Administration, n. d.), 11.

²²⁰ These commentaries are: Maṣṣūr b. Yūnus al-Bahūtī, *Sharḥ Muntabā al-Irādāt*, 3 vols. (Beirut: Dar al-Fikr, n. d.) and his *Kashshāf al-Qinā' 'an Matn al-Iqnā'*, ed. Hilāl Muṣaylihī Muṣtafā Hilāl, 6 vols. (Beirut: Dār al-Fikr, 1982).

²²¹ Ibrāhīm b. Muḥammad b. Salīm b. Dūyān, *Manār al-Sabīl fi Sharḥ al-Dalīl*, 2 vols. (Beirut: al-Maktab al-Islāmī, 1979); Maṣṣūr b. Yūnus b. Idrīs al-Bahūtī, *al-Rawḍ al-Murbi'*, a commentary

Only in case where applying the Ḥanbalī view would entail hardship and conflict with public interest, the view of another school may be adopted.²²³ If judgment is given according to a rule fixed in a recognized Ḥanbalī book, a judge could rule singly; whenever there is no such rule and the matter demands *ijtihād*, then the court should rule as a body.²²⁴ It seems that judges in the Kingdom are not as free to resort to *ijtihād* as judges of the higher judiciary in Pakistan are. However, judges in the Kingdom are not bound by the decisions of their fellow judges and they are free to overrule their own previous decisions if they think they were wrong. The process of appeal in the Kingdom is very different from that in Pakistan. The current law in the Kingdom provides:

If it is clear to the Board [of Review] that the judgment has contradicted a text of the Book, the *Sunnah*, or the *ijmā'*, then it must prepare a decision thereon, with explanation of its grounds in the *Shari'ah* [which is sent] to the court which issued the judgment.²²⁵

This means that even when the Board of Review does not consider the decision of the trial judge to be correct, it respects the *qāḍī's* independence.²²⁶ Vogel argues that Saudi Arabia's procedures is local modifications of the

on Mūsā b. Aḥmad al-Hujawī, *Zād al-Mustaḥṣin: Mukhtaṣar al-Mughnī*, 2 vols. (Cairo: Maṭba'at al-Sunnah al-Muḥamadiyyah, 1955).

²²² Al-Hay'ah al-Qaḍā'iyyah [Judicial Board], Decision No. 3, 7 Muḥarram, 1347 (June 25, 1928). Confirmed by the King on 24 Rabi' I, 1347 (Sept. 9, 1928). Reprinted in *Majmū'at al-Nuẓum*, 11. See also, Nabil Saleh, "The Law Governing Contracts in Arabia," *International and Comparative Law Quarterly*, 38 (1989), 764–765.

²²³ See, *ibid.*

²²⁴ Royal Will No. 647, 20 Rabi' I, 1349 (August 14, 1930). Reprinted in *Majmū'at al-Nuẓum*, 15–16.

²²⁵ Ministry of Justice, *Lā'iḥat Tamayyuz al-Aḥkām al-Shar'iyyah*, Royal Agreement No. 24836, 29 Shawwāl, 1386 (Feb. 9, 1967). Sec. 13. The Board of Review does not have the power to reverse the decision of a lower court without first engaging in an exchange of views with the trial judge. If after this exchange neither of the courts has changed its view, then the board is obliged to set aside the judgment, but it does not give a judgment itself and must remand the case for a fresh retrial before a different judge. See, *ibid.*, Sec. 17.

²²⁶ Judges in the Kingdom are independent of the Executive. Article 46 of the Basic Regulations states that, "[t]he judiciary shall be an independent authority and, in their administration of justice, judges shall be subject to no authority other than that of Islamic Shari'ah." The same article provides that "[n]o one may interfere with the judiciary." Article 5 of the Ordinance concerning the Prosecution of Ministers prohibits any interference with Courts affairs, and makes personal interference with the affairs of the judiciary a crime punishable with imprisonment for a term ranging from three to five years. See, *The Law of the Judiciary*, Royal Decree No. M/64, art. 26 (14/7/1395 AH/Jul. 23, 1975), O. G. *Umm al-Qurā*, no. 2592 (29/8/1395 AH, Sep. 5, 1975).

French system²²⁷ — a system that does not follow the doctrine of precedent. Shaykh Muḥammad b. Ibrāhīm, the then Chief Justice of the Kingdom, had issued special instructions to judges to avoid precedents set by other judges.²²⁸ This position is in accordance with Islamic law.

