



Machanism of Practicing Precedents by High Courts in Pakistan

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Abstract: To understand the practice of precedent in Pakistan, Martin Lau's article is a good starter¹. Justice Fazal Karim, in Part III of his book, "Access to Justice in Pakistan", has given a brief picture of the doctrine of precedent in Pakistani legal system.² However, he frequently quotes American case law to support his point of view, although any American decision, if identical to the case at Bar in Pakistan, is only persuasive. Moreover, our judges have advised against citing American/foreign case owing to the differences in socio-economic conditions between Pakistan on the one hand, and the United States and several other countries on the other. Secondly, he has discovered only twelve pages to precedent and its related aspects and does not discuss his own decisions regarding precedent in Pakistan. Thirdly, the book focuses too much on civil and criminal procedures, jurisdiction of civil and criminal courts, trial, evidence, decree and its execution, and so on. This means that the book is essentially pre-occupied with procedural laws and does not discuss what its title suggests³. However, there is other work on the subject like Justice Shahabuddeen's Precedent in the world court, some pages from AK Brohi's Book, The Judge made Laws by Ishfaq Ali and many others but I found the book of a legend Dr. Muhammad Munir on the subject i.e. Precedent in Pakistani Law being elaborative, comprehensive and authoritative and no other work is available in this regard, as such, most of literature is taken from it.

Key words: Practicing precedents, High Courts, Pakistan

1. Introduction

To understand the practice of precedent in Pakistan, Martin Lau's article is a good starter¹. Justice Fazal Karim, in Part III of his book, "Access to Justice in Pakistan", has given a brief picture of the doctrine of precedent in Pakistani legal system.² However, he frequently quotes American case law to support his point of view, although any American decision, if identical to the case at Bar in Pakistan, is only persuasive. Moreover, our judges have advised against citing American/foreign case owing to the differences in socio-economic conditions between Pakistan on the one hand, and the United States and several other countries on the other. Secondly, he has discovered only twelve pages to precedent and its related aspects and does not discuss his own decisions regarding precedent in Pakistan. Thirdly, the book focuses too much on civil and criminal procedures,

¹MartinLau, "IntroductiontothePakistaniLegalSystem,withSpecial reference to the Law of Contract, YIMEL 1994

²FazalKarim, AccesstoJusticeinPakistan, PakistanLawHouse, Karachi, 2003

jurisdiction of civil and criminal courts, trial, evidence, decree and its execution, and so on. This means that the book is essentially pre-occupied with procedural laws and does not discuss what its title suggests³. However, there is other work on the subject like Justice Shahabuddeen's Precedent in the world court, some pages from AK Brohi's Book, The Judge made Laws by Ishfaq Ali and many others but I found the book of a legend Dr. Muhammad Munir on the subject i.e. Precedent in Pakistani Law being elaborative, comprehensive and authoritative and no other work is available in this regard, as such, most of literature is taken from it.

1.1 Important Questions of the Topic

With regard to the practice and operation of precedent in the High Courts, some important questions for example, are the High Court bound by their own previous decisions? Is the decision of a Divisional Bench binding on another Divisional Bench? Is a single Judge's decision binding on another Single Judge? Is one High Court bound by the decisions of another High Court? What value should be attached to the precedent in they bound by the Supreme Court and the High Courts? Can a subordinate court of a province ignore the decision of the High Court of that province and follow the decision of a High Court of another province? Is there any value in decisions of the High Court of another province? Is there any value in decisions given by subordinate courts? These are some of the questions that are tackled in the following discussion.

1.2 Constitutional Provisions Dealing the High Courts

As we know, all the High Courts in Pakistan are bound by the Supreme Court under article 189 of the 1973 Constitution of the Islamic Republic of Pakistan. Moreover, the High Courts bind all lower courts subordinate to them under Article 201. This Article is similar to Article 189, which has been comprehensively explained above and the same explanation applies to Article 201 with the necessary changes to be made. The High Courts are also bound by the Federal Shariat Court (in matters under its exclusive jurisdiction) under Article 203GG. Moreover, the High Court binds all lower Courts subordinate to it, such as the District Courts. The District Courts include the Session and the Civil Courts as well as the criminal Courts. The main question that needs an explanation is whether the High Courts are bound by their own previous decisions or not.⁴

1.3 Some Laid Down Principles for Settlement of Conflicting Views of High Courts

In order to clarify this position, we have to reply on case law. Unfortunately, case law has been erratic on this point but some rules have emerged and the issue has been settled.⁵ In a recent case KLR 2015 Cr.C 211 (Lahore)⁶ it has been reiterated that earlier judgment of equal bench in the High Court on the same point is binding upon the second bench, if however, a contrary view has to be taken, then the request for constitution of a larger bench should be made.

