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Theoretical Foundations of Judicial Precedent: A Critical Analysis of Pakistan's Hybrid Legal System

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ABSTRACT

Judicial precedent is the backbone of common law systems, providing consistency, certainty and stability in judicial decision making. Precedent, however, is a more complicated process in Pakistan, due to the presence of common law traditions, constitutional supremacy, and Islamic jurisprudence. The study explores the theoretical underpinning of judicial precedent in the context of a hybrid legal system in Pakistan and assesses the nature of authority, functions and limitations of judicial precedent in the light of various jurisprudential theories. It adopts a qualitative doctrinal research method to analyze the theories of precedent from classical and contemporary times, such as those of legal formalism, legal realism, interpretivism, legal positivism, and Critical Legal Studies. It also examines certain aspects of the constitution, significant judicial precedents and the contributions of the Supreme Court and the Federal Shariat Court to the doctrine of precedent. The study explores that traditional common law theory is incapable of explaining judicial precedent in Pakistan because it is shaped by constitutional theory, Islamic jurisprudence and judicial responses to changing social and political contexts. The precedent increases legal certainty, institutional legitimacy and coherence, but too much rigidity diminishes the development of the law, and too much freedom of judicial departure diminishes legal stability and public confidence. The study concludes that a sound theory of precedent for Pakistan should be both pragmatic and flexible enough to ensure continuity and evolution in the law to meet constitutional values, democratic accountability and change over time. This research is a part of the jurisprudential discourse and a critique of the concept of precedent in a hybrid legal order and highlights the need for context-sensitive judicial power in Pakistan.

Keywords: *Judicial Precedent, Stare Decisis, Legal Authority, Pakistan Hybrid Legal System, Constitutional Adjudication.*

1. Introduction

The doctrine of precedent is one of the most unique and important characteristics of the common law system and the core of common law adjudication. It has been gradually acquiring a constitutional character, and it is now playing an increasingly important role in constitutional adjudication globally, through constitutionalization. (William Blackstone, 1876, pp. 48–49) Based on the Latin term “stare decisis” meaning to stand by things decided, precedent provides that similar cases are decided similarly, so that the values of consistency, stability, and fairness of the rule of law have been respected. (Rolf Sartorius, 1967) Precedent is traditionally defined as a rule of law that duty-bound courts follow prior decisions, but has come to represent a

complex jurisprudential concept that raises questions of authority, legitimacy, and legal reasoning.(Duxbury, 2008, pp. 31–33) In the contemporary normative theory of law, it is acknowledged not only as a procedural method but as a theory of legal authority, which governs judicial decision making over time and hierarchies.(MacCormick, 2005, pp. 114-123) In other words, the theory of legal authority is a normative approach to the way that the reasoning of past judges affects, shapes, and validates current judicial decision-making. The value of precedent goes beyond mere procedural efficiency: it contributes to equality before the law, by allowing citizens and litigants to anticipate how the courts will rule based on existing ratio decisions.(William Mark Landes & Richard Allen Posner, 1998, pp. 45–52) More significantly, the only cases where deviations are acceptable are those where earlier rulings have been made due to doctrines e.g. *per incuriam* (made in ignorance of the law); that seek to balance evolution and stability. The concept of precedent is thus not necessarily limited to a procedural convenience. They suggest basic questions about the nature of legal authority, the legitimacy of the judges' power, and the connection between law and reason.(Alexy, 2010, pp. 82–87) Precedent has also been useful in regulating conflicts between common law traditions and Islamic-based jurisprudence in hybrid jurisdictions like Pakistan, and has raised a more fundamental discussion of the concepts of *ijtihad* (independent reasoning) and *taqlid* (imitation) in the context of Islamic tradition. In this context, the study discusses the theoretical dimension of precedent starting from the definition of precedent and its theoretical foundations. It sheds light on its development and the constitutionalization in Pakistan and outlines its role in the legal system over time. From a classical jurisprudence and in the light of the comparative study of constitutional practice today, the discussion has been able to highlight the role of judicial reasoning and consistency in judgments making as a stabilizing and dynamic force in the contemporary legal systems.

2. Research Methodology

The methodology used in the study is doctrinal legal research which is qualitative. It covers primary legal sources such as the Constitution of Pakistan, and the most important decisions issued by the Supreme Court and the Federal Shariat Court, in addition to secondary sources like books and peer-reviewed journal articles. The study employs analytical and comparative approach that critically examines significant jurisprudential theories of precedent and examines their relevance in the context of Pakistan's hybrid judicial system. It also analyzes the approach of Pakistan with other common law jurisdictions to highlight the strengths and limitations of the theories and their relevance to judicial practice.

3. Literature Review

3.1 Defining Judicial Precedent

Legally, precedent is a judicial decision that forms a rule or principle to be used in the resolution of future cases that have materially identical facts or legal issues, and which represent an authoritative source of law. It represents the application of the hierarchical use of past rulings as the *ratio decidendi* which is binding reasoning necessary to the decision which governs future courts, and as *obiter dicta* (incidental observations) which are persuasive.(Zenon Bankowski et al., 1997, pp. 481–501) The most important part of this is the tradition of *stare decisis*, which binds the court to abide by things judged, and provides the continuity and predictability of doctrine. According to Thomson Reuters, this doctrine separates the type of precedent into binding (obligatory) and persuasive (influential but not binding) power of higher courts of the same jurisdiction creating binding authority. Indicatively, rulings made by the U.S. Supreme Court bind federal courts throughout the country resembling the English appellate frameworks after formalization in the 19th century.

