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PRECEDENT AS THE TRANSPOSITION OF A NORMATIVE ACT*

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1. INTRODUCTION

The interest in the concept of a precedent in the continental legal culture, as well as in Polish jurisprudence, is at least considerable.[1] It can be assumed that this results from the process of legal cultures convergence. It occurs not only in the form of the transformation of particular legal systems of a given western civilisation culture, which have become similar to each other in some aspects, but also as a result of theoretical solutions proposed in jurisprudence based on the observation of mechanisms functioning in the sister culture. In some sense, the development of codified law took place in the *common law* culture under the influence of observations of the advantages of the system of sources of law in continental states. On the other hand, the process called empowerment of judicial authority in the *civil law* culture is referred to the status of a judge in the *common law* order.[2] The concept of a precedent is a significant element on which the position of a judge depends. Thus, this results in the interest in this mechanism in the codified law systems. It is not possible to define the position of the judiciary power in the Anglo-Saxon countries and the deontology of the job of a judge in this culture without the explanation of a "precedent" as an entire instrument of common law, which is compo-

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1 A broad discussion of the jurisprudence approach towards the concept of a precedent can be found in T. Stawecki. Compare, T. Stawecki, *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda*, [Precedent in the Polish legal order. A concept and *de lege ferenda* conclusions], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim systemie prawa* [Precedent in the Polish legal system], Warsaw 2010, pp. 74–98.

2 For the needs of this article, the terms legal "culture" and "order" are used interchangeably for stylistic reasons. It must be remembered, however, that the two terms are sometimes assigned a different or partially corresponding meaning.

sed of such elements as, first of all, the principles of *stare decisis*,[3] or rules determining a different construction of a judgment in the Anglo-Saxon tradition expressed, inter alia, by elements of *ratio decidendi* and *obiter dictum*. Therefore, it should be indicated that the present article is an attempt at analysing the concept of a precedent through the prism of the entire "precedent-based system", which means looking for mechanisms different in nature in the continental legal culture, which are characterised by similar features as the "original" of the Anglo-Saxon law.

It is worth noticing that not only lawyers are interested in the concept of a "precedent", and in the era of highly hermetic nature and specialisation of the legal language, it is typical[4] that the term has also found its place in general discourse and is one of the most common terms associated with law. The interest in a precedent results from a certain intuitive need reflected in the development of the statutory law culture in the light of the interaction with its younger sister in the form of the Anglo-Saxon legal order as well as from conceptual transformations of the position of the judiciary in the civil law system. The institution of a precedent, adequately transformed and with the specificity of the continental system considered, may constitute a significant impulse for this power to search for a new identity because of the challenges resulting from the transformations of the modern legal systems into developed information systems.[5] What is very important is to maintain its own cultural identity. Apart from that, a precedent, as a mechanism of shaping the adjudication policy and judgment in difficult cases, may be a part of a broader phenomenon sometimes called a new formula of legitimisation of the judicial power, which continually looks for its own identity and wants to keep balance between the paradigms of activeness and moderation in decision-making at the different stages of law application.

The article is an attempt to develop an outline of an "intermediate" concept of a precedent in the system of statutory law.[6] Thus, it does not concern designing of normative solutions, formulating recommendations *de lege ferenda*, but reconstructing such interpretational behaviour of judicial bodies that even now can be indicated as those matching some features of a precedent in the statutory law culture, although it maintains an obvious distinction between the Anglo-Saxon precedent and the one of the statutory law culture. This way, it has been assumed that there are some aspects of judicial bodies' behaviour that may be recognised as corresponding to the mechanisms of a precedent-based system, as an instrument mainly connected with the process of adjudication. However, this does not involve indicating the basis of the conceptions in the existing theoretical constructions but explanation of precedent-related conditions in the context of judicial operational interpretation.

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[3] Compare, M. Koszkowski, *Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą* [Anglo-Saxon theory of precedent. A comparison with the Polish judicature], Warsaw 2009, p. 21.

[4] Compare, S. Grabias, *Język w zachowaniach społecznych* [Language in social relations], Lublin 2003, p. 83, and J. Pieńkos, *Podstawy juryslingwistyki. Język w prawie – prawo w języku* [Foundations of jurilinguistics. Language in law – law in language], Warsaw 1999, pp. 71 and 139.