1.4 Conflict of Precedent

If there is conflict of precedent what is the duty of Judge is that when a Judge faced with a conflict of precedent, he should abdicate his judgment and accept the view, which is favourable to the taxpayer was a wrong approach. Where, however, a judge finds that two equally reasonable views are possible and he is unable to decide which is the better view, that he may adopt the rule of interpretation that the view favourable to the taxpayer might be accepted. Taxing provision must receive a strict construction at the hands of the courts and if there is any ambiguity, the benefit of that ambiguity must go to the taxpayer, but this is not the same thing as the saying that a taxing provision should not receive a reasonable construction. Judge's duty is to consider which is the more reasonable. Where a judge finds that both the views were equally reasonable there he may resort to the rule of interpretation favouring the taxpayer.⁷

2. Position of Suspended Judgment

Suspended judgment continues to hold force as a binding precedent, for persons other than those, who were parties in the suspended judgment to the extent of decision based upon or which enunciate a question of law.⁸

⁴The Constitution of Pakistan 1973 by Muhammad Rafiq Butt 2008 published by Mansoor Law House

⁵Ibid page 142

⁶Peer Bakhsh vs. SHOKLR 2015 Cr.C 211 (Lahore)

2.1 High Courts and their Own Judgments

To answer the question of whether High Court is bound by its previous decisions, it is necessary to note that the binding nature of a decision of a High Court depends on the strength of the High Court which gave the decision in the first place. An earlier, though a controversial observation, was made by Justice Shabeer Ahmad of the Lahore High Court in *Bashir Ahmad V The State*,⁹ when he observed:

With regard to the extent of the binding nature of decisions of the High Court on itself, there is, as far as I know, no statutory provision in the laws applicable to Pakistan but judicial decisions have laid down certain principles. These may be summarized as under:-

- (1) *The decision of a Full Bench of the Court cannot be dissented from by a Division Bench or a Single Bench.*
- (2) *The decision of a Division Bench of the Court cannot be dissented from by a Single Bench.*
- (3) *The decision of a Division Bench of the Court can be dissented from by another Division Bench but it cannot be dissented from by a Single Bench, and.*
- (4) *The decision of a Single Bench can be dissented from by another or the same single Bench and can be overruled by a Division Bench or a Full Bench.*¹⁰

As shall be explained below, point number three has been over-ruled by the Supreme Court of Pakistan, and Justice Shabeer Ahmad's remark is quite surprising. On the one hand he has indicated that there are judicial decisions that had laid down some principles, while, on the other hand he seemed to have invented the principle that a Division Bench of a High Court can dissent from a decision of another Division Bench of the same Court. Justice Shabir reasserted this invented principle in *Jamal V. the State*¹¹, when he remarked even more emphatically that, 'a decision of a Division Bench was not binding on another Division Bench'. He further elaborated that, 'it is not obligatory for a Division Bench to agree with the views of another Division Bench to follow the views it does not agree with and in case it is not prepared to do this, to refer the case to a Full Bench. The principles that can be derived from *Bashir Ahmad*'s case are as follows:

- (1) A smaller Bench cannot overrule the decision of a Larger Bench.
- (2) That a Division Bench can deviate from the decision of another Division Bench. In other words a Division Bench does not bind another division Bench. A division Bench can disagree with a previous decision of its own or another Division Bench, but it cannot, clearly, declare the previous decision to be wrong.
- (3) A Full Bench can overrule the decision of a Division Bench.¹²

The above principles laid down in the *Bashir Ahmad* case left one question un-answered: is a Full Bench bound by the decision of another Full Bench or not? The analogy in principle (2) above, that is, 'a Division Bench can dissent from the decision of another Division Bench, can be extended to the case of the Full Bench. This would mean that a full Bench can dissent from the decision of a Full Bench. A good example of this was available when *Bashir Ahmad V. The State*, was decided although Justice Shabeer Ahmad has not referred to it.¹³

In *Sayeeda Khanam V. Muhammad Sami*,¹⁴ on the question of whether under Muslim Law, a wife, as of right, is entitled to Khula, a Full Bench of the Lahore High Court ruled that a Muslim wife was not entitled to Khula as of right. In *Mst. Balqis Fatima V Najm-Ul-Ikram Qureshi*¹⁵, the same question was raised before a Divisional Bench (of which justice Shabir was a member) but since they were bound by the Full Bench decision in *Sayeeda Khanam* case, they requested for a large Bench. The two judges Kaaikaus and Shabir ahmad, were joined by Justice Masud Ahmad, JJ. The full Bench in *Balqis Fatima* reached a different conclusion than the one already reached in *Sayeeda Khanam* case and ruled that the wife was entitled to dissolution of marriage on

¹¹PLD1960Lahore1192

¹²MuhammadMunir,PrecedentsinPakistaniLawpageXXXIXpublishedby Oxford University in 2014 page 143

