CHAPTER- V
THE DOCTRINE OF PRECEDENT AND THE CONSTITUTIONAL FRAME WORK
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5.1. Introduction:

Administration of justice is the firmest pillar of Government. Man is by nature wicked, needs teaching and discipline in order to be right. Hence for the maintenance of legal rights and for the prevention of wrongs and injustice, there must be efficient administration of justice according to pre-declared principles of law. ¹ Salmond observed, "Men being what they are – each keen to see his own interest and passionate to follow it-society can exist only under the shelter of the State and the law and justice of the State is a permanent and necessary condition of peace, order and civilization". ²

Administration of justice means justice according to law. While administering the justice what are the legal source to which, help the State to implement the justice in the society, i.e., what are the sources of law, which help the State to administration of justice? The expression ‘source of law’ is capable of three meaning. Firstly, it may mean the formal source that confers binding authority as a rule and coverts the rule

into law. The State, therefore, is the formal source of law and for every law this type of source is the same, the will of the State. No rule can have authority as law unless it has received the express or tacit acceptance of the State. Secondly, the expression ‘source of law’ may mean the place, where, if a person wants to get information about the law, he goes to look for it. In this sense the source means the literary source i.e., that from which actual knowledge of the law may be gained e.g., statues, reports of decided cases and textbooks. Thirdly, the expression source of law may mean that which supplies the matter on the content of the law. Custom, religion, agreement, opinion of text writers, foreign rules of law, statute, precedent or judge made law, all come under this category.

There are three kinds of sources of laws:

1. Customary law, having its source in custom;
2. Enacted law, having its source in legislation;
3. Case law, having its source in precedent;

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3. Literal meaning of the term source is ‘rising from the ground’ the origin or ‘the spring’.
4. Supra Note. 1. at 81.
5.2. Custom as a Source of Law:

In all societies of the world, custom has enjoyed a very high place in varying degree in the regulation of human conduct. Customs arise whenever a few human beings come together, as no association of human beings can exist permanently without adopting consciously or unconsciously, some definite rules governing reciprocal rights and obligations. This type of law is a created by the people themselves, by their unconscious adoption of a certain rule of conduct whenever the same problem arises for solution and its authority is based on nothing but its long continued use and recognition by the people. Law based on custom is known as customary law. In fact custom is one of the most fruitful sources of law. Custom is to society what law is to the State. Each is the expression and realization to the measure of men’s insight and ability of the principles of right and justice.

Custom is a habitual course of conduct observed uniformly and voluntarily by the people concerned. When people find any act to be good and beneficial, which is agreeable to their disposition, they practice it and in course of time by frequent observance and on account of its approval and acceptance by the community for generations, a custom evolves.

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7. Supra Note. 1 at. 86.
Custom is one of the oldest forms of law making. In primitive societies human conduct was regulated by practices, which grew up spontaneously and were later adopted by the people. The generally observed course of conduct, which is the main characteristic of custom, thus originated, observes Holland, in the conscious choice of the more convenient of two acts, though sometimes doubtless, it is the result of accidental adoption of one of the two indifferent alternatives. In either case the choice is either deliberately or accidentally repeated till it ripens into habit.8

Imitation plays an important role in growth of a custom. Such imitation may very often be guided purely by religious or superstitious adherence to a course of conduct. In early political societies the kind did not make laws but administered justice according to the popular notions of right and wrong, which were enshrined in the course of conduct pursued by people in general. What was accepted by the generality of the people and embodied in their customs was deemed to be right and which was disapproved by them or not embodied in their customs was deemed to be wrong.9

Customs have played an important role in moulding the ancient Hindu Law. Most of the law given in Smritis and the Commentaries had its origin in customs. Customs worked as a re-orienting force in Hindu

8. Supra Note. 1. at. 86-87.
9. Maine and Ihering accept this rule as the origin of custom.
Law. ¹⁰ In India, to some extent similarity can be drawn in respect of important labour rights in few vital areas.

There are many reasons why custom is given in force of law. Some of the more important reasons are;

(i) Custom is the embodiment of those principles, which have commended themselves to the national conscience as principles of truth, justice and public policy.

(ii) The existence of an established usage is the basis of rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated. A custom brings stability and certainty in the legal order.

(iii) Sometimes a custom is observed by a large number of persons in society; in course of time the same comes to have the force of law.

(iv) Custom rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.

