**PRECEDENT AS A SOURCE OF LAW**

Precedent means judgment or decision of a court of law cited as an authority for the legal principle embodied in it. The doctrine of precedent which is also known as stare decisis, i.e. stand by the decision, is based on the principle that like cases should be decided alike. Once a case is decided by judge by applying the principle, a case on similar facts which may arise in future must also be decided by applying the same principle. This is not always saves the time and labour of judges, but also secures certainty, predictability and uniformity in the applications of law.

**DEFINITION OF PRECEDENT**

In general English, the term precedent means, *‘a previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified.’*

According to Gray, ‘ *precedent covers everything said or done, which furnishes a rule for subsequent practice.*’[1]

According to Keeton, ‘a *judicial precedent is judicial to which authority has in some measure been attached*.’[2]

According to Salmond, ‘in a loose sense, it includes merely reported case law which may be cited & followed by courts.’

In a strict sense, that case law, which not only has a great binding authority but must also be followed.

**CLASSIFICATION OF PRECEDENT**

**Acc. to Nature of Rule laid down:** **Original and Declaratory Precedents**

 The judicial decisions are of two types, namely those which create a new law, and those which apply known and settled principle of law to the particular facts of law. Both these types of decision are treated as precedent. It is because the legal principles embodied there in are   authoritative guides to courts for the determination of future controversies. Decisions, which create a new law, are called original precedents, while those which apply known and settled principles of law to the particular facts of the case are called declaratory precedents. A declaratory precedent is not a source of new law where as an original principle is.

There are several declaratory precedents of law, for the law on most of the points is already settled, and judicial decisions are mere declarations of pre-existing rules. On the other hand, original precedent, though fewer in numbers are greater in importance, as they alone develops the law.

This distinction between original and declaratory precedents is based on two diametrically opposite theories of precedents. One theory supported by jurist like Austin and Friedmann concede they law making role of the judge. In their view some precedents may be original because they laid down original new principle of law. Jurist like Blackstone do not agree with this, and consider the precedents is the declaratory only, i.e., they merely reiterate recognise principles of law the common law contains a rule for every situation and the judge’s function is only to discover and apply it to the case at hand. This is known as declaratory theory of precedent.

**Influence exercised by them: Authoritative and Persuasive Precedent**

Classification of precedents into authoritative and persuasive is a widely accepted classification. An authoritative precedent is one which the judge is bound to follow the irrespective of whether he approves it. In other words the judge has no choice. For instance, are decision of Supreme Court of India is binding on a judge of Kerala High Court. Similarly, a decision of Kerala High Court is binding on lower courts in Kerala. In a system of precedent, decisions of superiors are always consider as authoritative precedents.

A persuasive precedent is one which the judge under no obligation to follow. Here, he has a choice in deciding whether to follow a precedent. If he is convinced of the crime of the merits of a decision, he may follow it; otherwise he may refuse. A decision of the Delhi High Court is only a persuasive precedent as far as the Madras High Court concerned, under it is under no obligation to follow it. Foreign judgements may also be considered as persuasive. Persuasive precedents though not binding, often exert a decisive influence on judicial decisions. The distinction between a persuasive precedent and a conditionally a authoritative precedent lies in the fact that the former requires reason to supported while the latter requires are reason to reject it. Authoritative precedents are considered to be legal source of law, while the persuasive precedent is only historical sources.

In  ‘oxford dictionary’  precedent defined as ‘a privious instance or case which is, or may be taken as an example of rule for subsequent cases or  by which  similar act or circumstances  may be  supported and justified’.

**Nature of authority: Absolute and Conditional Precedent**

**A) Absolute:**In case of absolutely authoritative Precedents, they have to be followed by the Judges even if they do not approve of them. They are entitled to implicit and unquestioned obedience.

**B) Conditional:** In the case of authoritative Precedents having a Conditional authority, the Court can disregard them under certain circumstances. Ordinarily they are binding but under special circumstances, they can be disregarded.

**FOREIGN JUDGEMENTS:**

Decisions of English courts lower in the hierarchy. For example, the House of Lords may follow a Court of Appeal decision, and the Court of appeal may follow a High Court decision, although not strictly bound to do so. In India Supreme Court may follow judgments of High Courts and High Courts may follow judgments of other High Court.