¹³ibid

¹⁴PLD1952Lahore 113

¹⁶MuhammadMunir,PrecedentsinPakistaniLawpageXXXIXpublishedby Oxford University in 2014

restoration of what she had received from the husband in consideration of the marriage. The precedential value of Balqis Fatima case is that a Full Bench is not bound by the decision of a Full Bench. This is controversial and in such cases the matter has to be resolved by the Supreme Court. This happened when Khurshid Bibi case was decided by the Supreme Court in 1967 which endorsed Balqis Fatima and rejected Sayeeda Khanam.¹⁶

2.2 Principles Confirmed by Supreme Court and its Solution by Larger Bench

The Supreme Court had confirmed the principles that a smaller Bench cannot overrule the decision of a Larger Bench and a Full Bench can overrule the decision of a Division Bench. But the controversial view held by Shabir, J, that a Division Bench is not bound by the decision of another Division Bench has been rightly overruled by the Supreme Court in a number of cases. The earlier case in point is Province of East Pakistan V. Dr Azizul Islam.¹⁷ In this case the Supreme Court allowed the appeal filed by the petitioner against the decision of the High Court, because the Division Bench of the High Court had overruled its earlier decision. Justice Hamood-Ur-Rahman in his judgment ruled that the earlier decision of the Division Bench of the High Court is binding on the Division Bench of the same court in the later case, if the facts of the earlier case are similar to the present one. He opined that if some differences appear with the earlier decision on a point of law, then it should refer the case to a larger Bench. Recently, in Multiline Associates V. Ardeshir Cowasjee,¹⁸ Justice Sajjad Ali Shah referred to the Province of East Pakistan and held that, the earlier judgment of 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 the request for constitution of a larger bench should have (been) made. In Ardeshir Cowasjee v. Karachi Building Control Authority,¹⁹ the Supreme Court relied on the above mentioned case when it ruled that, it may be pointed out that a Bench of the same number of Judges of the same High Court, or of the Supreme Court cannot deviate from the view of an earlier Bench as has been rightly held in the case of Multiline Associates in relation to the High Court. In Jameel Ahmad Malik V. Shaukat Aziz,²⁰ the Lahore High Court held:

“It needs no reiteration that whenever there is any uncertainty or obscurity about a legal position qua any particular proposition, the view expressed by a Larger Bench prevails and when the learned benches are of equal strength then the latest expression by the Bench holds the field”.

2.3 Position in Sindh

In Riaz Ahmed V. Province of Sindh,²¹ a Divisional Bench of the Sindh High Court held that, ‘under Article 201 of the constitution of Pakistan earlier judgment of equal Bench in High Court on question of Law and its interpretation is

binding upon the second Bench. Thus, in Pakistan the question whether an equal bench binds an equal bench has been refined and currently an equal bench in a High Court binds an equal bench and in case of two conflicting decisions by two benches of equal strength the latter decision should be followed.

3. Pakistan Supreme Court viz a viz Azad Jammu and Kashmir Supreme Court

Both the Courts have been established through different constitutions, but Azad Kashmir unluckily have no constitutional status, as such a doldrums’ position is seen in both the Courts’ relationship. However, as per new development as well as change in the relationship of both, a memorandum of Understanding on co operation in judicial sector is signed in the year 2013, under which it is the responsibility of Pakistan Supreme Court to provide justice to the victims of the state subjects of Azad Jammu and Kashmir and further it is held by the Supreme Court of Azad Jammu and Kashmir, that the judgment of the Supreme Court of Pakistan are binding in Azad Jammu and Kashmir.²² It is pertinent to mention here that unluckily in cases CLC 1986 1309 (AJK),

¹⁸ PLD1995SC423

¹⁹ 1999SCMR2883

²⁰ 2007CLC 1192

²³ 2003YLR410

²⁴ PLD1973SC621

²⁵ Muhammad Munir, Precedents in Pakistani Law page XXXIX published by Oxford University in 2014

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PLD 1973 AJK 51, PLD 1976

AJK 09, PLD 1993 Karachi, 449, PLD 1966 SC 88, it is held that the Judgment of both the courts are foreign judgments for each other. What is the constitutional status of Azad Jammu and Kashmir is a hot issue, need not be discussed herein.

3.1 Position of High Court in Azad Jammu and Kashmir

In Azad Jammu & Kashmir the position is a bit different. This can be seen in Ch. Ajaib Hussain V. Mst. Zareen Akhtar²³. Justice Khawaja Muhammad Saeed while referring to Faqir Muhammad Khan v. Mir Akbar Shah,²⁴ observed that:

“As we all know that judgment of Division Bench is binding upon the Single Bench. If a Single Judge has passed an order which is directly in conflict with the view taken by the Division Bench or full Court the such judgment can be reviewed in order to bring it in conformity with the binding view taken by the Division Bench. However, the judgment of a Single Judge is not binding upon another Single Judge and in the same way the judgment of a Division Bench is not binding upon another Division Bench”.