The binding precedents observe vertical hierarchy, which means that lower courts are required to adhere to higher decisions, for example *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991). with the focus on stability. *Obiter*, foreign judgments or dissenting opinions are persuasive precedents that can be taken into consideration by judges in new cases, as in early common law where Chancery dicta were used in equity courts.

In the hybrid legal system developed in Pakistan out of British common law of colonization (e.g., 1861 Indian Penal Code) as well as post-1973 Islamic requirements, this particular expression takes a unique form. Article 189 establishes the limits of all the courts to the Supreme Court ratios as constitutionally binding but Article 203-GG decisions by the Federal Shariat Court in Article 203-GG provide the taqlid-like rigidity, which has been criticized as an obstacle to *ijtihad*. Scholar Muhammad Munir says that precedents in Islamic jurisdiction run the risk of fossilizing *fiqh*, whereas statutory primacy in pure civil law jurisdictions. (Muhammad Munir, 2008) Recent commentaries emphasize negotiated coexistence: Hudood laws intensify apparent norms of evidentiary sharia with those of procedure common law, as in *Tahir Naqash v. State*, PLD 2022 SC 385, where courts found a balance between blasphemy precedent and constitutional rights.

3.2 Historical Development of Judicial Precedent

The principle of precedent was solidified in the common law of England in the 12th century, during the judicial reforms of Henry II that centralized writs and assizes, in which decisions were documented in Year Books to ensure uniformity. (Richard Hudson, 1911) As early as the 17th century, *stare decisis* was formalized in the *Historia Placitorum Coronae* by Hale, and developed into rigidity during the nineteenth century through *Rayner v. Pethick* (1890) contrasts ratio with obiter as a scheme of world common law emphasizing predictability, as opposed to fairness. This was shipped to India as British colonialism through the Charter Act of 1833 and High Courts Act of 1865, a source of precedent in the jurisprudence of the subcontinent and Privy Council appeals augmented the subordination until 1950. This structure was inherited by Pakistan on the 1947 partition and the Federal Court (now Supreme Court) applied English precedents under the 1956 Constitution.

The classical tradition of Islamic jurisprudence does not believe in binding precedent, instead focused on *ijtihad* that is a scholarly reasoning through *usul al-fiqh* (Quran, Sunnah, *ijma*, *qiyas*) in the form of flexible *ra'y* of Hanafi school. The influence of Hanafi in Mughal India was reflected in colonial hybrids, and innovation became restricted by the revival of taqlid after the 20th century. In Pakistan, this collides tensely with common law the rulings of the Federal Shariat Court (1980): this binds through Article 203-GG, which replicates *ijma*, but which has been criticized as taqlid by the judge, killing *ijtihad*, according to Munir. (Muhammad Munir, 2008, pp. 473–480)

The judiciary of Pakistan adopted precedents in the post independent era as it was being Islamized. Supreme Court supremacy was codified by Article 189 of the 1962 Constitution, as can be understood in *Federation v. Sh. Raza ul-Haq* (1972) in which constitutional precedent was given precedence over English precedent. The Islamic ethos was injected into Objectives Resolution (1949). The Shariat Appellate Bench in *Federation of Pakistan v. Dr. Mehmood-ur-Rehman* (1992) reconciled *riba* bans with existing banking precedents, directing phase-wise elimination by 2001. Pakistan's Islamization accelerated through General Zia-ul-Haq's 1979 Hudood Ordinances, imposing strict Shariah penalties, but the judiciary later asserted autonomy in *Suo Motu Case No. 1 of 2006* commonly known as the 'Missing Judges Case' where the Supreme Court disregarded strict *stare decisis* to protect judicial independence against Musharraf's emergency rule, in *Lahore High Court Bar Association v. Government of*

Pakistan (2007), prioritizing constitutional supremacy and public interest. More importantly, such evolution is an indicator of negotiated hybridity: common law offers procedural stability, whereas Islamic principles require substantive equity, which promotes resiliency, but at the cost of inconsistency when political interventions are realized, Reforms balancing *ijtihad* and binding ratios are imperative.

3.3 Jurisprudential Perspectives on Judicial Precedent

In the majority of legal systems, the concept of precedent is fundamental and integral to providing guidance to judicial decision-making. It ensures uniformity, predictability and stability of the law. The use and significance of precedent is, however, interpreted differently in different legal theories. (Brian Leiter, 2010) All these theories, Legal Formalism, Legal Realism, Interpretivism, and Judicial Activism, provide a different view of how precedent is to be utilized and this has an impact on the approach courts in various jurisdictions, including that of Pakistan.

