




# Judicial Precedent: Case Study Republic of North Macedonia

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**Abstract:** *Judicial precedent refers to previously decided judgments of the courts, which judges are bound to follow. It is an important formal source of law of the common law countries. Previous court judgements are not legally binding on future judicial decisions under the civil law systems. Republic of North Macedonia is part of the civil law system. The primary formal sources of law in the Republic of North Macedonia are written statutes. The purpose of this paper is to analyse the importance of judicial precedent in the Macedonian legal system. This paper consists of an introduction, two parts and a conclusion. The introduction describes the basic issues related to judicial precedent as a formal source of law. The first part analyzes the theories of precedent. The second part analyzes the situation with the judicial precedent as a source of law in the Republic of North Macedonia. The conclusion summarizes the main findings, observes how they relate to the research question and gives recommendations.*

## 1. INTRODUCTION

Judicial precedent, also known as case law or stare decisis (from Latin: to stand by things decided) refers to a court decision that is considered an authority for deciding subsequent cases involving identical or similar facts, or similar legal issues (Cornell Law School, 2024). Judicial precedent is a cornerstone of the common law jurisdictions. Salmond found that a judicial precedent speaks in England in 1998 with a voice of authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established. However, previous court judgments are not legally binding on future judicial decisions under the civil law systems (Varetskyi, 2021, p. 58). The Republic of North Macedonia (hereinafter: North Macedonia) is part of the civil law system. The primary formal sources of law in North Macedonia are written laws. According to Lindquist and Cross (2010), stable legal rules are not the only way to ensure predictability and political factors influence legal change through legislative enactments (p. 1). Smejkalová (2020) states that the choice to follow previous judicial decisions in precedential as well as non-precedential legal systems as well as to cite such a decision in another judicial decision may be explained in terms of the concept of optimal relevance. Thus, this paper aims to open up the debate about the use of past judicial decisions as a source of law in North Macedonia.

## 2. THE THEORIES OF JUDICIAL PRECEDENT

Theories of judicial precedent generally fall into three categories: the formalist theory, the realist theory, and the critical legal theory. Each offers a unique perspective on how precedents should be applied and the role they play in the legal system. Each of these theories has its impact on the judicial decision-making process.

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According to the formalist theory, the law is a set of rules that judges apply mechanically and precedents are binding. According to Capurso (1998), a judge's decision is the result of two fixed elements: the facts and the rule of law (p.9). The Formalists maintain that every judicial opinion is capable of being broken down into a three-part equation: the rules of law, "R"; the facts of the case, "F"; and the decision of the judge, "D" (Capurso, 1998, p. 9). This is represented by the formula  $R \times F = D$  (Capurso, 1998, p. 9). This perspective links judicial precedent to the consistency in court decisions and predictability for legal practitioners because it is dedicated to the exact law wording, not personal views, or external factors. While it contributes to the stability and coherence of the legal system, formalism is not without its limitations. The main criticisms of the formalist theory of judicial precedent are: its rigidity, obstruction to legal reforms, and ignoring of social, economic, and political factors in making courts' decisions.

In contrast to formalist theory, the realist theory emphasizes the practical and contextual application of judicial precedents. Realists argue that legal decisions are influenced by a range of factors beyond mere legal rules, including judges' personal experiences, societal needs, and contemporary values (Capurso, 1998; Hanna, 1957). The Realists suggest their formula,  $S \times P = D$ : the judicial hunch or stimuli, "S," multiplied by the judge's personality, "P," equals the decision, "D" (Capurso, 1998, p. 10). This approach stimulates judges to think beyond statutory laws and consider social, economic and political factors. Realists argue that the judicial decision-making process is flexible and affected by societal realities. This theory has its advantages: contributes to the evolution of the law, reflects changes in society and values, and considering the experience of judges, it faces several challenges. The main criticisms of the realistic theory of judicial precedent are: that flexibility can lead to inconsistency in judicial decisions, the judicial decision-making process might be based on the subjective judgments of individual judges and their personal beliefs. Also, the flexibility might lead to less uniform laws.