Custom is useful to the lawgiver and codifier in two ways. It provides the material out of which the law be fashioned – it is too bold an intellectual efforts to create law denovo. Psychologically, it is easier to secure reverence for a code, if it claims to be based on customs immemorially observed. Thus, no new legislation can completely ignore the existing practices.\textsuperscript{11}

In modern times, legislation is the most important source of law. However, importance of custom has not been diminished altogether. In India, for example, customs still occupy a very important place and their importance has been recognized by law as valuable in the administration of law and justice. Articles 25, 26 and 28 of the Constitution of India indirectly guarantee the protection of such customary practices of a community, which are not repugnant to the concept of secularism and democratic socialism. The existing Hindu law concerning marriage, succession, adoption, etc., in essence retains these customary features of old Hindu, which are still considered useful and necessary by our social reforms.\textsuperscript{12}

\textsuperscript{11} Ibid.
\textsuperscript{12} Supra Note. 5. at 96-130.
5.2.1. Impact of Custom on Key Labour-Rights:

The vital entitlements under the labour laws namely, dearness allowance, bonus, strikes and regulation of employment are originally recognized as customary rights of the industrial workers in India. Subsequently the entitlements namely, dearness allowance and bonus are recognized by the law and as such formalized them into a systematic statutory framework. However, the rights relating to strikes and regulation of employment are partially remained even today has customary rights and partially as statutory rights. The judiciary has reduced these customary entitlements of the industrial workers authoritatively into precedents.

5.3. Legislation as a source of Law:

In modern times legislation is considered as one of the most important sources of law. It may be said that custom precedes legislation, and, as society advances is replaced by it. Moreover, much early statute law is no more than formal promulgation of well-established customs. According to Salmond legislation is that 'source of law which consists in the declaration of rules by a competent authority. For Gray,
legislation is the formal utterances of the legislative organs of the society.\textsuperscript{12}

Legislation is that source of law, which consists in the declaration, or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called \textit{Jus Scriptum} (written law) as contrasted with the customary law or \textit{Jus non-scriptum} (unwritten law). \textit{Salmond} prefers to call it 'enacted law'. Statue law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).\textsuperscript{13}

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repealed, annulled or controlled by any other legislative authority. Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce law, is given in some cases

\textsuperscript{12} Supra Note. 1. at. 121.
\textsuperscript{13} Supra Note. 10. at 15.
the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws, which are recognized and enforced by the Courts of Law. 14

The term 'Legislation' is derived from the Latin words "Legist" a law and "Later" meaning to 'make', 'put', 'set'. Thus etymologically, legislation means making or setting the law. Broadly this term is used in three senses. Firstly, in its broadest sense it includes all methods of law making. In this sense legislation includes judge-made rules of law, and even the particular rules of law or the rights created at law between parties to contract. In the second sense, legislation includes every expression of the will of the legislature, whether directed to the making of law or not. Every act of legislature, in this sense, is an instance of a legislation, irrespective of its purpose and effect. The legislature does not confine its action to the making of law, yet all its functions are included within the term legislation, for example, the legislature may enter into a treaty with foreign state. In this example, there is no creation of new rule of law. Thirdly, legislation is used in a strict sense. In this sense it means the making of rules and laws to be followed and enforced in the courts of the State. These rules or laws can only be made by competent law making body,

14. Ibid. at 15.
i.e., body which, under the Constitution of the State, is empowered to make laws. This third sense is more popular and while considering legislation as a source of law.\textsuperscript{15}

Today, in India the place of legislation as a source of law is very high. Among the sources of law, the most important, today as so recognized, is that of legislation. Custom, which played a significant role in ancient times, lost much of its importance. At present customary laws have been incorporated in statutes. Legislation is considered as superior even to precedents. Sometimes, Precedents produce sound law, but at times, bad or fallacious judgments are responsible for bad law by production of unsound precedent. If a precedent is unsound, it is very difficult to remedy the defect and the procedure is a lengthy one. At first the trying judge in the same High Court must decide the case at hand according to the precedent. The aggrieved party may then go in appeal and the Appellate Court may give the right judgment. The defects of legislation can more readily be got over by a proper judicial interpretation of statute or by amendment of the Act. It is this abrogative power and amending facility that gives legislation a superiority over precedents. Besides this, legislation voices the views of the people; bills are circulated for public opinion and it is the voice of public opinion echoed in the voice of statute. Another great advantage of legislation is that it is direct and unambiguous. Whereas precedent provides rule which only a lawyer can