[5] Compare, L. Morawski, *Argumentacje, racjonalność prawa i postępowanie dowodowe* [Argumentation, rationality of law and evidence-taking procedure], Toruń 1988, p. 171 ff.

[6] "Intermediate" understood as placed between some extreme approaches presented in the literature, which will be discussed further on.

2. *DE IURE* VERSUS *DE FACTO* PRECEDENT

The basis for differentiating a *de iure* precedent from the *de facto* one is assigning to the former a validating status.[7] In other words, the specific rule included in the motives behind the judgment has a status of a binding legal norm in the same way as in codified law. However, it is a kind of ellipsis leading to many distortions of the meaning of the essence of a precedent.[8] A precedent is treated in the same way as the system of the sources of law in the statutory law system, obviously following the example of one catalogue of "ready-made" meanings coded in legal norms taken from a given catalogue. However, a precedent is not an instrument of the theory of exegesis *sensu stricto*. It seems that there is the lack of differentiation between the elements in the process of law application responsible for finding the sense of law, fact assessment and final adjudication that results from the chaos in concepts indicated in literature.[9] Considering the specificity of the civil law culture, we think about law as of certain meanings of patterns of appropriate behaviour. We conceptualise norms in the same way as signs – symbols, mainly because of praxeology connected with the adequacy of the aim of a regulation to its object (of course, it concerns the semantics of particular phrases used in the normative construction; the elements of an addressee, the subject of the regulation and circumstances of the use of a rule and a pattern of appropriate behaviour). Thus, as it seems, this is how intuitive perception of a precedent occurs. However, it is a considerable distortion of the sense, which does not take place in the Anglo-Saxon culture, where a rule is interpreted equally intuitively but the mechanism of its creation in the formula of a precedent is differentiated from a ready-made "meaning", which is its result. It can be concluded that a precedent in a court law order substitutes for a political act of law enactment from the statutory law order.[10] Conversely, a general norm, following the pattern of a legal norm as the meaning of appropriate behaviour,[11] is an effect;

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[7] In the Polish literature, the introduction of a semantic difference between *de iure* and *de facto* precedents is attributed to L. Morawski; compare, L. Morawski, *Precedens a wykładnia* [Precedent and the interpretation of law], Państwo i Prawo No. 10, 1996, passim. However, in the article, the author refers to the work by J. Wróblewski, who also indicates such elements of the phenomenon of a precedent, which normatively and actually bind a decision-making body. Compare, J. Wróblewski, *Precedens i jednolitość sądowego stosowania prawa* [Precedent and uniformity of judicial application of law], Państwo i Prawo No. 10, 1971, passim.

[8] T. Stawecki directly indicates the erroneous interpretation of the instrument of a precedent in the Polish literature. Compare, T. Stawecki, *Precedens jako zadanie dla nauk prawnych* [Precedent as a task for legal sciences], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim...* [Precedent in the Polish...], pp. 229–230.

[9] Compare, T. Stawecki, *Precedens w polskim porządku…* [Precedent in the Polish legal order...], p. 60.

[10] The status of development of a decision concerning semantics in a precedential judgment from the perspective of politics is an issue that needs separate consideration. The issue seems to be fascinating and requires a separate discussion.

[11] For the needs of this article, I use a legal norm as a meaning of behaviour. It is not possible to present all concepts of a legal norm in the article. It is only possible to point out that in the literature the concept of "legal norm" is most often explained in the context of its semantic relation to the term of "the provision of law". It is necessary to mention the academic work by J. Nowacki and Z. Tobor; compare, J. Nowacki, Z. Tobor, *Wstęp do prawoznawstwa* [Introduction to

it results from a precedential judgment. A precedent in the Anglo-Saxon culture is defined as: "something that has happened or that was done in the past, and that serves as a model for future conduct."[12] In the Anglo-Saxon literature, a precedent is also defined as a *legal decision* but its synonyms are also a *pattern* and a *standard* of behaviour. This way, the behaviour of the legal body is emphasised rather than a general norm itself, which results from it. It is of course determined by the specificity of law application in the Anglo-Saxon culture and the course of reasoning from a fact to a rule, and not from law to a fact as it is in the culture of codified law. The essence of precedent is a specific way of a court action, which becomes a type of "procedural" binding norm. The semantics of a rule, duplicated in similar judgments, is its result. This is a very important sequence, which must be taken into consideration, because in the culture of statutory law, a precedent is associated, based on that ellipsis, with specifically duplicated semantics shaped as a result of operational interpretation. However, the essence of a precedent is the requirement of identical (interpretational) behaviour of a court, even with some differences in the field of decoding the meaning of law based on every individual adjudicated case. This provides a minimum of flexibility also in the judicial law system.