According to the critical legal theory's approach to the legal precedent, the law and precedents are not neutral or objective but are influenced by the prevailing ideologies and interests of those in power. It emphasizes the role of power, ideology, and social context in shaping legal decisions. While critical theory provides valuable insights into the complexities of judicial precedent, it also faces several criticisms: critical theory's emphasis on power and ideology influences can lead to relativism, where the law becomes subjective; by focusing on the social and political contexts of legal decisions, critical theory may overlook the importance of legal principles and judges are expected to navigate complex legal doctrines while balancing competing interests.

### 3. JUDICIAL PRECEDENT AS A SOURCE OF LAW IN THE REPUBLIC OF NORTH MACEDONIA

According to Shkarik (2008) the latest novelties of the reform process in North Macedonia, which originate from the social and reform development starting from 2010, are mainly focused on introducing essential elements of the common law legal system into the Macedonian civil law judicial system, which gradually turns its civil law legal system into a mixed system (p. 95).

According to Article 98 of the Constitution of North Macedonia, Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. Macedonian Law on Courts contains equivalent provision in article 2 (Law on Courts, North Macedonia). However, the legislator could not always foresee legal detailed solutions for every situation in real life that appears in front of the court. This is precisely why so-called legal gaps

or legal vacuum appear in practice. The Macedonian legal theory defines legal gaps as social relations that are not regulated by the law, i.e. legal situations that the legislator previously failed to foresee ([Macedonian Constitutional Court Report, 2007, p. 16](#)).

The Assembly of the Republic of Macedonia is a representative body of the citizens and the legislative power of the Republic is vested in it ([Article 61 paragraph 1 of the Constitution of the Republic of North Macedonia](#)). According to Article 108 of the Macedonian Constitution, the Constitutional Court of North Macedonia is a body of the Republic protecting constitutionality and legality. Article 110 of the Constitution paragraphs 1 and 2, stipulates that the Macedonian Constitutional Court decides on the conformity of laws with the Constitution and decides on the conformity of collective agreements and other regulations with the Constitution and laws. This provision provides that the jurisdiction of the Constitutional Court does not refer to overcoming the legal gaps. In case the Constitutional Court refuses to examine and evaluate the legal gaps, most often, the court's justification refers to the jurisdiction of the Constitutional Court to decide on the constitutionality and legality of the provisions contained in the laws, and that the Constitutional Court does not have the authority to decide on what the law does not contain, but should have contained, according to the opinion of the petitioner of the initiative ([Macedonian Constitutional Court Report, 2007](#)). However, article 8 paragraph 2 of the Macedonian Law on Courts stipulates that the court cannot reject a request related to the exercise of a particular right because of a legal gap and shall be obliged to decide upon it, by invoking the general principles of law, unless explicitly prohibited by law. This means that even though there is a legal gap for a particular issue, the courts make a decision and thus create case law. Although judicial practice is not cited as a formal source of law in North Macedonia, it is not without impact. Namely, article 18 paragraph 6 of the Law on Courts, stipulates that when deciding, the court is obliged to apply the views expressed in final judgments of the European Court of Human Rights. Paragraph 5 of the same article provides that in specific cases, the Court immediately applies the final and enforceable decisions of the European Court of Human Rights, the International Criminal Court or another court, whose competence is recognized by the Republic of Macedonia. Also, article 19 paragraph 2 of the same Law, stipulates that the court of higher instance may require from the court of lower instance within its area data about the application of the laws, the problems emerging during the trial, the monitoring and harmonization of the court practice, the deferral of the procedure regarding particular cases, and other data, but it may inspect the work of those courts in another manner, as well as hold joint meetings in order to discuss the abovementioned matters.