\textsuperscript{15} Supra Note. 1 at. 122.
unravel from the mass of decisions in support and even among lawyers often there is considerable divergence of opinion as to the rule that is laid down. Again, legislation is definite and precise as comparison to case law which is mostly bulky and voluminous. Further, legislation is the pre-declaration of law to the citizens of the State before the law can be applied to their disputes or actions. A precedent for the first time declares what the law on a point is, till then the parties to the litigation were in doubt about law. A precedent may come as an unpleasant and unexpected surprise to a party and cause him serious damage. Enacted law, the product of legislation, on the other hand declares beforehand what the rights and liabilities of the parties will be and thus leads to greater justice to the parties.  

5.3.1. Labour Law Legislations – The Impact:

As far as the labour as a subject is concerned, there is abundance of law in the country to deal with the matters. The Central as well as State Governments have enacted more than one eighty legislations, dealing with the labour as such. They include the matters pertaining to;

(i) Freedom of association and collective bargaining;
(ii) Regulation of employment aspect
(iii) Industrial relations.

16. Supra Note. 1.at. 128.
(iv) Matters relating to terms and conditions of employment, and
(v) Matters relating to social welfare and social security.

Many unforeseen difficulties experienced while implementing the labour legislations to different segments of the workforce in the country. The interpretation clause and the charging provisions in the legislations. In view of the fact that either the legislations contained a gap or lack of clarity in the provisions. In this context the role of the higher judiciary was crucial in the effective application of labour legislations. One can find plethora of case law evolved by the High Courts in India with regard to interpretation and application of these statutes resulting in different viewpoints on same provision etc., Until the issue is resolved by the Supreme Court. The time has proved that even the apex Court laid down catena of case law with regard to interpretation and application of these legislations. At times difficulties were experience as to the correct proposition of law in view of the fact that the changing perceptions of the judiciary from time to time.

5.4. Precedent as a source of Law:

It is a basic principle of the administration of justice that like cases should be decided alike. This is enough to account for the fact that, in almost every jurisdiction, a judge tends to decide a case in the same way
as that in which a similar case has been decided by another judge. The strength of this tendency varies greatly. It may be little more than an inclination to do as others have done before, or it may be the outcome of a positive obligation to follow a previous decision in the absence of justification for departing from it. Judicial precedent has some persuasive effect almost everywhere because stare decisis (keep to what has been decided previously) is a maxim of practically universal application.\textsuperscript{17}

Judicial precedent is an independent source of law and is as important as custom and legislation. In fact, this doctrine of judicial precedent is an unique feature of English law as also of the Common Law Countries. In England Judge played a significant role in developing the English law. During the Middle Ages when the Parliament had not assumed the status of a sovereign law making body, it was left to the judges to define law and lay down legal principles. Thus, adjudication in England made a great contribution towards the formulation and development of English law. It is said that the English law is mostly a judge-made law. This principle of law, which was so common in England, is not unknown in a countries where the doctrine of legal precedent has been followed. In the continental countries like France, Germany and Italy, however, the system is different, there the judges look to legislation

or will of the legislature for interpretation of law and are not bound to follow a previous decision of a higher Court.  

A precedent means a previous instance or case, which is or may be taken as an example or rule for subsequent cases. In common parlance it means something said or done that may serve to authorize or justify further acts of the same or a similar kind. According to Keeton, a judicial precedent is a judicial decision to which authority has in some measure been attached. In the words of Gray, 'a precedent covers everything said or done which furnished rule for subsequent practice'.

According to Jenks, a judicial precedent is a decision by a competent court of justice upon a disputed point courts of inferior jurisdiction administering the same system until it has been overruled by superior court of justice or by a statute e.g., the Act of Parliament. In short the precedent means the guidance or authority of past decision for future cases.

Certainty, uniformity and predictability in the area of case law considered to be the benefits arising out of the doctrine of precedent. In its broadest sense a precedent is any set of pattern upon which future conduct may be based.

