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Argument from Precedent in Legal Interpretation of Texts of Legal Acts from the Perspective of a Derivative Concept of Legal Interpretation

1. Introduction

The problem of previous judicial decisions (sometimes referred to as a "precedent") has been present in the orbit of interest of the legal culture of statutory law for some time now.[2] The reasons for this are manifold, as it may be: 1) a response to judicial practice (courts cite decisions of other courts); 2) a diagnosis of certain changes in the legal culture; 3) the question of an argument from authority; 4) a shorthand for binding legal decisions that go beyond a specific case in regulatory findings. Earlier legal decisions have different levels of significance for the subsequent application of law. This significance can be determined by legal provisions that, for procedural reasons, require consideration of decisions made by other courts, but it may also have its roots in the deciding courts' genuine appreciation for prior court judgments.

Although in the statutory law and, therefore, also in the Polish legal system, precedent understood as a principle or a rule established in an individual and specific case that is binding in future cases of a similar nature (precedent in the strict sense of the term) is not a source of law (a legislative fact), legal scholarship has attempted to adapt this concept to domestic legal realities. There are various propositions regarding how to understand the concept of "precedent", which do not relate to the source of law but to a certain understanding of subsequent judicial decisions which are consequential to future lawmaking.[3] It is often pointed out, however, that although the culture of civil law precludes precedential decisions (based on the separation of the processes

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[2] D.N. MacCormick, R.S. Summers (eds.), *Interpreting Precedents. A Comparative Study*, Darthmut 1997; A. Orłowska, *Precedens w systemach prawnych różnych krajów europejskiej kultury prawnej* [Eng. *Precedent in the Legal Systems of Various Countries of the European Legal Culture*], "Radca Prawny" 2000/5, pp. 13–23; M. Koszowski, *Anglosaska doktryna precedensu. Porównanie z polską doktryną orzeczniczą* [Eng. *Anglo-Saxon Doctrine of Precedent. Comparison with the Polish Jurisprudence Doctrine*], Warszawa 2009, pp. 145–147; L. Leszczyński, *Precedens w porządku prawa stanowionego. Ujęcia polskiej nauki prawa* [Eng. *Precedent in the Statutory Law Regime. The Approaches by the Polish Science of Law*], in: L. Leszczyński, B. Liżewski, A. Szot (eds.), *Precedens sądowy w polskim porządku prawnym* [Eng. *Judicial Precedent in the Polish Legal System*], Warszawa 2018, pp. 3–20.

[3] L. Morawski, M. Zirk-Sadowski, *Precedent in Poland*, in: D.N. MacCormick, R.S. Summers (eds.), *Interpreting Precedents*…, pp. 228–230.

of lawmaking and applying the law, and thus an absence of lawmaking competences of courts), some judicial decisions can be deemed as generating the law (decisions that contain a normative novelty). What becomes relevant in this context is, therefore, not the issue of precedent in the strict sense, but the lawmaking nature of previous judicial decisions and the "normative novelty" itself, understood in this context as a change in the system of legal norms, which involves bringing new content to it, yet not through the creation of law, but through its application.[4]

An analysis of the above-mentioned issues requires accepting certain premises, especially as regards legal interpretation. The issue of "normative novelty" will look differently when systemic and functional directives are considered necessary only where linguistic ambiguity arises (*interpretatio cessat in claris*)[5] and differently when – regardless of the outcome of applying the linguistic directives – the extra-linguistic directives are also used in legal interpretation (*interpretatio cessat post applicationem trium typorum directionae*).[6] In the latter approach to legal interpretation, the outcome of applying functional directives in legal interpretation will constitute a result of legal interpretation rather than a "normative novelty". What is important in this context is the approach to the application of legal inferences that result in a legal norm being generated as a consequence of the norm of the premise from which it was derived. The issue of the functions performed by legal interpretation is also crucial in the context of the "normative novelty" and the precedential character of judicial decision.

This article addresses the issue of a precedent in the context of interpreting texts of legal acts (as an argument in legal interpretation). It is worth assessing whether such an argument is necessary in the Polish science of law and legal practice and whether the existing interpretational directives would necessitate a consideration of earlier court decisions in the process of legal interpretation.

It is difficult to examine the issue of interpretative directives without referring to some concepts (or theories) of legal interpretation. Although the legal interpretation is sometimes presented as a certain cultural phenomenon, reflected in jurisprudence and legal sciences, referred to as *ius interpretandi*,[7] this approach seems to be of little use in obtaining interpretative results effectively. Such an understanding of legal interpretation in fact relies on a chaotic collection of various rules grouped into ideas with different themes (often relevant only directly to legal interpretation), drawn from different historical contexts and not structured into a coherent whole.[8]

Referring to a concept of legal interpretation as an organised set of directives of interpretation based on coherent methodological foundations ensures an intersubjective

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[4] M. Zirk-Sadowski, *Tak zwana prawotwórcza decyzja sądowego stosowania prawa* [Eng. *The So-Called Legally Creative Decision of the Judicial Application of Law*], "Studia Prawnicze" 1980/1–2, p. 255.

[5] Z. Ziembiński, *Logika praktyczna* [Eng. *Practical Logic*], Warszawa 1975, p. 238.

[6] M. Peno, M. Zieliński, *Koncepcja derywacyjna wykładni a wykładnia w orzecznictwie Izby Karnej i Izby Wojskowej Sądu Najwyższego* [Eng. *Derivative Concept of Interpretation and Interpretation in the Jurisprudence of the Criminal Chamber and Military Chamber of the Supreme Court*], in: J. Godyń, M. Hudzik, L.K. Paprzycki (eds.), *Zagadnienia prawa dowodowego* [Eng. *The Issues of the Law of Evidence*], Warszawa 2011, pp. 117–136.

[7] L. Morawski, *Kilka uwag na temat wykładni* [Eng. *A Few Remarks of Interpretation*], in: S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej* [Eng. *Polish Legal Culture and the Process of European Integration*], Kraków 2005, pp. 32–34.