3.3.1 Legal Formalism

Legal formalism believes that the law is a set of objective rules, and judges should apply these rules in every circumstance without taking into account the social situation and the opinions of the individual. Precedents in this perspective is essential in offering a consistent application of the law, since a judge is supposed to follow past rulings to the latter to ensure consistency. (Luiz Fernando Eng De Lima, 2025) Precedent is thus not simply an instrument but a binding authority that imposes a predictability in the application of the law in a case law.

This view is based on *stare decisis*, the doctrine that a court should follow the ruling of another court in a case when the facts are the same. Formalism and the strict adherence to precedent contribute to the establishment of a stable legal environment that makes it possible to predict legal outcomes with certain certainty and facilitate the work of individuals and institutions. (Brian Leiter, 2010, pp. 112–117) However, this approach has been criticized for its lack of flexibility. Formalism does not take into account changes in the world, in norms, or new legal arguments, following the precedent. An example could be given that some of the colonial-era precedents still exist in the legal system of Pakistan, and the fact that there are laws developed in a separate socio-political environment might no longer be applicable to the needs of the modern society. They may lead to unfair judgments if they are applied by judges without considering the actual circumstances of a particular case, particularly in matters related to human rights or gender equality.

3.3.2 Legal Realism

The law cannot be applied mechanically or in an objective way, as legal realism argues. According to realists, the personal experience of judges and their biases and the social and political circumstances at large affect their judicial decisions which are based on personal opinions and choices. (Eskridge, 2010) In this opinion precedent is not necessarily determinative. Precedents should be followed as a reference point, but the judges are required to be flexible when appropriate particularly with regard to contemporary issues and/or new demands within the social fabric.

Legal realists argue that the flexibility of precedent application may also indicate that the law could respond more to modern concerns. A judge might, for instance, depart from the precedent in a case where the precedent would lead to an unfair or outdated result because it features a complex constitutional issue, a social justice case, or a case involving human rights harm.

This perspective is particularly relevant in the context of Pakistan, particularly in relation to the citizens' rights as provided in the constitution, or in situations where an executive or legislative

action is challenged. Whereas the judiciary of Pakistan has also demonstrated its willingness to review the precedents from time to time, especially when the constitutional rights are being upheld. For example, the judiciary has exercised their discretion in overturning past decisions that were in favor of authoritarianism in matters of restoring democratic institutions or independence of the judiciary. (Nadeem et al., 2023)

3.3.3 Interpretivism and Precedent

Another approach to the issue of precedent is interpretivism, which focuses on moral reasoning and justice in decision-making. Such scholars as Ronald Dworkin have invoked the idea that the judges must not apply the precedent blindly, but rather interpret it "in the light of justice and the principles of fairness. Interpretivists believe that the law is not a collection of pre-existing rules but rather an expression of the principles of justice and social morality. (Grant Gilmore, 1961)

This opinion states that the precedent itself must play a guiding role in the judgment, but also needs to be reassessed in cases where it does not reflect the principles of the society or justice. What judges are expected to recognize is whether or not the previous decisions were based on morality, or whether the society has changed and something different will have to be done. Precedent thus is open and not fixed.

This is evident in Pakistan where Islamic values and secular laws are both employed in the judicial system. Striking a balance between the Islamic jurisprudence and the common law in the nation frequently requires judicial interpretation beyond mere application of precedents. (Martina Di Gaetano, 2022) As an illustration the courts can resort to Islamic law in family proceedings, inheritance matters and this can result in the abandonment of secular legal precedents. Accordingly, the interpretivism, in the Pakistani context, enables the courts to modify the law so that it is consistent with the moral and religious principles, not to mention the current-day issues.

3.3.4 Precedent and Judicial Activism

Judicial activism is the policy in which the courts are actively involved in lawmaking by interpreting or even striking down precedent when they deem it necessary to counter modern issues or safeguard the vital rights of citizens. Judicial activism is common in constitutional cases, especially when the balancing of powers in the state is required or when it is necessary to promote social justice.

The level of judicial activism in Pakistan has been especially acute in the Supreme Court where the judiciary has actively practiced constitutional review and on occasions overturned or interpreted by exception past precedents to enforce the rights of citizens. *Zafar Ali Shah v. General Pervez Musharraf* (2000) is one such instance as the Supreme Court overturned previous decisions to declare its role in judicial review of executive behavior. This ruling reflects how the judiciary is ready to apply precedents not as an obstacle but as a means of justice and is usually seeking to interpret or modify it to fit the modern requirements.

Judicial activism in Pakistan commonly includes public interest litigation and cases regarding human rights, where the court fulfills its role that is not tied to the other arms of the government to protect the values in the constitution. This has seen the judiciary intervene in pertinent social and political matters but has also led to the debate on the separation of powers and whether the judiciary should come in to intervene on issues which were traditionally the role of the legislature or the executive.

3.3.5 Justice and Fairness in Precedent

The application of precedent should be based on an important theoretical basis that suggests that the application of precedent should be based on the principle of justice and fairness.

Precedent is not a historical relic to be prudently used blindly; courts must see that the use of precedent is in the interests of justice. When it comes to matters concerning human rights or constitutional values, adhering to precedent can create more results that are unfair or unjust to some groups. When this occurs, the argument goes that the courts should be ready to break with precedent if it is no longer consistent with the current ideas of justice.