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18. Supra Note. 1. at. 104.
21. Supra Note. 1. at 105.
theoretically distinct from the doctrine of precedent, which is based on the practices by which the courts give effect to that rule. The two cannot be separated in practice because, once it is established that judicial decision makes law for future, a decision on a point of law comes to be called a precedent and some doctrine concerning the weight to be attached to the different precedent becomes essential. The expression 'doctrine of precedent' therefore sometimes refers to the rule that judicial decisions have the force of law in addition to the practices by which effect is give to that rule. 24

5.4.1. Application of Judicial Precedents:

The application of judicial precedents is governed by different principles in different legal systems. These principles are called the 'doctrine of precedent'. It means two things. First, that 'such precedents are reported, may be cited and may probably be followed by courts. Second, that the precedent under certain circumstances must be followed. The doctrine of precedent, in its first sense, prevails in the continent and prevailed in England also before the 19th century. The application of the doctrine in the second is a special feature of the English legal system. With some modifications, it is followed in many countries including in India.

24 Ibid. at 3.
The importance of the decisions as a source of law was recognized even in very ancient times. In theological books there is numerous instances. Sir, Edward Coke, in the Preface to the Sixth Part of his Report, has written that Moses was the first law reporter. In the case of the daughters of Zelophehad, narrated at the beginning of the twenty-seventh chapter of the Book of Numbers, the facts are stated with great clearness and expressly as a precedent to be followed. A text of Mahabharat, "that path is the right one which has been followed by virtuous men". May also be interpreted as giving a theory of precedent. In ancient legal systems of Babylonia and China the judicial decisions were considered to be of great authority, and later on, they were embodied in the code law.25

Among the modern legal systems the Anglo-American law is judge made law. It is called 'common law’. It developed mainly through judicial decisions. Most of the branches of law, such as tort, have been exclusively by the judges. The constitutional law of England, especially the freedom of the citizens, developed through judicial decisions.26

The great importance attached to the judicial precedents is a distinguishing feature of the English legal system. The edifice of the common law is made up of judicial decisions. In no legal system of the

26. Ibid.
world so much authority is vested with the precedents. Though present English doctrine of precedent came into being in the 19th century, its history goes many centuries back. The organization of the judicial system, the power and the authority of the judges, legal thought, and the publication of the law reports all helped in the growth of the doctrine of precedent in English law. 27

5.5. Position of Precedent in India:

Though there are ancient texts which suggest that ‘that path is the right one which has been followed by virtuous men’ to say, on this basis, that there was a theory or precedent in India, in ancient times, would be going too far. There are not records of cases or any other reliable evidence upon which anything can be said definitely. The agrarian society had comparatively less disputes and there were very few occasions to go to the Court. The courts were generally local which decided most of the things orally. The ancient courts were kula, shreni, puga and shashan, of which the former three were the tribal, professional and local tribunals respectively. They decided the cases falling within their respective jurisdictions. Though in ancient texts the classification and title of the suits and a very comprehensive procedure, there being no record of cases, it is not fully known as to how it practically worked. There were no

27. Ibid. at. 197.
printing machines, and hence, no reporting system and for want of reporting there was little possibility of developing a doctrine of precedent.\(^2^8\)

In the medieval period also we find no traces of any theory of precedent. Though Mohammedan rulers established courts and had appointed Qazis to administer justice, most of the disputes in villages were decided by Panchayats. In the absence of a well-organized judicial system, no doctrine of precedent developed in India as it developed in England. It is after the establishment of the British rule that present theory of precedent started developing and from that time onwards we can trace a gradual development of the theory.

For sometimes the English people administered justice according to the 'personal law' of the parties with the help of Pandits and Mulvis. By the 'Regulating Act' a Supreme Court was established at Calcutta. Later on, Supreme Courts were established in other Presidency towns also. After sometimes High Courts were established in provinces. There was no relationship between the Supreme Court and the High Court and they were independent of each other. They administered two different sets of laws. When many of the branches of the law were codified, both kinds of Courts started administering the same law. When the Judicial committee of the Privy Council became the final appellate tribunal, a new chapter was added in the Indian legal history.