[8] M. Zieliński, *Mitów w myśleniu o wykładni ciąg dalszy* [Eng. *Myths in Thinking About Interpretation Continued*], in: A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo, język, media* [Eng. *Law, Language, Media*], Warszawa 2011, pp. 124–125; M. Zieliński, *Iura novit curia a wykładnia prawa* [Eng. *Iura Novit Curia and the Legal Interpretation*], in: S. Lewandowski, A. Machińska, J. Petzel (eds.), *Prawo, język, logika. Księga jubileuszowa profesora Andrzeja Malinowskiego* [Eng. *Law, Language, Logic. Jubilee Book of Professor Andrzej Malinowski*], Warszawa 2013, pp. 287–304.

verifiability of both the process of legal interpretation (in the pragmatic sense) and its results (in the apragmatic sense). In the Polish science of law, the derivative concept of legal interpretation (hereafter, the "derivative concept") is indeed such a coherent concept. The justification for the choice of this concept is also that the set of directives of interpretation includes those that require an interpreter of law to consider the interpretative findings contained in judicial decisions. For this reason, issues relating to the "precedent as an argument in legal interpretation" will be based on the directives of interpretation of this particular concept of legal interpretation.

2. The concept of precedent

In the Polish legal system as a system of civil law, adopted also by the Polish legal system, judicial precedent in the strict sense does not constitute, for obvious reasons, a source of law.[9] Judicial decisions, particularly of the highest lawapplying bodies have, nevertheless, a considerable significance for the legal practice, including legal interpretation. This is one of the reasons why some authors "adapt" the concept of "precedent" to the domestic legal culture. In the context of this article, it is suggested to adopt the understanding of the term "precedent" as proposed by Leszek Leszczyński who, together with John McClellan Marshall, used the judge's perspective to compare the most important aspects of using judicial decisions in the application of law by courts of different legal orders, i.e., the statutory law and the common law. Their understanding of "precedent" in the culture of civil law (hence, the Polish legal culture as well) involves an "actual influence because a precedential decision can determine the outcome of later decisions using its content and reasoning leading to its issuance or arguments indicated in its justification".[10]

Accepting that in the culture of civil law, every court decision referred to by future courts when deciding their cases – regardless of whether it relates to the application of law or its interpretation – is in fact precedential has certain consequences.[11] Such an acceptance requires redefining a concept that has specific meaning in the legal culture from which it derives but also in the legal culture in general. It can certainly be a convenient conceptual shorthand for the purposes of the domestic legal culture in the area of civil law. This change of meaning does not, however, preclude certain misunderstandings that it may cause, particularly with regard to the sources of law, which may in turn lead to a possible shift in the interpretative paradigm that might boil down to arguments of a purely verbal nature. Therefore, the question remains whether the term "precedent" is necessary and useful in the legal culture of statutory law, where it cannot be understood in the same way as in the common law. It must be pointed out that this very understanding of precedent – in a broad sense – is dominant in the Polish science of law.[12]

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[9] J. Wróblewski, *Precedens i jednolitość sądowego stosowania prawa* [Eng. *Precedence and Uniformity of the Judicial Application of the Law*], "Państwo i Prawo" 1971/10, p. 530ff; M. Zirk-Sadowski, *Precedens a tzw. decyzja prawotwórcza* [Eng. *Precedent and the so-called Legally Creative Decision*], "Państwo i Prawo" 1980/6, pp. 70–71; M. Koszowski, *Anglosaska doktryna*…, pp. 115–128; T. Stawecki, *Precedens jako zadanie dla nauki prawa* [Eng. *Precedent as a Task for the Science of Law*], in: A. Śledzińska-Simon, M. Wyrzykowski (eds.), *Precedens w polskim systemie prawa* [Eng. *Precedent in the Polish Legal System*], Warszawa 2010, pp. 229–265.

[10] L. Leszczyński, J. McClellan Marshall, *Precedent in the Judicial Process. Judge's Perspective in a Comparative Approach*, Lublin 2019, p. 110.

[11] D.N. MacCormick, R.S. Summers, *Introduction*, in: D.N. MacCormick, R.S. Summers (eds.), *Interpreting Precedents*…, p. 1.

[12] A. Śledzińska-Simon, M. Wyrzykowski (eds.), *Precedens*…

The role of jurisdiction in the courts' application of law is undisputed; it is sufficient to look at the statement of reasons for court judgments to find (or confirm) that courts cite decisions of other courts.[13] They do it for a range of reasons, of course. Sometimes, it is required by legal norms as part of the application of law, which is beyond dispute. In some situations, courts use previous judicial decisions for the purpose of argumentation, either substantive or merely "ornamental"; for the most part, however, it is purely a means of persuasion. The authors cited above mention such situations, analysing the similarities and differences between using judicial decisions in the judicial application of law in both legal cultures, including the legal-theoretical perspective. Nonetheless, despite evident differences in this regard, the concept of "precedent" (at times used synonymously with "other decision", "earlier decision" or "earlier decision treated as a precedent") is used by them both with reference to the precedent in the strict sense of the term (in the common law) and to the judicial practice of invoking earlier courts' decisions (in the statutory law). It means that the very concept of "precedent" in this context is mainly used simply as a convenient shorthand.[14]

3. Argument from precedent in legal interpretation

As already pointed out in the Introduction, when it comes to the problem of precedent, as linked to law in action, legal interpretation is of key significance.[15] The issue of precedent relates not only to the problem of sources of law but also to "normative novelty";[16] after all, it concerns the circumstances where one of the effects of applying a law in a specific case is both a general and an abstract norm, which can be applied in future cases that are similar to the one at the heart of the precedential decision. This is why the way we approach legal interpretation in a given legal culture has an impact on whether certain intellectual acts involved in the understanding of the text of a legal instrument will be treated as its interpretation or as acts that go beyond its interpretation and, as such, have a legislative dimension. It mainly refers to: 1) issues involved at the start of legal interpretation; 2) using the directives of extra-linguistic (systemic and especially functional) interpretation only when the linguistic directives have not produced an unambiguous interpretation, or when using these extra-linguistic directives regardless of the results of using the linguistic ones; 3) situations where the results of the linguistic