The English decisions referred to by Supreme Court are of courts of a country from which India has derived its jurisprudence and large part of Indian laws and in which the judgments were delivered by Judges held in high repute. Undoubtedly, none of these decisions are binding upon Supreme Court but they are authorities of high persuasive value to which Courts may legitimately turn for assistance. Whether the rule laid down in any of these cases can be applied by Courts must, however, be judged in the context of Indian own laws and legal procedure and the practical realities of litigation in India. Forasol v. Oil and Natural Gas Commission, AIR 1984 SC 241; 1984 Supp. SCC 263.

The Supreme Court is not bound by the dicta and authority of English cases.

Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram and others, AIR 1954 SC 236:

Supreme Court although can be guided by English judgement but can not ignore the rulings of Supreme Court itself.

Samant N. Balakrishna, etc. v. George Fernandez and others etc. AIR 1969 SC 1201; 1969(3) SCC 238.

American cases relating to American constitution cannot be relied for the purpose of examining fundamental rights under Indian Constitution because of difference of social conditions and habits of people of both the countries. Pathumma and others v. State of Kerala and others, AIR 1978 SC 771: 1978(2) SCC 1:

The Courts have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialized economy. Courts cannot  allow its judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. Indian Courts no longer need the crutches of a foreign legal order. Indian courts have to build up their own jurisprudence. M.C. Mehta and another v. Union of India and others, AIR 1987 SC 1086: 1987(1) SCC 395:Forasol v. Oil and Natural Gas Commission, AIR 1984 SC 241; 1984 Supp. SCC 263.

American cases relating to American constitution cannot be relied for the purpose of examining fundamental right under Indian Constitution because of difference of social conditions and habits of people of both the countries. Pathumma and others v. State of Kerala and others, AIR 1978 SC 771, 1978(2) SCC 1.

Decisions of Privy Council or Federal Court are not binding on Supreme Court. State of Bihar v. Abdul Majid, AIR 1954 SC 245.

**THEORY OF PRECEDENT**

**I. Declaratory Theory**

This theory was propounded by Sir Mathew Hale as early as in 1713 when he said:

“…the decision of courts of justice…do not make a law properly so called, for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is.”

However, it was Blackstone who formally enunciated this theory. According to him:

“A judge is sworn to determine, not according to his own judgement, but according to the known laws and customs of the land, not delegated to pronounce a new law but to maintain and explain the old one  jus decree et non jus dare.”

This means that the judges can only declare the law, and never make or give new law. The staunchest supporters of this Blackstonian doctrine were the judges themselves For example, Lord Esher MR said;

“…there  is in fact no such things as  judge made law, for the judges  do not make the law , though they frequently  have to  apply existing  law to circumstances  as to which it has  previously been  authoritative laid down such law is applicable.”

This Blackstonian doctrine uncompromisingly asserts that the function of judge is jus decree et non jus dare, i.e., to discover in the existing rules of the law the particular principle that govern the facts of individual cases. Judges are, therefore, only ‘law finders’ rather than law makers.

**Criticism of the Theory**

This classical theory of Blackstone has been subjected to severe criticism by eminent jurists. The great law reformer Jeremy Bentham said that the statement that judges only  declare the law  is ‘a wilful falsehood having for its subject the stealing  of legislative power by and for hands which could  not or durst not openly claim it’. His discipline john Austin also has assailed it as a ‘childish  fiction’ employed by our judges that  judiciary or common law is not made by them, but it is a miraculous something made by no body ,existing, I suppose from eternity and merely declared from time to time by the judges.’ Several other eminent jurists like Munro Smith and Holmes also consider that this orthodox theory cannot be taken seriously.

**II. Constitutive/Creative Theory: Judges as Lawmakers Theory**

The second theory of precedent is that judges make law. Law made by a judge is as real and effective as any statute. A number of jurists have supported this view. Prominent among them is Prof. Dicey who says;

“As all lawyers are aware, a large part and, as many would add, the best part of the law of England is judge made law –that is to say, consists of rule to be collected from the judgements of the courts. This portion of the law has not been created by acts of parliament and is not recorded in the statute book. It is the work of the courts it is recorded in the reports, and it is, in short, the fruit of judicial legislation.”

An American jurist Prof. Gray has however taken an extreme view contending that judges alone are makers of law. He says, ‘Whoever hath an absolute authority to interpret any written, it is he who is truly the law giver to all intents and purposes and not the person who first wrote or spoken them,’ and he concludes, A fortiori whoever hath an absolute authority not only to interpret the law but to say what the law is truly the lawgiver.’