\(^2^8\). Ibid. at 208.
A clear hierarchy of the Courts was established. There were Presidency Courts (in Presidency towns) and Mofussil courts (in districts). The Privy Council was the final appellate tribunal. Every Court was bound by the decisions of the superior Court. This helped in bringing uniformity and certainty in law because the decisions of Privy Council were binding on all the courts in British India. And in spite of the great and many defects of such judicial system, it rendered this valuable service. Thus, the doctrine of precedent, in the modern sense of term, took its birth in India. Reporting of Indian cases also started about this time. With the beginning of the present century many reports came into existence.\(^2^9\)

The Government of India Act, 1935, Federal Court was established in India. This was an interposition in the hierarchy of Courts. This Act provided that the decision of the superior courts will have the binding effect on the courts below. Section 212 of the Act made the following provisions:

"The law declared by Federal Court and by any judgment of the Privy Council shall, so far as applicable, be recognized as binding on and shall be followed by all courts in British India, and, so far as respects the application and interpretation of the Act or any order in council thereunder

\(^{29}\) Ibid. at 210.
or any matter with respect to which the Federal Legislature has power to make law in relation to the State, in any Federal State". \(^{30}\)

After independence of the country the Privy Council ceased to be the appellate court from India and Federal Court was abolished. By the Indian Constitution, 1950 a Supreme Court has been established which is the final appellate Court. In States there are High Courts and in districts there are district courts. The courts of the first instance in criminal cases are the judicial Magistrates Courts and in Metropolitan area the Courts of Metropolitan Magistrates. In civil cases the Court of the first instance is the Munsif's Court. In many States there exists a third set of courts also. They are for the decisions of the revenue cases. They are called the Revenue Courts. \(^{31}\)

5.6. Precedent in Post-Independent India – Constitutional Context:

With independence and the adoption of the Indian Constitution, there was a move to a significant new legal landscape and a whole range of new perspectives generated by the constitutional context, which led to a radical reorientation at the level of the Supreme Court in

\(^{30}\) Section 212 of Government of India Act, 1935.

\(^{31}\) Supra Note. 25. at 211.
regard to the Court's continuing obligation to follow the common law doctrine of precedent. 32

The Supreme Court has been established by the Indian Constitution, 1950. It is the highest judicial tribunal of the Indian Union. It has very wide appellate, writ, revisional and in some cases, original jurisdiction. "The law declared by the Supreme Court shall be binding on all Courts within the territory of India". 33 When the Supreme Court, 'as the apex adjudicator declaring the law for the country and invested with constitutional credentials under Article 141 clarifies a confused juridical situation, its substantial role is of legal mentor of the nation.

5.6.1. Law Declared – The Meaning:

The term "law declared" means not only the ratio decidendi of a decision but it includes an obiter dictum also provided it is upon a point raised and argued.34 However, it does not mean that every statement contained in a judgment of the Supreme Court has the binding effect.

"Judicial property, dignity and decorum demands that being the highest judicial tribunal in the country even the obiter dictum of the

Supreme Court should be accepted as binding. Declaration of law by that Court even if it be only by the say has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force. Several decisions of the Supreme Court are on facts and that Court itself has pointed out in Gurcharan Singh v. State of Punjab, and Prakash Chandra Pathak v. State of Uttar Pradesh, that as on facts no two cases could be similar, its own decisions which were essentially on questions of fact could not be relied upon as precedents for decision of other cases.

It is also to be noted that every decision of a case has to be understood in the context of the controversy. Mere logical retentions from the ratio or from obiter dictum are not the part of ratio nor of dicta. Similarly, any general observation cannot apply in interpreting the provisions of an Act unless the Supreme Court has applied its mind to and analyzed the provisions of that particular Act.

The Supreme Court itself has stated that the observation of a judge in a decision must be taken to relate to the precise issues before him:

35. 1972 F.A.C. 549.
'It must be remembered that when we are considering the observations of a high judicial authority like this Court, the greatest possible care must be taken to relate the observations of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, in the general compass of the question before him, unless he makes it clear that he intended his remarks to have wider ambit'.

Like its decisions, the construction, which the Supreme Court itself places on an earlier precedent, is also binding and authoritative. Judicial decisions may be distinguished as authoritative and persuasive. An authoritative precedent is one, which judges must follow whether they approve of it, or not. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight, as it seems to them deserved. It depends for its influence upon its own merits, not upon any legal claim, which it has to recognise. In other words, authoritative precedents are legal sources of law, while persuasive precedents are merely historical. Observations contained in the opinion in a judgment cannot be regarded as laying down the law on the point. If there is conflict between two decisions of the Supreme Court, a decision of a larger Bench is binding on

42. Supra Note. 2. at 26.
the High Court. It has to be followed in preference to the decision of smaller Bench.\textsuperscript{44} The binding effect of decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.\textsuperscript{45}