[13] L. Leszczyński, *Praktyka precedensowa w porządku prawa stanowionego. Podstawowe czynniki warunkujące* [Eng. *Precedent Practice in Statutory Law Regime. Basic Conditioning Factors*], "Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2017/CX, pp. 159–175; L. Leszczyński, *Precedent in the Decision-Making Process. Point of Legal Theory and Judicial Practice*, "Studia Iuridica Lublinesia" 2018/1, pp. 13–26; L. Leszczyński, *Implementing Prior Judicial Decisions as Precedents: The Context of Application and Justification*, "International Journal for the Semiotics of Law" 2020/33, pp. 231–244; B. Wojciechowski, *Stosowanie prawa podatkowego przez sądy administracyjne w* sytuacji *interpretacyjnego pluralizmu instytucjonalnego i otwartej tekstowości prawa* [Eng. *Application of Tax Law by Administrative Courts in the Context of Interpretative Institutional Pluralism and Open Textual Law*], "Państwo i Prawo" 2019/12, pp. 58–72.

[14] M. Koszowski, *Anglosaska doktryna*…, p. 143.

[15] M. Zirk-Sadowski, *Precedens a tzw. decyzja prawotwórcza* [Eng. *Precedent and the So-Called Legally Creative Decision*], "Państwo i Prawo" 1980/6, pp. 69–78; L. Morawski, *Precedens a wykładnia prawa* [Eng. *Precedent and Legal Interpretation*], "Państwo i Prawo" 1996/10, pp. 3–12; T. Stawecki, *Precedens jako zadanie*…, p. 265.

[16] M. Zirk-Sadowski, *Problem nowości normatywnej* [Eng. *Problem of Normative Novelty*], "Studia Prawno-Ekonomiczne" 1979/22, pp. 47–62; T. Stawecki, *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda* [Eng. *Precedent in the Polish Legal Order. The Concept and Conclusions of de Lege Ferenda*], in: A. Śledzińska-Simon, M. Wyrzykowski (eds.), *Precedens*…, p. 80.

directives are overruled by the results of the functional axiological directives; 4) using certain types of legal argumentation. An analysis of these issues is presented below.

Maciej Zieliński's derivative concept of legal interpretation, identified in the Introduction as the one underlying this article in its analysis of precedent as an argument in legal interpretation posits that an adequate understanding of a text of a legal act, just like any other artefact, requires its interpretation. This concept, therefore, does not involve inquiring *when* interpretation happens, because it occurs each and every time, in line with the principle of *omnia sunt interpretanda*.[17] Of course, such an interpretation is undertaken according to certain rules and directives outlined in this concept, which assume, for example, that irrespective of the outcomes of using the linguistic interpretative directives, examined later in the article, the extra-linguistic directives must also be used each and every time (including the functional axiological directives, which require consideration of issues such as the given legal culture's ethics when engaging in legal interpretation). An interpreter's activities, applying three types of interpretative directives (linguistic, systemic and functional) to legal interpretation, are based on the principle of *interpretatio cessat post applicationem trium typorum directionae* (legal interpretation can be concluded if the three types of directives of interpretation have been applied).[18] Therefore, irrespective of whether an interpreter fails to achieve a univocal meaning after applying the linguistic directives of interpretation (due to the multiple meanings of a given phrase, which could not have been eliminated at this stage of interpretation) or whether sufficient clarity for the given interpretative moment (the moment in time for which the interpretation is completed by the interpreter) is achieved, interpretation must include directives which refer to the socially accepted values.

In each of the above-mentioned cases, this shift to the functional axiological directives will be motivated by a different factor. In the case of ambiguity within the results of applying the linguistic directives, applying the functional axiological directives aims at removing the ambiguity as it leads to a rejection of those linguistic results of interpretation that are incongruent with the values most preferred in the given legal culture. On the contrary, in the case of a linguistically univocal result of interpretation based solely on the linguistic directives, applying the functional axiological directives aims at verifying whether the previous result is consistent with the socially accepted values. In the latter instance, we can be dealing with a situation where the results of applying both these types of directives (linguistic and functional axiological) will be consistent with one another. We can also, however, be facing a case where these results will be inconsistent. There can only be two solutions of such an outcome: we can accept either the outcome of the linguistic directives or the results of the functional axiological directives.

Should such a disparity arise, the derivative concept of legal interpretation offers a middle way solution. If accepting the outcome of the linguistic directives means that the axiological values most preferred in the given legal system are to be undermined, an interpreter should either expand or restrict the meaning of the interpreted phrases

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[17] Maciej Zieliński formulated this principle in Latin in his lecture *Basic rules of modern interpretation*, which was presented at a scientific conference at the Department of Law and Administration, Warsaw University on 27 February 2004 and then published (M. Zieliński, *Podstawowe zasady współczesnej wykładni prawa* [Eng. *Ground Principles of Contemporary Law Interpretation*], in: P. Winczorek (ed.), *Teoria i praktyka wykładni prawa* [Eng. *Theory and Practice of Legal Interpretation*], Warszawa 2005, p. 120).