In the culture of statutory law, it is assumed, based on the observation of judicial practice, that there are the *de facto* precedents, i.e. court's judgments shaping the way of interpreting the content of a normative act, which is assigned a feature of "soft" law. The binding power is informal and refers not to the judgment because it can never be the source of law (in such a situation, the identity of the culture of statutory law and the sense of its differentiation from the Anglo-Saxon culture would end). The way of a court interpretational behaviour in case of a precedent is not an object of reference, either, because it is not an instrument of interpretation treated pragmatically.[13] However, the meaning of law is an object of reference in a dual way:

– concerning the issue of validation (compatibility of a normative basis of the decision on law application);
– concerning the way in which it is understood.

Therefore, it concerns compatibility within the scope of semantics: the identical way of selecting a basis from a normative act. The point of reference is not a judgment but semantics of the same "fragment" of a normative acts system, duplicated in relation to similar cases.

This theoretical explanation of a precedent can be, in fact, recognised as adequate, although characterised by too general theoretical constructions used to its

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jurisprudence], Warsaw 1993, pp. 47–62 and typology presented by K. Opałek and J. Wróblewski. Compare, K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa* [Problems of the theory of law], Warsaw 1969, p. 62.

[12] Compare, http://legal-dictionary.thefreedictionary.com/precedent [accessed on 04.04.2017].

[13] A set of methods known in the theory of law interpretation serving to describe the way of reconstructing the meaning from a legal text. See, M. Zieliński, *Wykładnia prawa, zasady, reguły, wskazówki* [Interpretation of law, principles, rules, guidelines], Warsaw 2002, p. 45.

description. However, as I will try to demonstrate, it requires detailed specification because such a definition of a precedent has a low explanatory force as it creates a blurred definition that can indicate various mechanisms and phenomena in the field of duplicating meanings in the process of judicial operational interpretation, mainly judgment policies, judicial "legislation", rough interpretation,[14] or an interpreter's schematic acting. The last concept is so unclear that it is not known whether it makes reference only to the theory of exegesis or also to the requirements of cognitive interpretation. In my opinion, associating a precedent in the culture of statutory law with the phenomena presented above is inappropriate. Does every type of judgment policy certainly create a precedent? Because of obvious reasons, it seems it does not and, although the phenomenon exists in the culture of statutory law, maintaining adequate constructive differences resulting from the specificity of this culture, it is rare, for the aim of the conception presented here, and limited to the phenomenon indicated in the title as the transposition of semantics.

L. Morawski, in one of the fundamental articles on this issue, indicates that what influenced the continental understanding of a precedent was the French doctrine, based on the post-revolutionary ban on creating law by courts, laid down in the Napoleonic Code.[15] Article 5 of this regulation stipulates that:

"The judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them."

What is very important, the rule did not only mean a ban on making legislative decisions by courts but also a ban on introducing binding interpretational directives (rules of law interpretation) that might result in the creation of law by "getting in through the back door". The mechanism may be compared to the ban on creating soft law in the form of binding interpretational canons, which would substantially bind courts subordinate to those introducing such basic rules of exegesis.[16] This conception of judicial moderation is also the basis of the French political system, which gives the legislative branch the superior position. On the other hand, the authors of the Napoleonic Code introduced Article 4, which is often disregarded in the discussion of the present issue, which stipulates:

"The judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice."

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[14] Directed at searching for meanings with dialectic grounds in the given communication community. Compare, S. Frydman, *Dogmatyka prawa w świetle socjologii. Studjum pierwsze: o wykładni ustaw* [Dogmatics of law from the sociological perspective. Preliminary studies: on interpretation of statutes], Vilnius 1936, p. 85.

[15] Compare, L. Morawski, *Precedens*… [Precedent...], pp. 3–4.