**Limitation of the theory**

Although this theory proclaims that the judges make law, it is to be admitted that they do not enjoy an unrestricted power of laying down abstract principle of law. There are certain well-defined limitations on the power of judicial legislation. For instance;

(i) The judges has no power to ignore or override the provision of a statute. he is duty bound to enforce the statutory provisions ,leaving  to the legislature to deal with any unpleasant consequences not foreseen at the time of passing the act.

(ii) An authoritative precedent limits the law making power of the judge.

(iii) The judicial legislation is restricted to the facts of the case placed before the judges, which is the outcome of an accidental course of litigation.

(iv) Only the ratio decidendi, and not the obiter dicta, has a binding force and authority of law.

It is thus clear that within certain limit judges have the power of profoundly influencing the development of law. Even if they do not ‘make’ the law in the usual sense of promulgating at will the rules of human conduct, it must be acknowledged that they develop the law by contributing several original precedents.

**ESSENTIALS FOR ESTABLISHING PRECEDENTS AS SOURCE OF LAW**

1. **Hierarchy of Courts**

For the operation of the doctrine of precedent, a settled hierarchy of courts is imperative, because the basic rule of precedent is that a court is bound by the decisions of all superior courts. In India, as we know, the Supreme Court is the highest court of law in civil, and constitutional matters. There are high courts at the state level and civil and criminal courts below the high court. Article 141 of the Constitution states that the law declared by the Supreme Court of India shall be binding on all courts in India. The question whether the Supreme Court is bound by its own decision under art 141 was raised in Bengal Immunity Co Ltd v State of Bihar. In that case it was held that although the words, ‘all courts in India’ appear to be wide enough to include the Supreme Court.  As a result, the Supreme Court is not bound and is free to reconsider its previous decisions in appropriate cases. This position was reiterated in Sajjan Singh v State of Rajasthan wherein it was held that the Constitution does not place any restrictions on the powers of Supreme Court to review its earlier decisions or even to depart from them. The court made it clear that the doctrine of stare decisis should not permitted to perpetuate erroneous decisions to the detriment of the general welfare. The court recognised the need for exercising restraint in overruling previous decisions stating that the power must be exercised only when consideration of a substantial and compelling make it necessary to do it.

When there is conflict between the two decisions of the Supreme Court, the decision of the larger Bench prevails over that of the smaller Bench. This principle is true that in the case of high courts also.

1. **Reporting of cases/ Arrangement of Law reports**

**ADVANTAGES AND DISADVANTAGES OF PRECEDENTS**

**Advantages**

\* There is certainty in the law. By looking at existing precedents it is possible to forecast what a decision will be and a person can plan accordingly.

\* There is uniformity in the law. Similar cases will be treated in the same way. This is important to give the system a sense of justice and to make the system acceptable to the public.

\* Judicial precedent is flexible. There are a number of ways to avoid precedents and this enables the system to change and to adapt to new situations.

\* Judicial precedent is practical in nature. It is based on real facts, unlike legislation.

\* Judicial precedent is detailed. There is a wealth of cases to which to refer.

**Disadvantage**

\* Difficulties can arise in deciding what the ratio decidendi is, particularly if there are a number of reasons.

\* There may be a considerable waiting period for a case to come to court for a point to be decided.

\* Cases can easily be distinguished on their facts to avoid following an inconvenient precedent.

\* There is far too much case law and it is too complex.

**RATIO DECIDENDI**

When we say that a judicial decision is binding as a precedent, what we really mean is that a rule or principle formulated and applied in that decision must be applied when similar facts arise in future. This rule or principle is the ratio decidendi which is at the centre of the doctrine of precedent. The expression ratio decidendi has different meanings. The first meaning which is the literal translation of the expression is ‘the reason for deciding’. Ratio decidendi is as ‘the rule of law proffered by the judge as the basis of his dicisions.

According to Salmond: A precedent is a judicial decision which contains in its a principle. The underlying principle which thus form its authorative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it but it is the abstract ratio dicidendi which alone has the force of law as regard the world at large.

It is a legal phrase which refers to the legal, moral, political, and social principles used by a court to compose the rationale of a particular judgment. Unlike obiter dicta,the ratio decidendi is, as a general rule, binding on courts of lower and later jurisdiction—through the doctrine of stare decisis.  Certain courts are able to overrule decisions of a court of coordinate jurisdiction—however, out of interests of judicial comity, they generally try to follow coordinate rationes.