Article 141 of the Constitution of India provides that 'the Law declared by the Supreme Court shall be binding on all courts within the territory of India'. In Article 141 the expression 'all courts' has been used. Now the question comes whether all courts include Supreme Court also.' That is to say whether Supreme Court is bound by its own decisions or not. The position was not clear before 1954. In 1954, an important case \textit{Dwarkadas v. Sholapur Spinning and Weaving Co.},\textsuperscript{46} came before the Supreme Court, where Mr. Justice Das expressed the view, "Accepting that the Supreme Court is not bound by its own decisions and may reverse a previous decision especially on constitutional questions the Court will surely be slow to do so unless such previous decision appears to be obviously erroneous".

The position became very clear after this and in 1955 the Supreme Court in \textit{Bengal Immunity Co. v. State of Bihar},\textsuperscript{47} overruled its own

\textsuperscript{44}. \textit{Rudrayya v/s. Gangawwa}, AIR 1976 Karnataka 153.
\textsuperscript{46}. AIR 1954 SC 119.
\textsuperscript{47}. AIR 1955 SC 661.
previous judgment of the *State of Bombay v. The United Motors Ltd.* In this case the Supreme Court observed:

"There is nothing in Indian Constitution which prevents the Supreme Court from departing from its previous decision if it is convinced of its error and its baneful effect on the general interest of the public".

In *Sajjan Singh v. State of Rajasthan*, Gajendragadkar, C.J. while considering the question of precedent observed:

"It is true that the Constitution does not place any restriction on our powers to review our earlier decisions or even to depart from them and there can be no doubt that in matters relating to the decisions of constitutional points which have a significant impact on the fundamental rights of citizens, we would be prepared to review our earlier decisions in the interest of public good".

Since 1955 Supreme Court has been overruling its earlier decisions whenever it deems fit. In 1967, Supreme Court in *Golak Nath v. State of Punjab* overruled its two previous judgments *Sankari Prasad v. Union of India* and *Sajjan Singh v. State of Rajasthan*. The most important instance of the rule that Supreme Court is not bound by its own decision is

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48. AIR 1953 SC 255.  
49. AIR 1965 SC 845.  
50. AIR 1967 SC 1643.  
51. AIR 1951 SC 458.  
52. Supra Note. 31.
furnished by the case of *Kesavananda Bharati v. State of Kerala*.\(^\text{53}\) In a number of other cases Supreme Court has cleared the mind on this point. In *Rahim Khan v. Kursheed Ahmad*,\(^\text{54}\) Justice Krishna Iyer, observed:

"Precedents on legal propositions are useful and binding but the variety of circumstances and the peculiar features of each case cannot be identical with these of another and judgments of Courts on when and why a certain witness has been accepted or rejected can hardly serve as a binding decision".

In *Maganlal Chagganlal (Pvt.) Ltd. v. Municipal Corporation of Greater Bombay*\(^\text{55}\) Supreme Court observed,\(^\text{56}\) that if the previous decision is erroneous and has given rise to public inconvenience and hardship, there is no harm in overruling such decision.\(^\text{57}\) In *Sushila Kesarbhai and others v. Bai Lilawati and others*,\(^\text{58}\) the Court observed:

"The rule of precedent is not so imperative or inflexible as to preclude a deparative therefrom in any case, and its application must be...

\(^{53}\) AIR 1973 SC 1461.
\(^{54}\) AIR 1975 SC 290.
\(^{55}\) AIR 1974 SC 2039.
\(^{56}\) Justice Khanna observed in this case (AIR 1974 SC 2009) "The law laid down by the Supreme Court is binding upon all courts in the country under Article 141 and numerous cases all over the country are decided in accordance with the view taken by Supreme Court. Many people arrange their affairs and large number of transactions take place on the faith of the correctness of its view. It would create uncertainty, instability and confusion if the law propounded by this Court is held to be not the correct law. Although precedents have a value and the *ratio decidendi* of a case can no doubt be of assistance in the decision of future cases, yet the Supreme Court has to guard against the notion that because a principle has been formulated as the *ratio decidendi* of a given problem, it is therefore to be applied as a solvent of other problems, regardless of consequences, regardless of deflecting factors, inflexibly and automatically, in all its pristine generality. A view, which has been accepted for long period of time, should not be disturbed unless the Court can say positively that it was wrong or unreasonable or that it is productive of public hardship or inconvenience.
\(^{57}\) Sakaldeep Salmi Srivastaw v/s. Union of India, AIR 1974 SC 338.
\(^{58}\) AIR 1975 Guj 39 (FB).
determined in each case by the discretion of the Court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrongs may result".