As an illustration, the Pakistani judiciary can look at the issue of gender equality or freedom of expression to determine whether the literal interpretation of previous decisions would result in inequality and discrimination. Equality as a right of the Constitution of Pakistan demands that at times judges revise the precedents to maintain justice and fairness so that legal principles can be developed in accordance with the values of the society.

Although precedent is a key pillar in legal systems, it has encountered enormous criticisms especially its inflexibility and inability to be easily changed. Precedence can lead to the law becoming stagnant and not adapting to current social, political or moral issues because it follows precedent blindly. This is more a problem in such a country as Pakistan where social changes and shifts in perception such as human rights or gender equality, as well as freedom of expression, require a flexible and responsive legal system.

It is also possible that it is necessary to overrule precedents to bring the law into line with the realities of today. The fact that the Supreme Court in Pakistan is ready to override or amend previous rulings proves the dynamism of the judiciary in the formulation of legal norms, so that the law can act in the present situation, to bring justice.

3.4 Justifications for Stare Decisis

Stare decisis, which means "let the decision stand," has been defended on a number of normative arguments. There are four main arguments in the center that prevail in jurisprudential discourse.

3.4.1 Certainty and Predictability

The most common rationale for precedent is legal certainty. Precedent helps bring uniformity and stability to legal relations because similar cases are treated similarly. Lon Fuller recognized stability and consistency as two of the key elements of the rule of law, arguing that citizens need to be able to foresee the consequences of their actions if they are to be bound by them. (Lon Luvois Fuller, 1964/1969, pp. 39–41) Accordingly, precedent is directly related to these virtues because precedent ensures that similar cases are dealt with in a similar manner over time. Economic analyses do also emphasize the efficiency of legally predictable rules, which minimizes the costs of transactions and helps to plan for the future. (Richard Allen Posner, 2014, pp. 587–590) But critics have said that too much rigidity can make it difficult for the law to accommodate social change. Thus, in some cases, certainty at the cost of justice could, in part, erode the normative legitimacy of the legal system.

3.4.2 Legitimacy and Institutional Trust

Precedent strengthens the legitimacy of the judiciary by ensuring adherence to the law, and not to the personal whims of judges. In this sense, Alexander Bickel contended that the "rule of precedent" helps to alleviate the counter-majoritarian problem by ensuring that courts are "bounded" interpreters, not independent policymakers. (Alexander Mordecai Bickel, 1986, pp. 16–23) Furthermore, legitimacy exists on multiple levels. At institutional and procedural level, legitimacy is the reason that decisions are made in the same way and treated equally in each case, thus contributing to public trust in the impartiality and fairness of judicial action. Therefore, the courts uphold established legal frameworks instead of arbitrarily interpreting them. However, precedent is accepted as legitimate only if the prior decisions seem just. In some cases, such as *Plessy v. Ferguson* (1896), where precedents are generally considered

unfair, the literal application of them may weaken rather than strengthen the credibility of the institutions.

3.4.3 Coherence and Integrity

Law as integrity is a theory of Ronald Dworkin (Dworkin, 1997) which places precedent in a larger framework of coherence in legal reasoning. Courts are required to read the laws in a way that makes them coherent statements of political morality. (Dworkin, 1997, pp. 176–224) This coherence is also achieved by precedent, which adds continuity to the judicial decisions. It prevents fragmentation by avoiding conflicting judicial decisions and allows for the development of law in a principled way, rather than based on ad hoc decisions. So precedent is not simply a matter of repetition, rather it is a matter of ensuring consistency in interpretation, in accordance with the fundamental values of the legal system.

3.4.4 Constraint on Judicial Discretion

Precedent is a constraint on judges' discretion. It imposes the duty on courts to explain their divergence from the norm, thereby check and curb arbitrary and ideologically influenced decisions. The power of precedent is that it encourages decision making under rules and improves accountability and prevents the Judiciary from stepping out of its role. (Cass Robert Sunstein, 2018, pp. 35–61) However, there is no absolute constraint. Judges can be flexible by using interpretive methods like distinguishing and reinterpretation, as well as asking questions about the extent to which precedent really restricts their discretion. As a result, critics have questioned how judges can use selective interpretation, distinguishing, or even strategic overruling of precedents. So, the binding power of precedent could be more symbolic than real.

3.5 Critiques of Judicial Precedent

3.5.1 Legal Realist Critique

Legal realists rejected formalist theories of precedent as a source of legal obligations and a factor that shapes the result of judicial decisions. For example, Jerome Frank declared that there are psychological and contextual factors that impact judicial decisions, and that precedents are sometimes used as the "rationale" for decisions that are reached on other grounds. (Frank, 1930/2009, pp. 108–125) Karl Llewellyn highlighted the flexibility of precedent, which has the capacity to be applied broadly or narrowly to achieve desired ends. (Llewellyn, 2008, pp. 66–89) But the indeterminacy defeats the argument that there are objective limits in precedent. Hence, their central claims include:

3.5.1.1 Indeterminacy of Precedent

Precedents are always subject to interpretation. Judges may use the ratio decidendi in a narrow or wide way, choose appropriate precedents and distinguish bad cases. Therefore, it is hard to find any concrete precedents that make a difference in the results.