[18] M. Peno, M. Zieliński, *Koncepcja derywacyjna*…, pp. 117–136.

in a way that would maintain the axiological coherence of the legal system and prevent a situation where a linguistically univocal result of legal interpretation would lead to the rejection of the most preferred values.[19]

Such a decision obviously requires a thorough justification by the interpreter. Adopting this course of action involves an understanding of legal interpretation as an adaptive (and therefore also dynamic) process and allowing for fluctuations in the meaning of law due to social changes, including those related to axiology. This kind of interpretative process, however, is also quite limited. In his concept, Zieliński listed five such limitations. In a situation where the adoption of the linguistic meaning of an interpreted phrase would lead to undermining the crucial values, the linguistically unequivocal meaning of this phrase must not be change to break: 1) the content of the linguistically unambiguous legal definition; 2) a linguistically unambiguous provision granting specific competences to entities (the scope of these entities can be neither expanded nor restricted); 3) a linguistically unambiguous provision granting rights to citizens (existing rights cannot be removed through legal interpretation); 4) a linguistically unambiguous provision maintaining certain provisions of a repealed legal act in force; 5) exceptions must not be extended through interpretation (*exceptiones non sunt extendendae*).[20] If the above-mentioned limitations are considered, both the extending and the narrowing interpretation will remain legal interpretation. The result of the interpretative activities (performed according to the directives of interpretation aligned with the discussed concept) will become a legal norm understood as an expression sufficiently unambiguous at the given interpretative moment which makes it clear who should act, as well as when and how they should act. It is not difficult to see that, if based on other principles of legal interpretation, an interpreter's activities when applying the extending or narrowing interpretation may be treated not just as an interpretation of legal instruments but as lawmaking as such. If a court that interprets a law in the process of applying the law is such an interpreter, then the described activities, aimed at either an interpretative adjudication or a decision in an individual and specific case, may be considered lawmaking and, as a consequence, in the future such a decision may be seen as a precedent (according to the approach proposed by Leszczyński).

In the holistic (comprehensive) approach to interpretation, as manifested in the derivative concept of legal interpretation, a situation where a court acts in line with the principles and rules of this concept precludes the existence of activities falling outside the scope of interpretation. The result of interpretative activities in such a situation will be a legal norm derived by interpretation from legal provisions and not a legal norm "laid down" by a court in a judicial decision.

Moreover, the derivative concept requires from an interpreter a justification for their interpretative solutions with regard to not only the final decision of the interpretation but also the fractional decisions made at different stages of the interpretation process. Fulfilling this requirement generates a more methodologically valuable interpretation while also offering a reassurance to a court of law that its activities do not extend beyond the scope of interpretative actions. This is because they are justified

[19] "(P) RULE 40: In a situation where the linguistic meaning impinges upon (...) identified unshakable values, the linguistically clear meaning of the interpreted phrase should be changed in a way that ensures axiological consistency (expansive or restrictive interpretation)". See: M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* [Eng. *Interpretation of Law. Principles, Rules, Guidelines*], 1st edition, Warszawa 2002, p. 350.

[20] M. Zieliński, *Wykładnia prawa*…, 1st edition, p. 350.

by certain directives of interpretation applied by a judge who has already presented arguments for their use in providing the statement of reasons for the court's decision (both fractional and final).[21]

Possible reference to a previous judicial decision in which another court, after applying the extending or narrowing interpretation, reached an outcome that may have deviated from linguistic, but ensured axiological, consistency of the legal system, will not be considered as invoking a precedent on the basis of the adopted concept of legal interpretation.

4. The roles of legal interpretation

The results of interpretative activities are linked to the roles performed by legal interpretation, although the culture of statutory law does not stipulate any of these roles to be lawmaking. This issue is, however, relative to the understanding of "legal interpretation" and the roles this process is assigned as a consequence.

The derivative concept of legal interpretation specifies five roles of interpretation. These five basic roles include: 1) the perceptual role; 2) the didactic role; 3) the remedial role; 4) the streamlining role; and 5) the complementary role.[22]

The first of these roles, i.e., **the perceptual role**, involves understanding of the meaning of a given phrase and takes two forms. The first of these forms – the perceptual role *in initio* – is manifested in a certain *prima facie* understanding of the interpreted fragment of the text of a legal act, which in this concept is treated neither as the sole interpretation nor as a sufficient one. An *in initio* understanding is treated as an initial, not influenced by any directives of interpretation, fragment of legal interpretation, followed by appropriate interpretative activities.

The second form of the perceptual role of legal interpretation is its perceptual role *in fine*, which aims to establish the final meaning of the interpreted phrase by applying certain directives of interpretation from the derivative concept. Given that in the derivative concept an interpreter interprets the text of a legal act irrespective of the level of the *prima facie* understanding of it, what is established is of no significance for the meaning of the text of a legal act. The findings through interpretation in the strict sense are the only significant findings derived by interpretation, because they produce a legal norm (understood as an expression sufficiently univocal at in the given interpretative moment, whereby it indicates who should act, when and how should they act). And these are not solely semantic findings. A fully executed process of interpretation, in line with the discussed derivative concept, can only be concluded once a sufficient clarity is reached following the application of three directives of interpretation (linguistic, systemic and functional) by an interpreter, in accordance with the principles of *interprettaio cessat post applicationem trium typorum directionae*. In a judicial application of law, "only a judgment consistent with the values, aims and principles expressed in the law and the given legal culture can be considered appropriate and legal".[23]

Another role of legal interpretation is its **didactic role**. It is directly linked with the singular feature of texts of legal acts, which that are written as sentences in the

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[21] M. Zieliński, *Wykładnia prawa*…, 1st edition, pp. 266–271.

[22] M. Zieliński, *Wykładnia prawa*..., 1st edition, pp. 218–225.