In *Mamleshwar v. Kanhaiya Lai*,59 Justice Krishna Iyer delivering the judgment of the Court said:

"Certainty of the law, consisting of rulings and comity of courts— all flowering from the same principles converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case an obstructive omission".

English decisions have only persuasive value in India.60 Therefore the decisions of English Courts even if at variance with one of the Supreme Court do not by themselves justify an application to reconsider an earlier decision of the Court.61 The Supreme Court is not bound by the decisions of the Privy Council or Federal Court. They have only a

59. AIR 1975 SC 907.
persuasive value and the Supreme Court can overrule them. However in practice great value is attached to them.

A brief survey of the doctrine of precedent, as it operates in India, discloses that its operation in India is not so narrow as it is in England. For the sake of uniformity and certainty the decisions of the higher courts must be followed by the Courts subordinate to them. The Supreme Court is free to depart from its earlier decision. In fact, in the context of changing socio-economic conditions the courts must have the readiness to depart rules and principles contained in earlier pronouncements if they no longer conform to new conditions. Justice Cardozo observed:

"There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years. In such circumstances, the words of Wheeler, J., in Dwy v. Connecticut Co., (89 Conn. 74, 99,) express the tone and temper in which problems should be met: "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature." If judges have woefully
misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.62

Observation of Krishna Iyer J. in *K.C. Dora v/s. G. Annamanaidu*,63 are to the same effect. He stated:

"Precedent should not petrified nor judicial dicta divorced from the socio-economic mores of the age. Judges are not prophets and only interpret laws in the light of the contemporary ethos. To regard them otherwise is unscientific. My thesis is that while applying the policy of statutory construction we should not forget the conditions and concepts which moved the judges whose rulings are cited, not be obsessed by respect at the expense of reason".

The High Courts in India are bound by the law declared by the Supreme Court.64 Decisions of Supreme Court are binding only so long as they have not been overruled by the Supreme Court. The decisions of a High Court are binding on all the courts below it within its jurisdiction. The judgment of a particular High Court, is not binding on other High Courts. The High Courts are the courts of co-ordinate jurisdiction. Therefore, the decisions of one High Court is only of persuasive value for other High Courts. In *State v. Rampmkash Puri*,65 it was observed by the Gujarat High Court that:

63. AIR 1974 SC 1069.
65. AIR 1864 Guj 223.
"A judgment of a High Court is not binding on other judges of the same Court or upon the judges of any other High Courts. This is so because of Section 43 and Section 165 of the Indian Evidence Act66 and also because of Article 219 of the Constitution of India67 and the oath taken by High Court judges under that Article that they will act according to their judgment and not according to the judgment of others. It is open to High Court Judge to agree with the judgment of another but if he does not agree, he must follow his own judgment*. However, in practice the decision of one High Court are cited in other High Courts and they have persuasive value. The Full Bench decisions of one High Court command great respect in other High Courts.

Regarding the question that is how far a High Court is bound by its own decision it can be said that High Courts are not bound by their own decisions. In High Courts generally appeals are heard by a single judge (some appeals such as murder appeal, special appeals, etc. are heard by two judges. Different High Courts have their different rules in this respect). When an appeal involves some important and complicated point

66. Section 43 of the Indian Evidence Act, 1872 provides that a judgment, order or decree, other than those mentioned in Sections 40, 41 and 42, are irrelevant unless the existence of such judgment, order or decree is a act in issue or is relevant under some other provisions of this Act. Section 165 of the Act provides that the judge may, in order to discover or to obtain proper proof of relevant facts, ask any question lie pleases, in any form at any time, of any witness or of the purities about any fact relevant or irrelevant, and may order the production of any document or tiling; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor without the law of the Court, to cross-examine any witness upon any answer given in reply to any such question; provided that the judgment must be based upon facts declared by this Act to relevant and duly proved, provided also that this section shall not authorize any judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the judge ask any question which it would be improper to any question; which it would be improper for any other person to ask under Section 148 or 149; nor shall be dispense with primary evidence of any document, except in field cases hereinbefore accepted.