Speaking in the Indian context, Tahir Mahmood asserts that the common-law doctrine of judicial precedent is subscribed to “neither by Islamic law nor by ancient jurisprudence.”²²⁹ He further argues that both the Hindu and the Islamic “systems of jurisprudence accord to the “jurist-made” law the place which common law accords to “judge-made” law. In Islamic legal theory, *ijmāʿ* (consensus) and *qiyās* (analogy) belong to the province of the jurists and not the judges.”²³⁰ According to Justice Yaqoob Ali, “Juristic deductions are judge-made law.”²³¹

Conclusion

The Federal Shariat Court has very limited and exclusive jurisdiction in matters in which the High Courts and the Supreme Court have no jurisdiction. Moreover, any important ruling of the Federal Shariat Court is challenged in the Shariat Appellate Bench of the Supreme Court, which gives the final decision. In addition, the Supreme Court, the Federal Shariat Court and the Shariat Appellate Bench have the powers to review their own decisions. Decisions of the Federal Shariat Court, if challenged and maintained by the Shariat Appellate Bench of the Supreme Court, or if unchallenged, are binding on the Supreme Court. The Federal Shariat Court is bound by the decisions of the Supreme Court and the High Courts in all other matters of law other than the question of the repugnancy to Islamic law. The question of whether the binding precedent under Article 189, 201 and 203 GG are Islamic have not as yet been decided by the Superior Courts but these may probably never be questioned in the Federal Shariat Court because it does not have jurisdiction in constitutional matters as well as procedural laws. Other judicial norms regarding precedents established over time by the Superior Courts might not be questioned by the Federal Shariat Court because this would mean assuming jurisdiction in matters in which it has no powers; secondly, it

²²⁷ Vogel, *Islamic Law*, 96, n. 55. Hanson argues that the Saudi regulations in the field of public as well as civil law have been influenced by the Egyptian and French legal systems. Hanson, “The Influence of French Law on the Legal Development of Saudi Arabia,” *Arab Law Quarterly*, 2:3 (1987), 290.

²²⁸ See, *fatwā* no. 1799, dated 3/9/1380 AH as quoted in al-Daghīsar, “Hujjiyyat al-Sawābiq al-Qānūniyyah,” 194–95.

²²⁹ Tahir Mahmood, *Personal Laws in Crisis* (New Delhi: Metropolitan Book Co., 1986), 59.

²³⁰ *Ibid.*, 59, n. 23.

²³¹ PLD 1972 SC 139, at 235 (QQ).

would mean overruling cases of the Supreme Court as well as the High Court; and thirdly, it would tantamount to interference in the powers of these Courts.

The *fuqahā'* wrote books containing the preferred rules that were to be followed. In *al-Jāmi' al-Ṣaghīr*, Imām Shaybānī focused entirely on the preferred rules that were to be followed by people as well as the *qāḍīs*. In these books, preference is usually given to the rules that came earlier in time. This was done to base the statement of a rule with the opinion(s) of the earlier Imāms. This conforms with the system of precedents in Islamic law. In Islamic law, the precedents assigned priority are those that were laid down first and not those that came later.²³² In Islamic legal history, there were no fixed institutions for appeal but cases were sometimes referred for review.

According to the majority of schools every judge should be a *mujtahid*. In addition, one *mujtahid* is not bound by the *ijtihād* of another. A common man cannot be a *mujtahid* and he must follow a *mujtahid* without knowing the proof for his *ijtihād*. Such a man is called a *muqallid* (imitator). In Islamic legal history; the founders of the schools of thought were independent *mujtahids* and their fellow disciples were *mujtahids* within their respective schools. In Pakistan, the practice of binding precedent under Article 189, 201 and 203GG is “institutionalized *taqlīd*” because the higher Courts bind the lower Courts. Moreover, in practice Islamic law is enforced by the national courts and precedent is institutionalised, which means that decisions of the superior courts concerning Islamic law become precedents. This is a unique blend found in Pakistani law. The same is true of Bangladesh and India where Islamic law is enforced by the national courts.

In Islamic legal theory, a judge is not bound by his own previous decision and he can change his *ijtihād* if he knew that his previous *ijtihād* was wrong. ‘Umar b. al-Khaṭṭāb, the second Caliph, not only ordered it but also practiced it. In Saudi Arabia, the doctrine of binding precedent is not practiced and courts are not bound by their own previous decisions or the decisions of other courts. Finally, the doctrine of precedent restricts judges from undertaking *ijtihād*, and it is against the independence of the judiciary.



²³² See, Nyazee, “Introduction” to *al-Hidāyah*, xvi.