[23] B. Wojciechowski, *Dyskrecjonalność sędziowska. Studium teoretycznoprawne* [Eng. *Judicial Discretion. Theoretical and Legal Study*], Toruń 2004, p. 306.

grammatical sense (which usually appear as descriptive), yet are interpreted as prescriptive expressions (expressions ordering certain entities to act in a particular way in certain circumstances). Thus, the process of legal interpretation transforms expressions made in the language of legal provisions into the corresponding expressions in the language of legal norms. This role also takes on two forms, related to different situations of interpretation. The first form of this role manifests itself when a lawyer interpreting the text translates a legal provision into a legal norm, doing so in a language more useful to them than the language of the legal provision. The legislator does not express legal norms directly in a legal provision but scatter their various fragments like puzzles across various legal provisions (often in different legal acts). On the one hand, this leads to a situation where some elements of a legal norm (e.g. the addressee and circumstances) are in one legal provision while other components of the same norm (e.g. the duty and specific conduct) are to be found in another. This is called syntactic splitting of legal norms in provisions. On the other hand, one provision may contain elements of more than one legal norm (e.g. several duties of conduct imposed on different addresses). This is known as condensation of legal norms in a legal provision. Another technique of coding legal norms in legal provisions is content splitting, which happens when the legislator drafts legal provisions in a way where certain provisions modify the content of others, thus resulting in content splitting of legal norms in legal provisions. Each of the above-mentioned techniques of coding legal norms in legal provisions compels an interpreter to consider, in the process of interpretation, not only the interpreted provision but an entire set of provisions, often even from different legal acts.[24] All these procedures are essential in order to reconstruct a norm-like expression from legal provisions which is complete syntactically, logically and content-wise. Therefore, an interpretation of a legal provision requires not only a legal expertise but also knowledge of how the legislative texts are written and interpreted. A legislative text constitutes a complete message, thus a legal provision cannot be interpreted separately from the normative context of the legal act in which the given legal provision is situated or without considering its intertextuality against other legal acts. In this regard, the discussed form of the didactic role is reconstructive.

The second form of this role is set in motion when an interpreter-lawyer explains the content of law to a non-lawyer, having already interpreted it for themselves. Distinguishing these two forms of the didactic role is directly linked to legal communicative competence, which varies among different interpreters. This competence is usually higher among interpreter-lawyers than among non-lawyers because legal knowledge is not common knowledge.

Another role of interpretation is the **remedial role**, which relates to law drafting errors. It does not concern just any legislative errors but specifically the error of ambiguity. The legislative drafter has different tools of legislative techniques at their disposal, which help to eliminate this ambiguity (from legal definitions to linguistically contextualising an ambiguous expression). Considering the fact that the role of legal interpretation is not only to establish the content of law but also to establish it sufficiently unambiguously; therefore, whenever ambiguity occurs, it is the role of the interpreter to remove this ambiguity and establish one clear meaning at the given interpretative

[24] M. Zieliński, *Wykładnia prawa*…, 1st edition, pp. 103–131; A. Choduń, *Maciej Zieliński's (Derivative) Concept of Legal Interpretation*, "Studia Prawa Publicznego" 2015/2, pp. 112–114.

moment by rejecting all competing meanings. Achieving this goal is facilitated by a set of directives of interpretation, the application of which is meant to lead to a single result at the given interpretative moment. While the error of ambiguity within the text of a legal act is always attributed to its legislative drafter, the use of indeterminate (or blurry) phrases is not seen as an error whenever such a use is intentional.[25] Ambiguity relates to the specifics of a term and exists when these specifics are not clearly defined, leading to the blurriness of the term and its scope. We deal with blurry terms when, despite being familiar with certain features of the object we encounter, we are unable to determine whether or not they are referents of the given term. They form a sphere of ambiguity around that term. This, in turn, offers an interpreter some leeway regarding how to interpret a blurry term (interpretative freedom). This does not, however, imply a full discretion or total freedom of interpretation. Every time a blurry term appears in the text of a legal act, an interpreter must determine the scope of the term and its sphere of ambiguity, that is, the interpreter must establish the boundaries of this ambiguity. To this end, based on the previously accepted criterion of objectivity (socially accepted), they classify certain objects as blurry terms and those that do not meet the criterion become nonreferents of that term. Objects that cannot be classified as referents of the term belong to its sphere of ambiguity. This classification according to a given criterion will enhance the sphere of ambiguity but will not make it clear-cut. Moving beyond the sphere of ambiguity would lead to its disruption by the interpreter. In the case of blurry terms, after all interpretative activities are concluded, the entity applying the law will use interpretative freedom when making decisions and do so within the impassable boundaries of the sphere of ambiguity. This freedom does not involve including or not including the referents that undoubtedly are within or beyond the scope of the blurry term. Such decisions would not fit within the bounds of the freedom of interpretation. Excluding some referents from the scope of those that undoubtedly are part of the blurry term would restrict its scope. On the other hand, including nonreferents that undoubtedly are within the scope of the blurry term would lead to expanding the scope of this term. Both situations would result in a change in the scope of the interpreted term and, as such, go beyond the activities associated with the interpretation of texts of legal acts as well as the application of law. In the case of blurry terms, the purpose of interpretation is not to achieve clarity by making a phrase univocal but to establish the boundaries of the blurry term that an interpreter can use in order to organise certain facts as either qualifying or not qualifying within a certain legal norm.[26]

The legislator provides the interpreter (decision maker) with the freedom of interpretation to be used appropriately to a given, specific situation that requires a decision. Thus, the interpreter's decision may be influenced by a range of specific factors. Accordingly, the interpreter's activities that exercise the remedial role by petrifying the meaning of a blurry term would classify as interpretative abuse. This would happen if the interpreter established a particular definition of that term, which would eliminate the sphere of its ambiguity that safeguards the freedom of interpretation.[27]

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[25] M. Zieliński, *Wykładnia prawa*…, 1st edition, p. 222; A. Marmor, *The Language of Law*, Oxford 2014, p. 99.

[26] A. Choduń, *Klauzule generalne i zwroty niedookreślone – wybrane zagadnienia teoretycznoprawne* [Eng. *General Clauses and Indefinite Phrases – Selected Theoretical and Legal Issues*], in: A. Choduń, A. Gomułowicz, A. Skoczylas, *Klauzule generalne i zwroty niedookreślone w prawie podatkowym i administracyjnym* [Eng. *General Clauses and Indefinite Phrases in the Tax and Administrative Law*], Warszawa 2013, pp. 32–38.

[27] M. Zieliński, *Wykładnia prawa*…, 1st edition, p. 239.