According to article 37 paragraph 1 alinea 1 and alinea 3 of the Macedonian Law on Courts, the Supreme Court of North Macedonia, at a general session, shall: define general views and legal opinions on issues of significance for provision of the unity by the application of the laws by the courts within three months, but not longer than six months at its own initiative or at the initiative of a president of a court or by an initiative of the sessions of judges or the session of the court divisions in the courts or by an initiative of lawyers and shall publish them on the web site of the Supreme Court of North Macedonia, and review issues concerning the work of the courts, the application of laws and the court practice. The general views and legal opinions determined by the Supreme Court of North Macedonia at a general session are binding for all of the councils of the Supreme Court ([Article 37 paragraph 2 of the Macedonian Law on Courts](#)) i.e. for the judges and the President of the Supreme Court ([Article 66 of the Macedonian Supreme Court Rules](#)). This legal provision indicates that general views and legal opinions are binding only on the councils of the Supreme Court and not on the lower courts. This legal wording follows the Constitutional provision of article 98 which stipulates that judicial power is exercised by the courts and that the courts are autonomous and independent.

Also, the provision of article 19 paragraph 3 of the Law on Courts stipulates that in the exercise of the powers, the court of higher instance cannot in any way exert influence on the independence and autonomy of the court of lower instance in the adjudication of particular cases. This wording is interesting from the following point of view: the lower courts are independent in their work, but there are still other legal provisions that bind the lower courts to the general views and legal opinions of the revision court, that is, the Supreme Court. Namely, Article 386 of the Macedonian Law on Civil Procedure stipulates that the court to which the case is returned for a retrial is bound by the legal understanding on the basis of which the decision of the revision court (Supreme Court) is based, which abolished the second instance decision or the decisions of the two lower courts. [Nedelkova \(2016\)](#) states that the Macedonian Law on Criminal Procedure, which is much more oriented to the common law legal system, does not contain precise legal duty for applying the general views and legal opinions of the highest court - the Supreme Court, but the strength of the decision's legal arguments implies that *eo ipso* (p.5). Hence, article 386 of the Law on Civil Procedure introduces a new legal term, the so-called "legal understanding", which is quite broad and needs further elaboration and interpretation. Such interpretation is necessary to clarify this legal term. At the same time, that explanation is necessary to clarify whether it belongs to the interpretation of substantive law or procedural law, or both, or whether it simply refers to the essence of the reasoning of the Supreme Court ([Ristic et al., 2015, p. 15](#)).

Regarding the previous, it can be concluded that in Macedonian law there is no clear legal norm about the legal effect of general views and legal opinions ([Ristic et al., 2015, p. 26](#)). This could be a problem in terms of ensuring uniformity in courts' decisions across the country, if cases end with a final judgment of the second-level court (Appellate Court) and they do not reach the Supreme Court to be reviewed and decided upon them ([Article 375 of Law on Civil Procedure, article 463 of Law on Criminal Procedure](#)).

The Supreme Court Rules regulate the procedure for determining the general views and legal opinions. Article 63 of the Supreme Court Rules stipulates that the Supreme Court at the general session establishes general views and legal opinions which is of importance for ensuring unity in the application of laws by the courts. According to paragraph 2 and 3 of this article, the general view represents a position determined by the Supreme Court of North Macedonia on matters of importance for ensuring unity in the application of laws by the courts, while a legal opinion is the position of the Supreme Court of North Macedonia established at the General Session due to unequal practice in the application of laws. General views and legal opinions of the Supreme Court of North Macedonia elaborate not only on the legal provision but also on the principles and values protected by that provision. This does not mean changing the law, only developing its *ratio legis* in relation to the application of the law, in the interest of human rights, equality of citizens before the law and legal certainty ([Nedelkova, 2016, p. 3](#)). Within the Supreme Court of North Macedonia, a special department for monitoring judicial practice has been established. Its purpose is to monitor and study judicial practice, initiate a review of the adopted legal opinions and propose to the Supreme Court General Session to take a position on a separate legal issue. This department organizes meetings with appellate courts to discuss certain legal issues with the aim: unification of the courts practice. The department also monitors the practice of the European Court of Human Rights. ([Article 71 of the Supreme Court Rules](#)). The determined legal opinions and conclusions of the Department and the determined sentences of the councils are published on the website of the Supreme Court.