According to this decision, in Azad Jammu & Kashmir, the judgment of a Division bench is not binding upon another Division. As mentioned above in Pakistan an equal bench binds an equal bench.²⁵ The principle that a Full Bench can overrule the decision of a Division Bench was confirmed by the Supreme Court in Faqir Muhammad V. Akbar Shah,²⁶ when it held that a judgment of a full Bench of a High Court was binding on all Division Benches and Single Benches.

3.2 Position in larger bench and smaller bench

It is important to note that in the 1960s, the Supreme Court had even ruled that even a larger Bench of the High Court cannot overrule a decision of a smaller Bench.²⁷

In the province of East Pakistan V. Sirrajul Haq Patwari,²⁸ the petitioner appealed against the decision of the High Court. The five members Bench of the High Court overruled an earlier decision of a Bench comprising of three judges. Chief Justice Cornelius allowed the appeal and directed that the writs issued by the High Court be recalled. He referred to the practice of the Court of appeal Civil Division in England. The Court of appeal Civil Division had ruled in Young V. Bristol Aeroplane company²⁹, that it was bound by its own previous decisions subject to three exceptions. First, it was not bound by its own previous decision if it was given per incuriam (in error); Secondly in case of two conflicting decisions of its own, it shall follow only one; Finally, if its own decision were to be overruled by the House of Lords, then it will follow the decision passed by the House of Lords.

Chief Justice Cornelius, therefore, stopped the High Court from overruling its own previous decision. However, the English Court of appeal civil Division had itself ruled that it is bound by its own previous decisions subject to the above exceptions, whereas the Sirajul Haq Patwari case had established that it is bound by its own previous decisions without any exception(s). The analogy is therefore wrong.³⁰

3.3 Ways of Solutions for Maintaining Judicial Decorum

That in order to maintain the (sic) judicial decorum and propriety the decision of a Division Bench on a question of law should be followed by (the) other Bench. If they differ from it (sic) the proper course to adopt would be to refer the question for the decision of a Full Bench. Here are some principles for solutions.

- (1) The decision of one Division Bench on a question of fact is not binding on the other Division Bench.
- (2) If the decision of one Division Bench has not come to the notice of the other Division Bench and a different view is taken in the subsequent Division Bench case, when such two conflicting decisions are placed

²⁷ Muhammad Munir, Precedents in Pakistani Law page XXXIX published by Oxford University in 2014 page 146

²⁸ PLD 1966 SC 920

³² Auto Cars Limited v. Sharif Khan 1996 CLC 1337

³³ PLD 1963 SC 296

³⁴ PLD 2004 Peshawar 247

(3) before the Bench, (sic) proper procedure to follow in such (sic) case would be, for the Bench hearing the case, to refer the matter to a full Bench in view of the conflicting authorities without deciding the question itself. That the above mentioned principles will not be applicable to per incuriam decisions, which carry no binding effect.

(4) Justice Waheeduddin Ahmed, who wrote the decision, warned that if the above mentioned principles were not followed, it is bound to create not only uncertainty but confusion in the minds of the litigating public and subordinate Courts about the judicial decisions of the Courts of law, and such issues would not enhance the prestige of the Courts³¹.

3.4 General Conditions for Accepting Precedents by Lower Forums

According to the established principles of jurisprudence, a judgment of any higher forum may not be treated as precedent for other courts if:

- (i) The precedent is based on abrogated decisions i.e, when a judgment is overruled by a High Court;
- (ii) The precedent was given in ignorance of statutory provision;
- (iii) The precedent is inconsistent with the earlier decisions of Higher Courts;
- (iv) The precedent is obiter dictum i.e, an incidental opinion expressed by a judge.
- (v) The precedent passed sub silentio or not fully argued on the point along with the connected or relevant points;
- (vi) The precedent is distinguishable with reference to the facts of the case in hand;
- (vii) The precedent is inconsistent with earlier decisions of the same rank.³²

3.5 Present Position

The current position is that the decision a Division Bench is binding on another Division Bench. This has been asserted in many cases by the Hon'ble Supreme Court such as Faqir Muhammad's case in 1973, discussed earlier. In *Multiline Socrates V. Ardeshir Cowasjee*, also discussed above, the Supreme Court held that, 'the 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. In this case, Chief Justice Shah relied on the *Province of East Pakistan Vs. Dr Azizul Islam*.³³ Thus, in principle an equal Bench is bound by its own previous decisions and decisions of equal Benches in the past and if it thinks that the previous decision should be overruled it will refer the case to a Larger bench. This was reaffirmed in *Nazeem Khan V. Inspector General of Prisons*³⁴. The positions of the Supreme Court in the *Multiline* case shows that it had overruled its decision given in the *Province of East Pakistan V. Sirajul Haq Patwari*, discussed above. The above proposition was reaffirmed by the Supreme Court in *Chaudhry Muhammad Saleem V. Fazal Ahmad*.³⁵ Moreover, the Supreme Court has ruled in *All Pakistan Newspapers Society V. Federation of Pakistan* that a Bench of a High Court binds another Bench of the same number. This position was also reaffirmed in *Shahzad Dreho V. Khalid Mahmood Soomro*,³⁶ in which the Sindh High Court held that, an earlier judgment of a Division Bench of the High Court on the same point is binding upon a subsequent Division bench of the same High Court. The same point was reaffirmed by the Sindh High Court in *House Building Finance Corporation V. Member N.I.R.C.*³⁷