The last of the roles under the derivative concept is the **complementary role**. When it comes to this role, Zieliński expresses some concerns. Firstly, this is not a role related to the features of texts of legal acts and, secondly, it goes beyond legal interpretation in the strict sense as it is associated with legal argumentation. This role of legal interpretation may manifest itself in two forms. The first form stems from the fact that inferences are made about the implicit legal norms via the rules of inference adopted in a given legal culture from the explicit legal norms articulated in legal provisions. In the second form, we are dealing with the complementary role in situations where an interpreter in fact adds some normative element, which was not present in the text of a legal act due to the writer's error. It concerns adding an element without which the given legal institution could not function. This situation is described in Polish jurisprudence as a "legal gap" and concerns situations where certain legal acts and their consequences are regulated by law, but there is no regulation that allows to clearly determine whether such an act has happened in a legally valid way. Because this "missing" regulation is a legal rule, the legal gap should be removed by the legislator by providing the missing regulation. This is why the interpreter's activities, which to an extent substitute for the legislator, are of a creative (lawmaking) dimension and, therefore, go beyond legal interpretation. Its qualification as either acting within the boundaries of interpretation or exceeding these boundaries depends on the understanding of "legal interpretation" itself, as well as on the types of legal inferences accepted in the given legal culture.

In each of the above-mentioned cases – with the exception of latter relating to the "complementary" role – the role of legal interpretation is to establish the content of law as a legal norm. The outcome of interpretation is, therefore, not a normative novelty even when, in the course of legal inference from a legal norm derived by interpretation from a provision, inferences are made about a legal norm that is the consequence of the former. In terms of the derivative concept, admittedly, it is not an interpretation in the strict sense of the term because of the need for validating findings i.e. establishing which norms are valid in the given legal system. It is an interpretation in the broad sense, which has certainly nothing to do with legislating. If it is accepted in a given legal culture that the directives of inference are part of legal reasoning, then the legal norm derived from their application will have the same justification as the legal norm it was inferred from. Hence, it will not constitute a "normative novelty" but an augmentation of the existing knowledge about legal norms within the given legal system.[28]

The process of legal interpretation requires that an interpreter makes a number of decisions at different stages of the interpretation process. In the case of interpreting an ambiguous term, it requires selecting one meaning of this term. In the case of interpreting a blurry term, it requires establishing the sphere of ambiguity, within which the interpretative discretion afforded by the legislator can be exercised.

If legal interpretation is not made chaotically but conducted according to certain directives of interpretation within a certain concept (or theory) of legal interpretation (derivative or other), then both the use of a particular directive of interpretation and the choice of a particular meaning from a range of meanings come as a consequence of a precise reasoning, not arbitrariness. Moreover, the expectation that an interpreter's decisions will not only be transparent but also well justified decreases the risk of making arbitrary decisions as well. The possibilities of engaging in "lawmaking" under

[28] M. Zieliński, *Wykładnia prawa*…, 1st edition, pp. 46–47.

the umbrella of legal interpretation are equally reduced. If a decision about a particular interpretation has to be justified, it requires at least an indication of what legal reasoning has led to such a decision within the process of interpretation. The rational nature of such actions precludes both arbitrary decisions and those reached through revelation. On the other hand, the *prima facie* meaning is a kind of legal interpretation, though a subjective one, because it is conditioned by individual competences and pre-judgments of those who "experience" it. This is sometimes regarded to be an "unconscious interpretation".[29] It is, therefore, reading of a text of a legal act for one's own personal use and as such cannot constitute the final outcome of legal interpretation.

The rational nature of legislative activities presupposes that the legislator accepts a particular legislative solution in a legal text, which is the one that an interpreter will establish as a result of applying the directives of interpretation adopted and universally accepted in a given legal culture. This presupposition is also based on the principle of consistency between the directives governing the writing and interpreting legal texts as well as the legislators' and interpreter's familiarity with these directives. The consequence of establishing a particular verbal form of a legal norm through legal interpretation does not introduce any legal novelty, but it increases the interpreter's knowledge about the content of law, which had not been developed to that extent before embarking on the process of interpretation.

The activities of interpretation in the strict and in the broad sense do not encompass activities that have no justification in the directives of interpretation under the given concept of legal interpretation.

5. Interpretative directives ordering the previous judicial decisions to be considered

A court may have a range of reasons for citing a decision of another court. From the perspective of legal interpretation, however, it is interesting to see whether invoking such interpretative decisions is rooted in any directives of interpretation or whether it is merely part of legal practice.[30]

In the derivative concept of legal interpretation, which is a normative concept (that which constitutes a set of directives that indicate what activities are to be undertaken in the process of legal interpretation in order to achieve a culturally significant result that would become a legal norm derived from legal provisions), there are two directives of interpretation, which dictate that an interpreter must consider judicial interpretation.

Both of them in a (direct or indirect) way concern the need to take into consideration, in the process of legal interpretation, the interpretative decisions made in the previous judicial rulings. One of these directives has an additional thetic justification regarding the content of legal acts within the Polish legal order. It is a directive that "someone else's decision regarding the interpreted phrase is binding". The second directive, partially related to court judgments with regard to the contents of a law, is a directive that requires checking whether the interpreted phrase already has an established meaning in the legal language as a legal term.

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[29] M. Van Hoecke, *Law as Communication*, Oxford 2002, p. 129; A. Choduń, *Aspekty językowe derywacyjnej koncepcji wykładni prawa* [Eng. *A Linguistic Aspects of Derivative Concept of Legal Interpretation*], Szczecin 2018, pp. 126–127.

[30] See: Z. Tobor, M. Zeifert, *How Polish Courts Use Previous Judicial Decisions?*, "Studia Iuridica Lublinensia" 2018/1, p. 193ff.

Both directives demonstrate that other interpretations matter, although only one of them has not been provided for by the lawmakers. These directives, therefore, differ in terms of their status.