The Supreme Court of North Macedonia is competent to decide upon a request of the parties and the other participants in the procedure for violation of the right to trial within a reasonable period, in a procedure defined by law before the courts in the Republic of Macedonia in accordance with

the rules and principles determined by the European Convention for the Protection of Human Rights and Fundamental Freedoms and directed by the court practice of the European Court of Human Rights (Article 35 paragraph 5 of the Law on Courts).

Macedonian Law on Civil Procedure provides for an extraordinary remedy Repetition of a procedure on the occasion of a final judgment of the European Court of Human Rights in Strasbourg. Namely, article 400 paragraph 1 and 2 of this law provides that: when the European Court of Human Rights determines a violation of a human right or of the fundamental freedoms provided in the European Convention for the Protection of Fundamental Human Rights and Freedoms and in the Additional Protocols of Convention, which the Republic of Macedonia has ratified, the dispute party may, within 30 days from the finality of the judgment of the European Court of Human Rights, submit a request to amend the decision by which that right or fundamental freedom was violated. This request should be submitted to the court in the Republic of Macedonia that judged in the first instance in which the decision that violated human rights or fundamental freedom, was made. In this procedure, the provisions for repeating the procedure shall be applied accordingly. Paragraph 3 of this article, stipulates that in the repetition of the procedure, the courts are obliged to respect the legal positions expressed in the final judgment of the European Court of Human Rights, which established a violation of basic human rights or freedoms.

#### 4. CONCLUSION

One of the most neglected topics in the Macedonian judicial system is the status and significance of judicial precedent.

There is a certain contradiction between the legal provisions which, on the one hand, provide that the court of a higher level must not in any way influence the independence and autonomy of the court of a lower level in making decisions in specific cases (article 19 paragraph 3 of the Law on Courts ), and on the other hand, article 386 of the Law on Civil Procedure determines that the court to which the case is returned for a retrial is bound by the legal understanding based on which the decision of the revision court (Supreme Court) was based, which annulled the second instance decision or decisions of the two lower courts. According to the wording of these legal provisions, this obligation for legal understanding of the Supreme Court applies only to cases for which revision is allowed as an extraordinary legal remedy.

Pursuant to the Supreme Court Rules, a separate Department for Judicial Practice has been established, through which activities the Supreme Court harmonizes the practice with the lower courts to ensure uniform application of the laws by courts, as well as with the practice of the European Court of Human Rights.

The website of the Supreme Court contains general views and legal opinions as well as court decisions, but the structure of the web side is not user friendly; it is complicated and more data is required to find a document. The section Bulletin contains only one document: Supreme Court Case Law Bulletin 2016-2017. This base of data should be continually updated and available, both for the needs of the courts and for lawyers as well as any other person.

There is no legal provision about the mandatory nature of general views and legal opinions of the Macedonian Supreme Court, but such a provision exists for the positions expressed in final judgments of the European Court of Human Rights.

It can be concluded that efforts are being made to establish certain rules and standards that will contribute to unifying the application of laws, along with the opinions of the European Court of Human Rights expressed in its final judgments. At the same time, there is no doubt that the improvement relating judicial precedent is necessary. As for beginning, creation of an updated user friendly database and necessary information; and perhaps most important of all, ensuring the quality of the judges, their knowledge and integrity. Through argumentation of the decisions they make, the judges will convince the parties that their case was fully considered, and decided in the legal procedure and in a fair way.

Each approach for judicial precedent has its practical impact on the decision-making process of the judges, thus the process could differ in significant ways. As legal systems evolve, the challenge remains to balance adherence to precedents with the need for flexibility and responsiveness to changing societal conditions. Judges should not be reluctant to challenge established norms and introduce progressive changes.

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