Because of repeated decisions of the superior Courts that the decision of one Division Bench of a High Court, is binding on another Division Bench of the same High Court, the convention has attained a status from which derogation seems impossible. In *Noor Muhammad V. Province of Sindh*,³⁸ a Division Bench of the Karachi Court observed that:

³⁵1997SCMR 314

³⁶2003PCr.L.J 319

³⁷2005PLC 1.

³⁹1997MLD3142

“The Division Bench of the High Court was bound by the earlier enunciation of the law by another Division Bench of the same Court subject of course to the formation of a larger Bench and a different determination of such (a) Bench of the same question but that would arise only when a Bench, subsequently seized of a similar matter, comes to entertain a different view on the same legal issue.”

3.6 Balochistan Position

The Court refused to be bound by the leave granting order which it described as not constituting declaration of law in terms of Article 189 of the Constitution of Pakistan. In Province of East Pakistan V. Dr Azizul Islam, the Supreme Court of Pakistan ruled that if the learned judges of the High Court are inclined to take a different view, they should have in accordance with the rules of their own courts, referred the matter to a larger bench. In Ozone International (pvt) Ltd. V. Federation of Pakistan,³⁹ a Division Bench of the Balochistan High Court observed.

“It is a long standing practice that if a Division Bench has given a Judgment on particular question of law, another Division Bench of the same High Court, while hearing identical matter in exercise of jurisdiction under Article 199 of the Constitution, is bound to follow the earlier Judgment of the Division Bench, unless, some new point is not agitated or more convincing arguments with support of fresh material including legal provisions etc. are not advanced.”

3.7 Shocked Conflicting Position

There is an interesting case but shocking position regarding conflicting decisions of two different Division Benches of the same High Court. In Habib insurance Co. Ltd, V. Pakistan National Shipping Corporation,⁴⁰ the issue before a Single Judge of the Sindh High Court was that if an advocate for the defendants pleaded that he had no instructions from his client, could the Court pleaded that he had no instructions from this client, could the Court decree the suit ex-parte against the defendants? Speaking for the Single Bench, Justice Rashid A. Razvi was faced with a difficult situation. The first decision was Mir Abbas Khan V. Mrs Rianat Fatima,⁴¹ and the second was Mst. Sardaran Bibi V. Allahdhino.⁴² The former had been decided by a Division Bench comprising Tanzil-Ur-Rehman and Allahdhino G. Memon, JJ (as they then were), and the latter had also been decided by a Division Bench comprising Imam Ali G. Kazi and Wajihuddin Ahmed, JJ (as they then were). There was a time period of about one year between the two decisions. However, the earlier case was not cited before the Bench dealing with Mst. Sardaran Bibi. In the former case of Mir Abbas, the Court had dismissed the appeal whereas in the later case of Mst. Sardaran, the Court had allowed the appeal and directed the First appellate Court, which had dismissed the appeal earlier, to decide the same on merits. Justice Razvi extensively quoted relevant case law on the point that the decision of a Division Bench of the same Court is binding on another Division Bench of the same Court and if a contrary view were to be taken, then the proper course is to make a request to the learned Chief Justice for constitution of a larger Bench. Justice Razvi, therefore, declined to follow either of the two decisions and requested the Chief Justice to place the matter before a larger Bench,⁴³ Justice Razvi seems to have maintained what had been described by the Sindh High Court as “judicial decorum”.

3.8 Present Settled Principle

The well settled principle is that one Division Bench of Higher Court will not give a decision contrary to that of another Division Bench be that a Bench of the Supreme Court, a High Court or the Federal Shariat Court. The idea behind this is probably that an equal Bench binds another equal Bench because otherwise there will be no certainty in law and it will not be proper judicial behavior. It must be noted, however, that this practice does not stop the overruling of an earlier Division Bench’s decision if he equal Bench disagrees with the view taken by

⁴³ 1999 CLC 1727

⁴⁷ PLD 1959 SC 9

⁴⁸ Muhammad Munir, Precedents in Pakistani Law page XXXIX published by Oxford University in 2014 page 152