3.5.1.2 Judicial Psychology and Policy Preferences

In the words of realists, "judicial decisions are affected by personal values, social context and policy issues. Therefore, in practice precedence is not necessarily a restraint but is often used for post hoc rationalization.

3.5.1.3 Situation-Sense of a Case

Llewellyn (2008) pointed out that judges make decisions after taking into account the "situation sense of a case". (Llewellyn, 2008, pp. 121–127) They make reasoned decisions and then articulate their argument in relation to precedents. Hence, precedent merely legitimizes rather than dictates judicial decisions.

Despite their critique of the precedent, realists didn't call for the complete rejection of precedent. They recognized that it was stabilizing, but they did not believe in mechanical

application. Rather, they seek to uncover the difference between theory and practice in the judiciary.

3.5.2 Critical Legal Studies

Critical Legal Studies (CLS) scholars built on realist critiques by placing the concept of precedent in larger frameworks of power and ideology. In this context, Duncan Kennedy contends that legal arguments, such as appeals to precedent, sometimes cover political decisions. (Duncan Kennedy, 1976, pp. 1693–1697) Thus, the presence of objective adherence to precedent conceals judicial discretion and political choice which leads to false neutrality. CLS scholars also argue that precedent can reinforce social inequalities by incorporating ideologies and assumptions into legal doctrine that serve dominant social and economic interests. The neutrality of adherence to precedent may thus mask the political and economic agenda behind specific decisions.

The importance of precedents has also been noted by feminist and postcolonial scholars, who maintain that these have historically reinforced patriarchy and colonialism. (Catharine Allan MacKinnon, 1991, pp. 157–165) For instance, the history of constitutional precedent in many jurisdictions has a majoritarian bias that needs to be reinterpreted to realize substantive equality. (Reva Beth Siegel, 2004, p. 54) This requires transformative reinterpretation in order to obtain substantive equality and justice.

3.6 Research Gap

Existing scholarship has extensively examined judicial precedent from the perspectives of common law, legal positivism, legal realism, and interpretivism. There has been, however, limited attention given to operating within a hybrid legal system of Pakistan, where common law, constitutional supremacy and Islamic jurisprudence meet. This article aims to fill this vacuum by critically exploring the theoretical bases of judicial precedent and assessing the different perspectives of jurisprudential theories on its role in the constitutional framework in Pakistan.

4. Theoretical Framework

4.1 Precedent as a Theory of Legal Authority

In jurisprudence, legal authority is the ability of legal institutions or norms to give strong reasons for actions. Joseph Raz's conceptualizes authority as generating content-independent and pre-emptive reasons. (Raz, 2009, pp. 20–33) These pre-emptive arguments preclude any competing arguments and direct decision-making despite the decision-maker's personal objections. (Raz, 2009, pp. 28–29) So, authority demands that subjects obey its commands regardless of their own evaluation of correctness. In this scheme, introduced by Raz, precedent is not just a persuasive tool, but a second-order reason that compels judges to abide by previous decisions, without being bound by their own independent judgment of their correctness, with limited exceptions. Furthermore, it also provides an institutional and hierarchical structure for legal reasoning. Thus, precedent embodies a theory of authority in at least three senses that includes institutional, epistemic and systemic authority.

As an institution of authority, the precedent serves as a confirmation of the authority of courts as institutions that create law. In this context judgements lose their status as being just and right only if they are issued by an authorized legal institution. As an epistemic authority, precedents are the repositories of accumulated legal reasoning, and they embody an institutional experience and continuity of interpretation. Precedents offer epistemic guidance by capturing judicial wisdom from the past in the current judicial process, as Neil Duxbury notes. (Duxbury, 2008, pp. 22–26) Moreover, the system of precedent creates a continuity of law as a normatively binding system of rules, not merely a string of judicial decisions. It

establishes uniformity throughout time and strengthens the rule of law. Therefore, by accepting prior decisions as authoritative reasons to guide and limit present adjudication, courts treat earlier decisions as binding. Therefore, precedent is not just persuasive reasoning; it's a codified type of authority institutionally embedded in legal frameworks.

4.2 Institutional and Systemic Dimensions of Precedents

The role of precedent as an institutional device is to strengthen the power of courts as law makers and law interpreters. It declares judicial rulings to have a normative effect beyond the case at hand. According to Neil Duxbury, precedent is also a “part of the ‘institutional practice’” of common law adjudication, and it maintains continuity and stability over the generations of judicial decisions. (Duxbury, 2008, pp. 7–25) In addition, precedent enhances coherence within the system, because law is not just a series of decisions, but a comprehensive, normative system. When precedent establishes a temporal chain of legal authority, it helps to maintain the identity and continuity of the legal system.