[16] The ban resulted from the post-revolutionary France's "fear" that the judiciary apparatus without a social mandate may interpret the new law based on revolutionary axiology by introducing meanings contrary to the will of the nation. The phenomenon is well known and described in specialist literature and journalistic writings. Compare, E. Łętowska, *Pozaprocesowe znaczenie uzasadnienia* [Extrajudicial significance of justification for a judgment], Państwo i Prawo No. 5, 1997, p. 4 and A. Kotowski, *Polski test na ontologię prawa* [Polish test for ontology of law], Dziennik Gazeta Prawna, "Prawnik" of 31 May 2016, pp. 4–5.

The most important aspect of the rule interpreted based on this Article is not the fact that a judge cannot refuse to adjudicate because of unclear law but that he cannot state that the law is "obscure or insufficient". Thus, even in the most extreme situations, where the text of a normative act has not been formulated in an understandable way and has substantial syntactic or semantic defects, a court must take an interpretational decision, even if it is in fact constructive in nature.[17] From the point of view of the philosophy of politics, however, it is important that a body designed to apply legal acts in the paradigm of declarative interpretation, i.e. decodes the meaning of an unclear text and does not create a rule based on the illegitimate source of law. Thus, in some sense, Article 4 of the Napoleonic Code narrows the rule of Article 5. Such a mechanism constitutes the basis of the fact that also in the continental culture the creation of semantics by courts takes place and resembles, to some extent, its counterpart in the form of a precedent in the Anglo-Saxon culture.

3. PRECEDENT OR "PRECEDENT"?

It is necessary to be censorious of too broad interpretation of the concept of a precedent in the statutory law culture. Indicating that every judgment that influences the judgment in similar or related cases, or the "argument from a precedent", which appears in judicial justifications, is an example of giving up the positive core of the meaning of a "precedent" and of diluting its essence. Thus, it is necessary to assume that the term: a *de facto* precedent possesses the broadest meaning and covers all cases of influence of some judgments on other judgments of a different nature: institutional, argumentative, related to the theory of exegesis, etc. What they have in common is the assumption that such a precedent, which should not be called a real precedent but a precedent *sensu largo*,[18] has normative significance but not in a validating sense. In other words, it is assumed that indication of or reference to a judgment of another court made in the justification to another judgment is an example of a "precedential" action. This approach adopts an element of the pattern of behaviour from the Anglo-Saxon construction of a precedent but without formulating a condition that for a precedent to be included in the statutory law order, it

[17] The lack of a body in the legal system responsible for commonly binding interpretation of law puts an end to phenomenological concept of legal texts interpretation, which assumes the necessity to refer to superiors for interpretation in case "the direct understanding" is disturbed. The conception originates from St. Augustine's philosophy of *ius naturale*. Compare, A. Kozak, *Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa* [The dilemmas of legal discretion. Between political ideology and the theory of law], [in:] W. Staśkiewicz, T. Stawecki (eds.), *Dyskrecjonalność w prawie* [Discretion in law], Warsaw 2010, p. 60.

[18] The present article has not been influenced by the broad and narrow understanding of the term "precedent" suggested by J. Wróblewski. Also the concept of a precedent *sensu largo* is defined in the article differently than in the works of that author, although, because of obvious reasons, it is based on the aspect of being bound by interpretation. However, the understanding of the concept of a precedent *sensu stricto* is identical, limited only to its construction as it happens in the common law system. Compare, J. Wróblewski, *Wartości a decyzja sądowa* [Values vs. court decision], Wrocław 1973, p. 133.

is enough to assume that the originally worked out meaning of a norm is binding (obliging) in the formal sphere. This means that every argument indicated in the justification to a judgment that refers to the interpretation of law developed by courts is quasi normative, although this "normative feature" does not have the status of formal or material binding. That is why, there is a term of a *de facto* precedent and, if we take into account the scope of judgments matching this sense, a precedent *sensu largo*. This approach is, even intuitively, exposed to criticism because of a too broad scope of the meaning and a shift of stress from a precedent as an instrument of judicial power to "the principle of precedent" as a form of argumentation.