⁴⁹ PLD 1963 (w.p) Karachi 280

⁵⁰ 2003 CLD 326

an earlier, equal Bench, then the matter shall be referred to a larger Bench which may overrule the same as it would not be considered judicial conduct. The right of overruling is freely available to the single Bench of the same High Court. An example of a Single Bench overruling a decision of a previous Single Bench is Shehzad Mujahid V. Additional Sessions Judge,⁴⁴ which overruled Abdul Latif V. Additional Session Judge⁴⁵. In the Abdul Latif case, Justice Dr Munir Ahmad Mughal gave a surprising decision and held that Section 133 of the Code of criminal Procedure stood impliedly repealed by provisions of the Pakistan Environmental Protection Act 1997, because subsequent legislation on the same subject had repealed the earlier law to the extent of the mutual inconsistency or repugnance between them. As a matter of fact, Justice Mughal did not go into details of his claimed inconsistency between the former and the latter laws. In reality, the provisions of the Pakistan Environmental Protection Act, 1997 did not apply to situations meant for the application of Section 133 of the Code of Criminal Procedure. Therefore, both were applicable to different types of situations. In Shahzad Mujahid's case Justice Muhammad Jahangir Arshad of the Lahore High Court had no hesitation to hold that, 'I would like to point out that the view taken by my learned brother Dr. Muhammad Munir (sic) Mughal, J (as his Lordship then was) in the above referred judgment (Abdul Latif V. Additional Session Judge), that after enforcement of Pakistan Environmental Protection Ordinance (XXVII of 1997), the principle that, "Later enactment to repeal the earlier or a special enactment supersedes the general" is still open to further discussion and will be decided in some appropriate matter.

3.9 Position of Single Bench

Lastly, the question that is raised and answered here is whether a judge is bound by his earlier decision or not. In Mono Engineering (Pvt.) Ltd v. Karachi Development Authority⁴⁶, Justice Rashed A. Razvi of the Sindh High Court had opined that an earlier finding on a point of law by a Judge is binding on him in subsequent proceedings.

Similarly there is also one remark of the Supreme Court regarding the same. In Muhammad Muzaffar Khan V. M. Yusuf Khan,⁴⁷ it was held that, '(The previous decision should have been accepted as binding on him by the learned Single Judge. Although, as we have seen in the last chapter, Shafi-Ur-Rahman, Acting CJ, overruled two of his own previous decisions, that is, Javaid Shaikh V. The State, and Juma Khan V. The State, when he decided Bashir Ahmad V. The State in 1991, this is quite surprising.⁴⁸

4. Position of Different High Courts Against One Another

Decision taken by the High Court of one province is not binding on the High Court of another province. In Murad Ali

V. Collector of Central Excise and Land Customs⁴⁹, discussed above, Justice Waheeduddin Ahmed opined that the decision in the Bashir Ahmad case of the Lahore High Court discussed above was not binding on the Sindh High Court. In Khairpur Textile Mills Ltd. V. National Bank of Pakistan⁵⁰, the Sindh High Court did not follow the decision of the Lahore High Court, namely, Gold Star International V. Muslim Commercial Bank Ltd.⁵¹, and declared that, earlier Division Bench judgments of this Court are binding on us and, consequently, we are obliged to follow the law as laid down by the various Division Benches of this Court. Justice Muhammad Mujeebullah Siddiqui, expressed his opinion about precedent when he remarked that the law of precedent is a delicate one and before following a decision it is necessary to see as to what were the facts of the case in which the decision was given and what was point which was to be decided. Too rigid observations to the precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. Endorsing the view of Sir Henry Slessar in his book, the art of Judgment, he asserted that good Judges and lawyers should never be slaves of the doctrine of precedent as the doctrine of precedent should serve as a guide and not a dictator.

In the Ozane International case⁵² discussed earlier, Justice Iftikhar Muhammad Chaudhary (as he then was) of the Balochistan High Court, while dealing with the above problem observed:

As far (sic) as following judgment of another High Court on same question of law, is concerned, there is not prohibition, except with the condition that if the condition that if the Judgment has more convincing reason, based on such legal proposition, legal provisions, materials, etc., which was not before the Bench of the High Court, who had already decided identical matter.

In Mst. Zarina Jan V. Mst. Akbar Jan,⁵³ the Peshawar High Court held that under Section 4 of the Muslim Family Law Ordinance 1961, on the death of the grandfather, the share of the daughter of a predeceased son was

two third and that of her aunt was one third. However, in *Kamal Khan V. Mst. Zainab*,⁵⁴ the Lahore High Court dissented from the above view of the Peshawar High Court. In this case, the grandfather was survived by a granddaughter of the predeceased son and a nephew (son of his full brother). Under section 4 of the MFLO Muslim Family Laws Ordinance), and according to the interpretation of the Peshawar High Court, she was supposed to have inherited the whole estate, upon the death of her grandfather. But she was given only half of what her father would have been entitled to, if alive, and the remaining half was given to the nearest agnate (her grandfather's nephew).