4.3 Precedent as Structured Reasoning

Structured reasoning processes include recognising ratio decidendi, analogical reasoning, distinguishing and overruling and it is through these processes that precedent works. Precedents are like rules and must be followed by decision-makers even if they could make an independent decision and reach a different conclusion. (Frederick Schauer, 2009, pp. 36–58) This rule-like dimension reinforces the precedent's authoritative nature that restricts judicial discretion and allows for interpretive reasoning. In addition to the formalist approach that precedents are tools for mechanically applying rules, precedents can also be seen as a structured argumentative process that includes ratio decidendi, analogical reasoning, distinguishing and overruling. Frederick Schauer contends that rules and precedents are based on “entrenched generalizations,” (Frederick Schauer, 2009, p. 106) in which decision-makers are obligated to adhere to previous rulings even if those rulings lead to less than ideal results for individuals. In this rule-like function, the importance of precedent as an authoritative constraint is emphasized.

4.4 Precedent versus Principle in Adjudication

Precedent and principle have been one of the longest running and most contentious debates in jurisprudence.

4.4.1 Dworkinian Perspective

Ronald Dworkin was famous for distinguishing between rules and principles, maintaining that rules should be used to guide a process of adjudication in terms of underlying principles of the law. (Ronald Dworkin, 1978, pp. 112–117) Precedents are relevant as they reflect and articulate these principles (112–117). Thus, Dworkin's precedents are only relevant if they embody a moral underpinning of justice and fairness and should be read with regard to the best moral explanation of the law. Therefore, judges in Dworkin's must interpret precedent in light of the “best moral justification of the legal system”. This interpretive approach is more concerned with substance than consistency. Precedent, then, cannot be used mechanically, but must be incorporated into a coherent, and principled, understanding of law.

4.4.2 Positivist Perspectives

According to Legal positivists like Hart and Raz, precedent gets its authority from the social sources of authority, which include recognition by institutions and judicial practice, not from moral considerations. (Herbert Lionel Adolphus Hart & Green, 2012, pp. 50–55) From this point of view, precedent is binding because it is deemed to be a good legal source by the rule of recognition, which makes it binding for the legal system. Furthermore, the interpretation of principles has to be based on legal sources, but not in contravention of them unless recognized

by the system. Moreover, in Raz's service-based theory of authority, precedent gives authoritative guidance just because it enables people to use institutional decisions without having to think through their moral responsibilities themselves. (Raz, 2009, pp. 107–112)

4.4.3 Contemporary Synthesis

In a modern constitutional adjudication, there can be a synthesis between precedent and principle. Principles serve as the basis for interpretation and the justification for departing from precedent as needed while precedents serve to give the structure continuity and stability. Courts thus often use precedent to maintain stability, and constitutional principles as a basis for reinterpretation or overturning. Comparative constitutional jurisprudence shows this dynamic interaction in this context. Dignity, equality, and proportionality are among the concepts that have been invoked in India, Canada, and South Africa to reinterpret and/or deviate from previous cases in a coherent system. For instance, the evolution of the 'basic structure doctrine' in *Kesavananda Bharati v. State of Kerala* (1973) by the Indian Supreme Court shows how constitutional principles can give rise to a new interpretation of the previous precedent but do not render it unconstitutional.

5. Judicial Precedent in Pakistan's Hybrid Legal System

Precedent in courts of Pakistan is part of the legal continuity, justice, and uniformity. Pakistan is a common law country and the principle of stare decisis, which means that the decisions of superior courts are highly persuasive and are followed in subsequent cases with similar facts and/or with similar law. The idea of precedence provides a sense of predictability in legal decision making which is highly important in maintaining the rule of law as well as fostering the public confidence in judicial system. Nonetheless, precedent may be complicated to use particularly in cases where the facts of the case do not conform to past decisions or in situations where the courts need the discretionary element to match the changing needs of society.

5.1 The Hierarchy of Precedent

Supreme Court is the highest court in Pakistan which has the power to create binding precedents. Supreme Court decisions should be followed by all lower courts including High Courts and District Courts. However, it is important to have the ability to distinguish the precedents when the facts or the issues of law are quite different. Decisions of the High Court, although influential, are not as weighty as those of the Supreme Court (Matthew Paul Hitt, 2016) The High Court decisions are not binding to lower courts but may be used as persuasive authority. This can have some effect on legal evolution; judges at a district level may be somewhat free to depart from the rulings of higher-level judges when they feel that a ruling by a higher-level judge or other more general rulings on law are not in harmony with their own.

5.2 Challenges in Applying Precedent

The application of the precedent to the judiciary in Pakistan is however not always simple. One of the problems is that when there are conflicting precedents. This typically happens if the Supreme Court and High Courts have issued judgments that are inconsistent with one another and/or have failed to take into account new legal, social or political developments. These conflicts require judges to use judicial discretion to interpret the law in a manner that upholds the integrity of the law as well as responding to the current-day issues.

As an example, the dual system of laws that Pakistan has, where both the secular common law and the Islamic law (Sharia) are involved, brings about complications in the application of the precedent in the cases that entail Islamic teachings. Even Islamic law can be interpreted and the judges have to make decisions on the school of thought in most of the cases whenever Islamic law encounters the issues of modern law. This becomes particularly difficult in such

fields as family law, inheritance or human rights, where precedents may clash with the changing views of society or even with the constitutions.