The concept of precedent *sensu stricto* (*de iure*) is the opposite, which assumes a transfer of all main features of the instrument into the culture of statutory law. This means that in some circumstances the justification of the adopted meaning of law has a validating status[19]. This means that it constitutes an independent source of a legal norm reconstruction equal to sources of law. In other words, a court's justification as a source of law cognition has a formal binding status (i.e. a court must take it into account when adjudicating) and a substantive one (the court adopts the interpretation of law established in original judgments).[20]

In the Polish legal order, there is no room for precedents classified in this way, and if there are opinions in the literature that precedents *sensu stricto* exist, these are statements *de lege ferenda*.[21] Essentially, such an opinion is supported not only by the closed constitutional conception of sources of law based on legal acts developed by the legislative branch but also the lack of common binding power of law interpretation provided by whatever body involved in law application.[22] Moreover, the above results

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[19] This group of opinions include works devoted to the concept of judicial legislation. The literature on this issue and the concept of precedent quotes the publications by: R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego* [Significance for law-making of the Constitutional Tribunal rulings in the judgments of the Supreme Administrative Court], Warsaw 2008, passim, and A. Stelmachowski, *Prawotwórcza rola sądów (w świetle orzecznictwa cywilnego)* [Legislative role of the courts (in the light of civil law judgments)], Państwo i Prawo No. 4–5, 1967, passim, following T. Stawecki, *Precedens w polskim porządku…* [Precedent in the Polish legal order...], pp. 59 and 83.

[20] Compare, *ibid*., p. 61.

[21] Compare, L. Morawski, *Precedens…* [Precedent...], pp. 11–12 and by the same author, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [Key issues in the contemporary philosophy of law. Law in the course of changes], Warsaw 2003, p. 284.

[22] This opinion is also supported by the comment that the Supreme Court rulings are not "applied" but what is applicable is the legal state developed by those rulings concerning compatibility or incompatibility of the reviewed act with the normative pattern reviewed. Compare, E. Łętowska, *Sądy nie mają styku z wyrokami TK. Stosują jedynie ukształtowane prawo* [Courts' verdicts do not coincide with the Constitutional Tribunal judgments. They apply only statutory law], at: http://prawo.gazetaprawna.pl/artykuly/1030492,sady-nie-maja-styku-z-wyrokami-tk.html [accessed on 31.03.2017].

On the other hand, the opinion is in conflict with the stand concerning judicial "crypto-legislative" role, mainly, of course, "quasi-legislative" role of the Constitutional Tribunal rulings, presented over many years both in theory and legal dogmatisms. Similar arguments can be applied to the process of adopting justification of judgments of supreme courts: the Supreme Court and the Supreme Administrative Court by various law application bodies. "Application" of judgments does not take place in the continental culture of course because it would be an example of a precedent, but the "application" understood as the "use" of argumentation

from the necessity of separating the acts of enacting and applying law in order to maintain legal, cultural and historical identity. Moreover, the transfer of so strictly understood precedent directly from the culture of common law to the area of statutory law would have to be done without the consent of the legislator who introduces to the system specific instruments which, coincidentally, already resemble the instrument of a precedent *sensu stricto* or at least considerably gets closer to it.[23]

Summing up this thread of thought, it is worth reminding that although a precedent in the Anglo-Saxon culture is associated with strong autonomy of judicial power, from the point of view of the process of law application, it is an instrument narrowing the judicial discretion to adjudicate. The role of a precedent is to organise and standardise case law. From the point of view of a representative of the Anglo-Saxon culture, a precedent may be assigned a more important role in narrowing the possibility of free development of law and its significance in validating sense than in granting competence to freely develop new general rules in relation to similar cases. Thus, what the representatives of the civil law culture are "impressed" by does not seem to be the essence of a precedent from the point of view of the common law culture.

4. PRECEDENT AS INTERPRETATIONAL HEURISTICS

The concept of heuristics is useful for the analysis of interpretational processes from the perspective of an interpreter's action. The concept focuses on all aspects conditioning an exegete's activity aimed at searching for the meaning of law. On the other hand, the limitation of the field of research only to strictly juridical threads analysing which theoretical conceptions and in what form are used within the specific decision-making processes in the field of exegesis (e.g. within the action of the legal doctrine, legal practice, etc.) becomes a subject matter of the approach analysing the interpretation in terms of a pattern of an interpreter's action that becomes a secondary term in relation to interpretational heuristics. Therefore, such an approach is only normative and limits the field of analysis to the theory of exegesis.[24]

By the same token, a precedent in the statutory law culture must be analysed through the prism of interpretational heuristics because the continental theory of exegesis does not know the instrument of a precedent "as such", as it is limited to the interpretation of sources of law in the form of statutory legal acts. One cannot confuse a source of law with the sources of its cognition, which indirectly influence the content of the decision made concerning the meaning of law. The situation when the decision-

presented by the supreme judicial bodies is a common phenomenon. Compare, L. Morawski, *Precedens*… [Precedent...], pp. 8–11, the concept of "crypto-legislation" on p. 10.