There is also one observation available on the point that one High Court is not bound by the decision of another High Court. Justice Shamim Hussain Kadri writes about *Darwesh*

M. Arbey V. Federation of Pakistan,⁵⁵ that Yahya Bakhtiar, the then Attorney General of Pakistan, cited before the Full Bench (of five judges), a decision of the Sindh High Court and tried to compel them to follow the said judgment. Justice Kadri argues that he told him that, even a judgment passed by all the judges of another High Court does not bind this Court.

Whereas, subordinate court is faced with contradictory High Court decisions, the decision of the High Court administering the subordinate court is binding. This principle was summarized by the Dacca High Court, when it observed;

*"In view of the ruling of this Court, however, in the case referred to earlier, it was in our opinion, not permissible to the courts below to travel to other High Courts. The decisions of this Court must be preferred by the courts subordinate to this Court to any decision of any other High Court if directly in point and can only yield to the decision of our own Federal Court or Supreme Court"*⁵⁶.

The same point was reaffirmed in *Safa Textile Ltd v. Habib Bank Ltd*.⁵⁷ by the Sindh High Court. The facts of the case are interesting. The Judge of the Banking Court Number III in Karachi had passed an order against the plaintiff and had ruled that provision of Section 12(2), CPC were not applicable to decrees passed under the Banking Companies (Recovery of Loans) Ordinance 1979, and the Banking Tribunal Ordinance 1984. Moreover, the said banking judge had relied on a decision of the Lahore High Court, namely *Gold Star International V. Muslim Commercial Bank*⁵⁸, ignoring many decisions of the Sindh High Court. The Sindh High Court ruled that:

"Therefore, we are of the view that learned Judge has not followed the principles of judicial discipline which requires that the law declared by this Court should be unreservedly followed by the Courts subordinate to it, enshrined in Article 201 of the Constitution, he instead followed the view taken by Lahore High Court, which was not a correct approach in case of conflict of views between two High Courts."

The decision of the Lahore High Court was conflict with the decisions of the Sindh High Court expressed by members of the Division Benches in *Mian Munir Ahmed V. United Bank Ltd*,⁵⁹ *Tawakal Export corporation V. Muslim Commercial Bank*,⁶⁰ *National Band of Pakistan v. Khairpur Textile Mills*,⁶¹ and *Dadabhoi Cement Industries Ltd. V. NDFC*⁶² the last case was approved by the Supreme Court as well.

The above view is also supported by the language of Article 201 of the 1973 Constitution, which states that: Subject to Article 189, any decision of a High 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 courts subordinate to it. It is clearly mentioned that the ratio of a High Court is binding on all the Courts of that particular province. In other words, only an original precedent will be binding on the subordinate courts and not every decision. This should also exclude the obiter dictum of a High Court decision from being binding. However, to the best of my knowledge, there is no decision to the effect that the obiter

dictum of a High Court is also binding on its subordinate courts.⁶³

⁵⁶ PLD 1958. Dacca 564

⁵⁹ PLD 1998 Karachi 278

⁶⁰ 1997 CLC 1342

⁶¹ 2001 CLC 1187

4.1 Comparison with AJ&K

It is important to note that Article 201 of the 1973 constitution of Pakistan is reproduced in Article 44B of the Interim Constitution 1974 of AJK verbatim. Just like the Supreme Court, some of the decisions of the High

Courts are original precedent while others are 'declaratory precedent'. A very good example of an original precedent of a High Court is *Rashida Begum V. Shahab Din*,⁶⁴ concerning the custody of a child. In this case, the real uncle of two children had sued his sister-in-law who remarried someone else after the death of her husband for custody of the two children. The High Court ruled that since the Hanafi law on custody was not founded on any injunction of the Qur'an or the Sunnah, decisions concerning custody should be guided solely by the welfare of the monitor. Accordingly the Court allowed the mother to retain custody of the children. The decision in *Rashida Begum V. Shahab Din*, was endorsed and taken one step further by the then West Pakistan High Court in *Mst. Zohra Begum V. Sh. Latif Ahmad Munawwar*,⁶⁵ when it held:

"On this view, it would be permissible for courts to differ from the Rule of Hazanat (custody) stated in the Text Books on Muslim Law for there is no Quranic or Traditional Text on the point. Courts which have taken the place of Qazis can, therefore, come to their own conclusions by the process of Ijtihad which, according to Imam Al-Shafi is included in the doctrine of Qiyas."