5.3 Judicial Activism and Its Impact on Precedent

Precedence has also been a constraint in Pakistan's legal system, and has been hindered by judicial activism. Judicial activism occurs when judges are active in interpreting and modifying the law, typically by overturning prior decisions and/or changing the meaning of the law to address social, political or constitutional issues. This was aptly demonstrated when the executive was challenged on these measures in court as in the case of *Benazir Bhutto v. Federation of Pakistan* (1988) which the Supreme Court set aside the actions of the executive. At that, the court emphasized the importance of constitutional priority and took its own legal initiative in protecting the democratic values, overstepping the set precedents. It was not so much about following the previous orders as it was about taking positive steps towards the constitutional rights and promoting democracy.

Judicial activism is also an important feature in the human rights law. For instance, the doctrine of necessity was introduced in the military regimes in Pakistan to excuse otherwise unconstitutional actions, such as military coups. This provided the judiciary with a chance to uphold the military regimes when it's quite apparent that the Constitution was breached. It helped to calm down the political tensions, but the officials' actions were not in line with the fundamentals of democracy and constitutionalism, critics argue.

One of the controversial precedents in context of the doctrine of necessity is the case of *Ghulam Ishaq Khan vs. Nawaz Sharif* (1993) where Supreme Court allowed the military to remain in politics during emergency. This ruling has been seen as a bad precedent as it undermined the independence of the judiciary and led to dictatorial rule in the name of the law.

On the bright side, cases where the judiciary has fitted Islamic tenets to the current legal systems particularly in family law can be cited as one of the good precedents. Representing a paternity case, judges in Pakistan have used the Hanafi school of thought to read Qanoon-e-Shahadat (The Law of Evidence), which can lead to manipulation of the legal criteria of paternity and family relations as in *Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan* (2015). This judicial interpretation was an attempt to make Islamic law fit into the modern standards of justice and the best interests of children and eventually changed the evidentiary law in order to make it fit the modern realities.

On the other hand, bad precedents have also arisen, where the courts have given shelter to law, which does not serve the needs of a modern and democratic society. One may cite a doctrine such as 'necessity' that is used to excuse military coup as mentioned. The Gardazi Rule (*Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yousuf* (1963)) and the other precedent setting judicial cases during the martial law era remain a blot on the judicial history of Pakistan. All these rulings were criticized to justify the military dictatorship and its authoritarian regime under the banner of the greater good.

The other case of bad precedent is the Martial Law cases where the courts invoked the doctrine of necessity to legalize military rule and to excuse the suspension of democratic procedures. This undermined the integrity of judicial independence and was not able to defend constitutional democracy. These precedents have been useful in times of political unrest to provide a temporary stability, but in general they have been regarded as unfair and an abuse of legal reasoning.

5.4 Balancing Rigidity and Flexibility in Precedent

Even though precedent plays a crucial role in the legal system of Pakistan, it is troubled by the issue of rigidity. As an example, the legal structure of the colonial period still influences the jurisprudence that does not necessarily correspond to the contemporary values of fairness or equality. The use of old precedents can hinder development and social change in most places, especially regarding gender rights, freedom of speech, and minority protection. The feminist movement and the human rights activists have often called upon legal amendments which are not based on the colonial mindset and attempts to redefine the way the precedents ought to be developed to meet the demands of the modern world. (Mary Garvey Algero, 2012) Meanwhile, it is necessary to ensure that precedent is not so loose that it becomes useless as a rule. Judges must strike a balance between respecting past precedents and keeping abreast of the current realities of law. Flexibility is required to reflect the development of today's society, but a consistent adherence to the law and constitutional principles.

6. Conclusion

To sum up, the theory of precedent shows that it is a complex doctrine that is a source of legal authority, a form of institutional legitimacy, a forum of reasoning, and a space of ideological contestation. Its justificatory virtues are certainty, legitimacy, coherence and constraint, its centrality to the rule of law, but critics reveal its indeterminacy and vulnerability to power. These tensions are further magnified in the context of Pakistan's mixed legal system, where common law, constitutionalism and Islamic law exist side by side. There is a danger of stagnation and injustice in the rigid adherence to precedent and a danger of instability and arbitrariness in the unlimited departure from precedent. The real challenge is to balance on a principled basis and to ensure continuity while allowing for transformation. Any theory of precedent that is forward-looking must therefore have a dual commitment to fidelity and flexibility: fidelity to the past and to the evolved nature of judicial authority, and flexibility to the changing needs of justice, constitutionalism and democratic legitimacy.

References

- Alexander Mordecai Bickel (with Internet Archive). (1986). *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Yale University Press. <http://archive.org/details/leastdangerousbr00bick>
- Alexy, R. (2010). *A Theory of Constitutional Rights* (1st edn). Oxford University Press.
- Brian Leiter. (2010). Legal formalism and legal realism: What is the issue? *Legal Theory*, 16(2), 111–133.
- Cass Robert Sunstein. (2018). *Legal Reasoning and Political Conflict* (2nd ed). Oxford University Press.
- Catharine Allan MacKinnon. (1991). *Toward a Feminist Theory of the State* (1st edn). Harvard University Press.
- Duncan Kennedy. (1976). Form and Substance in Private Law Adjudication. *Harvard Law Review*, 89(8), 1686–1778.
- Duxbury, N. (2008). *The Nature and Authority of Precedent* (1st edn). Cambridge University Press. <https://doi.org/10.1017/CBO9780511818684>
- Dworkin, R. (1997). *Law's empire* (10th edn). Belknap Press of Harvard University Press.
- Eskridge, W. N. (2010). Interpretation of Statutes. In D. Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory* (1st edn, pp. 188–196). Wiley. <https://doi.org/10.1002/9781444320114.ch11>
- Frank, J. (2009). *Law and the Modern Mind*. Transaction Publishers. (Original work published 1930, Brentano's Inc.)