The process of determining the ratio decidendi is a correctly thought analysis of what the court actually decided—essentially, based on the legal points about which the parties in the case actually fought. All other statements about the law in the text of a court opinion—all pronouncements that do not form a part of the court’s rulings on the issues actually decided in that particular case (whether they are correct statements of law or not)—are obiter dicta and are not rules for which that particular case stands Ratio Decidendi is the binding part for the case at hand. Goodheart- He does not accept the classical view that ratio is the principle of law which links the essential determination of the case with the essential or material facts of it and the statement of the judge may or may not do that or may be formed too widely or too narrowly. It is the general ground upon which the decision is based- Supreme Court of India How to ascertain Ratio Decidendi Krishna Kumar v. Union of India- AIR 1990 SC 1782 The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law either statutory or judgment and minor premise consisting of the material facts of the case under immediate consideration. Therefore, we find that it is the ratio decidendi which is a binding precedent. Other material part is the Obiter Dictum.

**Process of Reasoning**–

1. Major Premise
2. Minor Premise

In Union of India v. Maniklal Banerjee[[1]](https://www.legalbites.in/ratio-decidendi/" \l "_ftn1) Only ratio decidendi is binding and has precedent value.

State of Orissa v. Sudhanshu Shekhar Mishra[[2]](https://www.legalbites.in/ratio-decidendi/" \l "_ftn2)– A decision is an authority for what it decides and not for what can logically be deduced from it. The only thing in a judge’s decision binding a party is the principle upon which the case is decided. On our analysis, we have to isolate the ratio of the case. A decision contains:

1. Finding of Material Facts- Direct and inferential
2. Statement of the principle of law applicable to the legal problem disclosed by the facts.

* Judgments based on the combined effects of the above two.

Ratio Decidendi is a statement of law applied to the legal problems raised by the facts as found upon which the decision is based. Dalveer Singh v. State of Punjab[[3]](https://www.legalbites.in/ratio-decidendi/" \l "_ftn3) Though we are able to find out the ingredients from the decision. But later on, when there is a similar situation, it is very difficult for him to apply the ratio in that case because a rigorous division of facts has to be made which is not possible. It is correct that a decision on a question of sentence depending upon the facts and circumstances of a case can never be regarded as a binding precedent, much less ‘law’ declared under article 141 of Constitution of India so as to bind all law courts within the territory of India. \

Minerva Mills v. Union of India[[4]](https://www.legalbites.in/ratio-decidendi/" \l "_ftn4) “If a provision is uphold by the majority, the fact that the reasoning of some of the judges is different from the ratio of that case will not affect its validity”.

                                                            \*\*\*\*\*\*\*\*

**OBITER DICTA**

The judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an obiter dictum.

The binding part of a judicial decision is the ratio decidendi. An obiter dictum is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However, an obiter dictum may be of persuasive (as opposed to binding) authority in later cases.

A difficulty arises in that, although the judge will give reasons for his decision, he will not always say what the ratio decidendi is, and it is then up to a later judge to “elicit” the ratio of the case. There may, however, be disagreement over what the ratio is and there may be more than one ratio.

In a judgement delivered by a court, what part is a binding precedent is relevant so as to be precise as to what is ultimately biding proposition to other courts. What the court decides generally is ratio decidendi or rule of law which is authority. As against persons not parties to suit or proceeding general rule of law i,e ratio decidendi is binding . The rule of law or ratio decidendi is that what is applied and acted upon by the Court . The rules of law or ratio decidendi are developed by courts and are thus creatures of courts. The ratio has to be developed by judges while deciding cases before them. Statement made by judges when giving lectures are statements made in extra judicial capacities and are therefore not binding. In the course of judgement a judge may make observations not precisely relevant to deicide the issue. These observations are obiter dicta and are having no binding authority but are none the less important. These obiter dicta are helpful to rationalize law only to suggest solutions to problems not yet decided by the Court. Any ratio decidendi are amenable to distinction on different facts and thus where the meaning thereof are widened , restricted, distinguished or explained , the latest interpretation of ratio decidendi in later cases becomes authority to these state of facts and in that sense. The rule of law based on hypothetical facts is mere obiter dicta and thus not binding.

Not infrequently it is difficult to find out what is the ratio decidendi in the judgement when several propositions are considered by the Court. In short ratio is general rule without which the case would have been decided otherwise.

The application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

*The Regional Manager and another v. Pawan Kumar Dubey,*AIR 1976 SC 1766:; 1976(3) SCC 334.

The general observations therein should be confined to the facts of those cases. Any general observation cannot apply in interpreting the provisions of an Act unless the Court has applied its mind to and analysed the provisions of that particular Act.