The above is a typical example of an original precedent that the subordinate courts have to follow. Decisions of subordinate courts such as the Session Courts, along with those of the civil and the criminal courts, are not binding on them. Moreover, these decisions are not reported, and are, therefore, not cited. Any good decision of a Session Court might be appealed to the High Court, or may be petitioned to the same if appeal is not available and the decision of the High Court will most likely be reported or further appealed to the Supreme Court.⁶⁶

In a recent case *PLD 2015 SC (AJK) 31*⁶⁷, it has been held that judge made law could not be applied or interpreted in such a manner which resulted into making any provision of the Constitution as inoperative or redundant. Allowing such an interpretation would amount to subversion of the Constitution.

4.2 Precedent in Criminal Cases

While discussing the doctrine of precedent and whether the High Courts in Pakistan are bound by their own previous decisions or not, there is a very important area of law, namely, criminal law, where the doctrine tends to operate differently. There are plenty of decisions given by the Supreme Court as well as the High Courts that seem to be taking softer view of stare decisis in criminal cases. On the one hand there are general comments, whereas on the other hand there are particular comments made about precedent in criminal cases⁶⁸.

In many Supreme Court decisions such as *Sikandar A. Karim V. State*;⁶⁹ *Dr Anwar Ali Sabto V Federation of Pakistan*;⁷⁰ *Tariq Mahmood V. The State*;⁷¹ *State V. Bashir Ahmed*;⁷² *Muhammad Nawaz Khan v. Mubarak Ali*;⁷³ *State*

V. Rabnawaz;⁷⁴ *Ghulam Muhamamd V. Allah Yar*;⁷⁵ *Muhammad Tazeem V. The state*;⁷⁶ *Abdul Waheed V. State*⁷⁷; and *Muhaamd Nawaz V. State*⁷⁸, The crux of all these judgments was that since the facts and circumstances of each criminal case are different, therefore, one criminal case cannot serve as a precedent for another. Later judgment on this point is of 2015 PCr.LJ 1463 Lahore⁷⁹ in which it is held that facts of every criminal case differs from each other and the attraction of principles laid down in the judgment in one case would depend upon the similarity of the facts in other case, as such, is not binding.

4.3 Position in Azad Jammu and Kashmir

In *Javed Hussain Shah V. Azad Jammu & Kashmir*⁸⁰ Government the Supreme Court of Azad Jammu & Kashmir observed:

"Precedent would be authority only if facts of two cases are common. If facts of cases are different and had nothing common with facts of cases referred by party in support of his case, precedent would fall in district cadres. Authorities on question of law would need no reference to facts of a particular case of authority which must necessarily be honoured."

⁵⁶ PLD 1958. Dacca 564

⁵⁹ PLD 1998 Karachi 278

⁶⁰ 1997 CLC 1342

⁶¹ 2001 CLC 1187

Courts in AJK apply the principle regarding criminal cases in *Mahmood Ahmad V. State*⁸¹, the Shariat Court of AJK ruled that, 'it is the golden principle of law that the principles laid down in criminal cases are always founded on facts and circumstances of each case and cannot be loosely applied in an omnibus manner.

4.4 Position in Punjab

The authority on this point is *Punjab Cooperative Bank Ltd. Amritsar v. Commissioner of Income Tax*,⁸² Lahore, decided by the Privy Council in which it held:

Even decision must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found."

4.5 Position in Sindh

In *Muhammad Yousaf V. the State*,⁸³ the Sindh High Court held, that, judgments in criminal cases were defined to facts of a particular case and were not to be treated as precedent until and unless facts of two cases were similar. The judgment in a criminal case would have the force of precedent, if any principle of law had been propounded which was of general application. In addition the Sindh High Court while rejecting a bail application in a criminal case observed in *Usman V. The state*.⁸⁴ Coming to the case law referred by the learned counsel, it may be observed that in criminal cases, especially in bail matters, there is no universal rule of application which can be pressed in to service in all cases, and thus, passing of an appropriate order would necessarily depend on the facts and circumstances of each case.

In another case *Wazir V. Ghulam Mustafa*,⁸⁵ Justice Muhammad Mujibullah Siddiqui of the Sindh High Court observed:

"The facts and circumstances of two criminal cases are seldom on fours to each other. Thus while following observations in the judgments of superior Courts in criminal cases, particularly circumstances of the case are always required to be kept in view. On such finding of the superior Courts in a criminal case has (sic the force of precedent, having binding effect, by which same principle of law is decided or deduced, learned Judges of the subordinate judiciary should always be cautious and careful in placing reliance on the judgments of the superior Court in criminal cases and only such finding should be followed which contain a principle of law."

5. Conclusion

The conclusion of the above discussion is that the decision of a division bench of the High Court is binding on another division bench of the same High Court, if a contrary view has to be taken, than the matter is referred to a larger bench. Further the decision of a single bench is not binding on the single bench. And Further in Criminal cases, the precedent is not strictly followed.

⁸⁰ 2002 PLC CS 996

⁸² 2002 PLC CS 996

⁸³ 2002 PCr. LJ 1645