- Frederick Schauer. (2009). *Thinking like a Lawyer: A New Introduction to Legal Reasoning*. Harvard University Press.
- Grant Gilmore. (1961). *Legal Realism: Its Cause and Cure*. 70(7), 1037–1048.
- Herbert Lionel Adolphus Hart, & Green, L. (2012). *The concept of law* (3rd edition). Oxford University press.
- Llewellyn, K. N. (2008). *The Bramble Bush: The Classic Lectures on the Law and Law School*. Oxford University Press.
- Lon Luvois Fuller. (1969). *The Morality of Law* (Revised). Yale University Press. <https://yalebooks.yale.edu/book/9780300010701/the-morality-of-law/> (Original work published 1964)
- Luiz Fernando Eng De Lima. (2025). Legal Pragmatism and the Overcoming of Formalism: Abduction, Precedents and Contextualization in the Judicial Decision. *Beijing Law Review*, 16(03), 1920–1933. <https://doi.org/10.4236/blr.2025.163097>
- MacCormick, N. (2005). *Rhetoric and The Rule of Law: A Theory of Legal Reasoning*. Oxford University Press.
- Martina Di Gaetano. (2022). The Use of Judicial Precedent as a Form of Activism by the Court of Justice: Strengthening the Union's Powers to Protect the Rule of Law. *The Italian Review of International and Comparative Law*, 2(2), 390–414.
- Mary Garvey Algero. (2012). Considering Precedent in Louisiana: Balancing the Value of Predictable and Certain Interpretation with the Tradition of Flexibility and Adaptability. *Louisiana Law Review*, 58(1), 113.
- Matthew Paul Hitt. (2016). Measuring precedent in a judicial hierarchy. *Law and Society Review*, 50(1), 57–81.
- Muhammad Munir. (2008). Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan. *Islamic Studies*, 47(4), 445–482. <https://doi.org/10.52541/isiri.v47i4.4266>
- Nadeem, M., Qasim, M., & Ibrahim, S. (2023). Original Jurisdiction of the Supreme Court of Pakistan Article 184 (3) of the Constitution of Pakistan, 1973. *Journal of Social Sciences Review*, 3(2), 1054–1064. <https://doi.org/10.54183/jssr.v3i2.339>
- Raz, J. (2009). *The Authority of Law* (second). Oxford University Press.
- Reva Beth Siegel. (2004). *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*. 49(1).
- Richard Allen Posner. (2014). *Economic Analysis of Law* (9th edn). Wolters Kluwer Law & Business. <https://chicagounbound.uchicago.edu/books/709>
- Richard Hudson. (1911). The Judicial Reforms of the Reign of Henry II. *Michigan Law Review*, 9(5), 123–145.
- Rolf Sartorius. (1967). The Doctrine of Precedent and the Problem of Relevance. *Archives for Philosophy of Law and Social Philosophy*, 53(3), 343–366.
- Ronald Dworkin. (1978). Hard Cases. In *Taking Rights Seriously* (pp. 81–130). Harvard University Press.
- William Blackstone. (1876). *The Commentaries on the Laws of England (1765-1769)* (4th edn, Vol. 1). William Clowes and Sons. <https://lonang.com/library/reference/blackstone-commentaries-law-england/>
- William Mark Landes & Richard Allen Posner. (1998). Legal Precedent: A Theoretical and Empirical Analysis. In *Scientific Models of Legal Reasoning* (1st edn, p. 60). Routledge.

Zenon Bankowski, Donald Neil MacCormick, Lech Morawski, & Alfonso Ruiz Miguel (Eds). (1997). Rationales for Precedents. In *Interpreting Precedents* (1st edn, p. 21). Routledge. <https://doi.org/10.4324/9781315251905>

Case Laws

Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 416.

Ghazala Tehsin Zohra v. Mehr Ghulam Dastagir Khan, PLD 2015 SC 327.

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991).

Lahore High Court Bar Association v. Government of Pakistan, PLD 2007 SC 394.

Mehmood ur-Rahman Faisal v. Government of Pakistan, PLD 1992 FSC 1.

Muhammad Nawaz Sharif v. Federation of Pakistan, PLD 1993 SC 473.

Plessy v. Ferguson, 163 U.S. 537 (1896).

Rayner v. Pethick, 24 QBD 685 (CA 1890).

Sheikh Riaz-ul-Haq v. Federation of Pakistan, PLD 1972 SC 585.

Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yousuf, PLD 1963 SC 51.

Tahir Naqash v. The State, PLD 2022 SC 385.

Zafar Ali Shah v. General Pervez Musharraf, PLD 2000 SC 869.