The first one, i.e., the directive imposing on the interpreter the requirement to treat other decisions as binding, is directly expressed in procedural and systemic regulations that require of courts to respect certain legislative judgments when it comes to the established contents of the law.[31] Accordingly, an interpreter-judge applying the law is legally obliged to consider cases of imposed interpretation, while an interpreter who is not a judge must consider those cases in order to avoid a situation where not doing so will invalidate their interpretation (e.g. in the process of applying the law).[32] Applying this directive of a "legislative imposition to respect another interpretative decision" depends on whether, at a certain interpretative moment, appropriate provisions specifying the binding nature of the judgment exist. If they do, then the interpreter applying the law (in practice it is usually the interpreter-judge) is obliged to include them in the directives of interpretation prescribed in the derivative concept. This obligation arises from the law because the interpreter-judge is formally bound by it, but is it also stipulated (as a potential obligation, because it is conditioned by the legal provisions that impose it) in the discussed concept of legal interpretation. When it comes to using the directive that "another's interpretative decision is binding" in the process of legal interpretation of a particular legal provision, there are certain rules guiding its application. Most crucially, it relates to those situations where, in a previous interpretative decision, a court had established a particular meaning of the phrase present in the currently interpreted provision. One cannot, therefore, use such an interpretative judgment when interpreting a legal provision derived from a legal act different from the one that was the object of interpretation by the court that had issued the previous interpretative judgment. Moreover, the legal provisions referred to in the discussed directive of interpretation are addressed to courts. There is, therefore, a certain formal limitation in the application of legal provisions per se, although not in the application of the directive of interpretation itself. The interpreter-judge is authorized and obliged to consider the interpretative judgments indicated in legal provisions, which apply to the discussed directives of interpretation. They are thus authorized and obliged[33] to make

[31] In the Polish legal system, these are, for example, the provisions of the Act of 30 August 2002 on Proceedings Before Administrative Courts (Polish title: ustawa z 30.08.2002 r. – Prawo o postępowaniu przed sądami administracyjnymi, tekst jedn: Dz. U. z 2022 r. poz. 324): "Art. 87 § 1. If, when examining a cassation appeal, a legal issue arises which raises serious doubts, the Supreme Administrative Court may postpone the examination of the case and refer the matter to a panel of seven judges of this Court. § 2 The decision made by the panel of seven judges of the Supreme Administrative Court is binding. § 3. The Supreme Administrative Court composed of seven judges may take the case over to be examined' or the Act of 17 November 1964 – Code of Civil Procedure (Polish title: ustawa z 17.11.1964 r. – Kodeks postępowania cywilnego, tekst jedn.: Dz. U. z 2021 r. poz. 1805): "Art. 390 § 1. If, when examining the appeal, a legal issue arises which raises serious doubts, the court may refer this issue to the Supreme Court for resolution, postponing the examination of the case. The Supreme Court has the power to take the case over for examination or to refer the case to an enlarged composition of this Court. § 2. The decision of the Supreme Court resolving the legal issue is binding in a given case".

[32] M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* [Eng. *Interpretation of law. Principles, Rules, Guidelines*], 7th edition, Warszawa 2017, pp. 220–221.

[33] The authorisation is not logically related to the obligation (cf. M. Zieliński, *Dwa nurty pojmowania "kompetencji"* [Eng. *Two Paths of Understanding "Competence"*], in: H. Olszewski, B. Popowska (eds.), *Gospodarka, administracja, samorząd* [Eng. *Economy, Administration, Local Government*], Poznań 1997, p. 581ff; M. Zieliński, *Wykładnia prawa*…, 1st edition, pp. 30–31; K. Gmerek, *Udzielanie przez sąd pouczeń w postępowaniu cywilnym. Uwagi na tle wykładni art. 5 Kodeksu postępowania cywilnego* [Eng. *Court Notes of Caution in Civil Proceedings. Comments on the Interpretation of Art. 5 of the Code of Civil Procedure*], in: M. Herman, M. Krotoszyński, P.F. Zwierzykowski (eds.), *Wymiary prawa. Teoria. Filozofia. Aksjologia* [Eng. *Dimensions of Law. Theory. Philosophy. Axiology*], Warszawa 2019, pp. 239–258).

a certain conventional procedure legally significant. In turn, when it happens, it arises the obligation of all other subjects to adapt to the content of the judicial act.

A court judgment based on one of the provisions stipulating that certain courts are bound by other interpretative decisions of other courts results in determining meaning regarding the subject of interpretation. From this moment, an interpreter that interprets a provision, which had before been the subject of legal interpretation by a court in accordance with one of the provisions indicated in the discussed directive of interpretation, will not be able to ignore this meaning, which is not, however, tantamount to an inability to overcome it.[34] Overcoming it will be possible, for instance, in a changed normative or axiological context at the given interpretative moment, or as a result of a change in an interpretatively binding preliminary ruling of the European Court of Justice (based on Article 267 of the Treaty on the Functioning of the European Union[35]). It may be relevant both to the cases of legal interpretation associated with indeterminate (or blurry) phrases, estimates phrases (related to measurable phenomena, e.g. "a considerable loss"), evaluative phrases (invoking moral values), as well as expressions with no such characteristics (factual phrases). In the derivative concept of legal interpretation, each of these types of phrases is subject to interpretation, and the way this interpretation is performed takes into consideration the specific features of these expressions. Establishing the meaning of a given phrase in an interpretative judgment is linked to the aforementioned examples set out in the content of the "another's interpretative decision is binding" directive, although it is absolutely and legally binding only in relation to those cases, which in legal provisions are designated as binding for a court by virtue of a judgment of an appellate court in the given case. From the point of view of judicial precedent in the strict sense of the term, it would be most closely resemble a classic precedent, if not for the fact that in the Polish legal system, this formal binding is not operative *erga omnes* (that is, it applies only to the appellate court or the court ruling in the given case). From the point of view of legal interpretation, such a formal stipulation is not, however, an obstacle to respecting interpretative judgments made by a court based on appropriate procedural or systemic provisions. "Being bound by an interpretative decision when interpreting a phrase" is common knowledge for a court. It is not, however, for an interpreter who is not a court. For that reason, the position of an interpreter-judge and an interpreter who is not a judge will be different for each instance of interpretation. An interpreter who is not a judge is not legally bound by another interpretative decision, because the legal provisions that stipulate so are not addressed to them. The perspective of legal interpretation and the concept of legal interpretation that limit the notion of interpretation as specified in the title of this article require an expansion of the subjects who are "bound by another interpretative decision". Such a justification involves ensuring a certain balance (a level playing field) between the interpreter legally bound by the content of a legal provision, and consequently the result of a conventional procedure such as an interpretative judgment with a specific content, and an interpreter not legally bound by such a judgment.