67. Article 219, Constitution of India, provides that "Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule."
of law, it is referred to a larger Bench. A single judge constitutes the smallest Bench. A Bench of two judges is called the Division Bench. Three or more judges constitute a Full Bench. The decisions of a larger bench are binding on a smaller bench. A bench is not bound by the decisions of another bench of equal authority. In *Gourishankar Govindram v. Raja Azam Sahab*,\(^6\) the Nagpur High Court held that,

> 'The decision of a Division Bench is binding on another Division Bench as much as it is binding on a single judge. A Division Bench cannot pronounce on the correctness of a decision of another Division Bench. If it is necessary to reconsider a Division Bench ruling the only course open to a Division Bench is to make a reference to the Chief Justice with a recommendation that the case be placed before a Full Bench'.

In *Rudder & others v. The State*\(^6\) it was laid down that:

> "Where a Judge of a Division Bench nowhere in his judgment expressed his concurrence with the views expressed by the other judge on a certain point nor indicated that in his opinion it was not necessary for the decision of appeal to enter into the question at all, the views expressed by the other judge must be held to be views of a single judge and not of the bench as a whole and later Division Bench can reconsider the views so expressed by a single judge and it is not necessary to refer the question to larger bench".

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\(^6\) AIR 1956 Nag 115.
\(^6\) AIR 1957 All. 239.
In Basanti Lal Shah v. Bhagwat Prasad,\textsuperscript{70} it was observed:

"A judge, sitting singly is not bound by the observations of a Division Bench which were made without considering an earlier decision of a Division Bench in which the principles of law were laid down in a matter directly in issue, and he can follow the earlier decision which is in accord with his own opinion".

In Enatullah v. Kowsher Ali,\textsuperscript{71} it was observed:

'A decision of a Full Bench is binding on all Division Bench, unless it is subsequently reversed by a Bench specially constituted or by a rule laid down by the Judicial Committee of the Privy Council, and it is obvious that it might lead to serious results if a Division Bench, wherever it felt inclined to differ from a decision of a Full Bench, could refer the matter to a Special Bench and the Chief Justice was compelled to form such a Special Bench whether he thought it necessary or not'.

In Jyotish Chandra Nath v. Ejdani Mea Majumdar,\textsuperscript{72} it was held that:

"A Full Bench decision by three judges of the High Court will be having a certainly binding authority on a Division Bench of the High Court but a Special Bench consisting of three other judges of the High Court is not bound by that decision though that decision is entitled to great respect and the question can be examined by this Bench apart from the decision of the Full Bench".

\textsuperscript{70} AIR 1964 All 210.
\textsuperscript{71} (1956) 54 ILR 266.
\textsuperscript{72} AIR 1963 Assam 49.
All Districts Courts, Magistrate Courts and Munsif Courts are bound by the decisions of Supreme Court and High Courts (within its jurisdiction). Again, Munsifs Courts and Magistrate's Courts are bound by the decisions of District Courts (within its jurisdiction).

5.7. The Binding Nature of the Supreme Court of its Own Previous Decisions:

Article 141 of the Constitution provides that 'Law declared by the Supreme Court shall be binding on all courts within territory of India'. The view that, it is clear from this expression is that all courts within the territory of India include the Supreme Court itself. There are several views expressed by different authors on this issue. A close perusal, the judgment of the apex Court provide the following:

(i) It has been a practice in the apex Court whenever Constitutional matters or conflicting constitutional aspects reach the apex Court the matters is always placed for a larger bench.

(ii) For usual matters of appeal, the matters under Article 136 or under Article 32 of the Constitution a two judge, three judge, four judge or five-judge bench is constituted for hearing the matters.
(iii) A larger bench like five judge bench or seven judge bench is constituted usually in situations wherein there is an involvement of Constitutional issue or to resolve an apparent conflicting views expressed by the Court in respect of matters involving either interpretation, application of operation.

(iv) A greater larger bench consisting of more than ten judges like thirteen judge bench is constituted to resolve greater conflicting constitutional issues touching the very root of the Fundamental Rights guaranteed under Part III of the Constitution. 73

It is respectfully submitted that the practice in the Supreme Court is that, the Court is not bound by the previous decision decided by the coordinate bench of the same Court. However, a smaller bench of the Court is bound by the decisions of the larger bench. This is the normal practice of jurisprudence in the Supreme Court of India.

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