The problem of "precedent" in this context involves a question whether, in the given legal culture of statutory law, in a set of directives of interpretation, there exist such directives that allow for the inclusion of an element of realism into the process of

[34] A. Choduń, *Aspekty językowe...*, pp. 220–221.
[35] OJ C 202, 2016, p. 47.

interpretation. Its significance stems from the fact that the interpretative activities that contemplate previous decisions contained in an interpretative judgment will, in this case, have justification in the content of the interpretative directives of the given legal culture. It is also worth mentioning that in the culture of the common law, precedent is not regulated by law but has its foundations in the culture.

The second directive of interpretation in the derivative concept, which imposes to examine the meanings established earlier by courts, is the directive of legal language. In contrast with the previously discussed directive, it does not have its grounds in legal provisions, in the sense that there are no legal regulations that would compel courts or other entities to consider how a certain phrase has been understood in the case law. This directive compels an interpreter to check whether the interpreted phrase has its established meaning in the legal language of the case law as a legal phrase (and it concerns both strict legal phrases and factual ones). The interpreter's actions are not limited in this case to merely finding any judgment in which a court would establish such a meaning for the phrase the interpreter is interested in. Only a univocal and unambiguous understanding of the given phrase in the case law can become the grounds for its acceptance it in the process of interpretation. It certainly differs from the previously discussed directive of interpretation. In this case, it is assumed that the understanding of a given phrase developed in jurisprudence is justified by the postulate of uniform application of the law (with regard to judgments made in specific and individual cases) in this area, which must be demonstrated and justified. Also in this case, it may involve the meaning of phrases with different characteristics; they may be indeterminate phrases (or blurry ones), estimate phrases, or evaluative phrases.

Considering the results of legislative practice in the process of legal interpretation – with the previously discussed directives of interpretation in mind – does not involve a necessity to consider "normative novelty", as is the case with a precedent in the strict sense. Similarly, the results of applying legal inferences (inferences from norms about norms) are not treated in the derivative concept as an interpretation in the strict sense but as an interpretation in its broad sense. Their application relates to the issues of validation.

6. Conclusion

The goal of this article was to ascertain whether precedent may be used as an argument in judicial interpretation in the culture of statutory law, which posits a clear separation between applying the law and lawmaking (manifested by bestowing the lawmaking and law-applying bodies with the respective powers). This question was inspired by long-standing debates over the role of precedent in the culture of statutory law, particularly as applied by the Polish courts.

While the issue of precedent in the strict sense as a law-making fact, for formal reasons, does not cause much doubt, the problem of relying on previous judgments in the process of applying law opens the door to deliberations about their lawmaking character.

The analysis carried out in this article has led to the conclusions outlined below. Reference to precedent in the legal culture of statutory law may be an indication that the term is used as a convenient shorthand to describe the influence of previous court judgments on later decisions in the application of law, hence, it is not a precedent in the

strict sense of the term. Citing previous judgments by the courts may have a different character, thus the mere act of invoking such judgments in a given case does not predetermine the decision as to the facts of the case or the content of law. What matters in terms of influence are those previous judgments that refer to interpretation, which is not synonymous, however, with giving them a legislative character simply because they have been taken into consideration. Such would be the case if these judgments contained a "normative novelty", i.e., if they regulated the actions of addressees differently than before (regarding at least one element of a legal norm, i.e. the addressee, the context, the duty or conduct). Yet, this issue is still relative to a specific understanding of legal interpretation. Based on the directives of interpretation of the given concept of legal interpretation, certain interpretative activities can be classified as existing within the process of interpretation, or as activities that go beyond its scope and thus are legislative activities carried out without appropriate legal authority. Such a situation usually has certain consequences, if the given legal culture stipulates that legislative competences cannot be presumed.

If the content of the directives of interpretation accepted in a given legal culture compels an interpreter to consider decisions made in previous court judgments, such an interpretative action will be appropriate to the application of law. Considering such judgments will be at the same time an activity that has its justification in the applied directive of interpretation or in the equally accepted directive of legal reasoning.

Argument from Precedent in Legal Interpretation of Texts of Legal Acts from the Perspective of a Derivative Concept of Legal Interpretation

Abstract: The aim of this article is to ascertain whether in the Polish legal culture in which precedent is not a legislative fact, it can become an argument in the process of judicial interpretation. The article posits that an analysis of precedent as an argument in judicial interpretation must be carried out in relation to a particular concept (or theory) of legal interpretation. Hence, it adopts the Maciej Zieliński's (derivative) concept of legal interpretation as a point of reference for understanding "legal interpretation". The choice is based on the following reasons: 1) this concept offers a complex approach to legal interpretation (which assumes that interpretation can be concluded if three directives have been applied by an interpreter: linguistic, systemic and functional); 2) this concept considers the realistic elements of legal interpretation in the form of directives linked to the interpretative findings achieved in judicial practice; 3) this concept stipulates that legal interpretation has certain roles, which allow establishing whether the outcome of legal reasoning is within the scope of the interpretation or whether it constitutes a "normative novelty". As a result of this analysis, it can be concluded that depending on the content of the directives of interpretation adopted in a given legal culture, the proceedings of the entity applying a law will have either an interpretative or a legislative character and will consequently determine how invoking earlier court judgments in legal interpretation will be classified.

Keywords: precedent, legal interpretation, roles of interpretation

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