[23] The instruments of positive law that are closest to a precedent are resolutions issued by enlarged benches of the Supreme Court and the Supreme Administrative Court, and the Supreme administrative Court resolutions have a stronger binding power than the Supreme Court ones. Compare, Article 269 para. 1 Law on the procedure before administrative courts.

[24] Here, I mainly mean research activity and concepts presented by P. Chmielnicki. Compare, P. Chmielnicki, *Identyfikacja celów i funkcji w ramach wykładni prawa* [Identification of aims and functions for the interpretation of law], Przegląd Prawa Publicznego No. 3, 2015, passim.

making body also takes into consideration other sources influencing the final decision such as morality, opinions of science (not only jurisprudence) or any other factors that, even in an exegete's opinion, are responsible for the reconstruction of the meaning of law, does not change the fact that only positive law, namely the validated editorial components of a normative act, is an initial factor responsible for taking a decision in a normative sense, as the basis for every decision on law application. All the other sources of reconstruction of a decision have the power to weigh reasons within the scope of the choice of the meaning alternative or the direct reconstruction of semantics.[25]

All the statements indicating a possibility of transferring the construction of a *de iure* precedent to the statutory law order should be treated either as a *de lege ferenda* category (and in such a formula they have been presented so far[26]), or directly in opposition to the construction of statutory law culture. On the other hand, the formula of a *de facto* precedent has a very low explanatory power. The term lacks the positive meaning core,[27] and it neither expresses what a precedent would be in the civil law order nor what its characteristic features would be.

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[25] As a curiosity, it can be pointed out that the presented stand differentiates the conceptions of law interpretation. It is closer to J. Wróblewski's concept of clarification and not fully compatible with the classic ("narrow") derivative concept, and different from validating-derivative theory of interpretation treated as another theory of the derivative type. In this conception, the validating basis is not only composed of the content of a normative act but also basic moral principles in accordance with R. Dworkin's integration concept. However, this causes adaptation difficulties on the basis of statutory law because it requires, for methodological coherence, operating a non-linguistic concept of a legal norm, which as such may be treated as an interpreter's behaviour of the interpretation of *contra legem* type. In such an approach, a precedent may be an element of the reconstruction of the decision (adjudication) but it is highly controversial whether it should be an element of reconstruction of a validating basis. L. Leszczyński presents such an opinion in the literature. Compare, L. Leszczyński, *Precedens jako źródło rekonstrukcji normatywnej podstawy decyzji stosowania prawa* [Precedent as a source of normative reconstruction of the basis of a decision on applying the law], [in:] I. Bogucka, Z. Tobor (ed.), *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego* [Law and values. Professor Józef Nowacki jubilee book], Kraków 2003, passim.

The statutory law orders only use a linguistic concept of a norm and bind an interpreter with the type of sources of law determined by the legislator. That is why, the opinion on admissibility of creative interpretation as a tool of a justice institution is highly controversial. Compare, T. Flemming-Kulesza, *Czy w Polsce możemy mówić o prawie precedensowym?* [Can we speak of precedent law in Poland?], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim* [Precedent in the Polish...], p. 15. Also M. Zirk-Sadowski drew attention to this issue. Compare, M. Zirk-Sadowski, *Precedens a tzw. wykładnia prawotwórcza* [Precedent and the legislative interpretation], Państwo i Prawo No. 6, 1980, p. 71.

On the other hand, according to J. Wróblewski, "creating" meanings through a specific intermediate stage, in addition realised by an interpreter, is always an example of constructive interpretation *sensu largo*. Compare, J. Wróblewski, *Sądowe stosowanie prawa* [Application of law by courts], Warsaw 1973, p. 115 and by the same author, *Precedens i jednolitość…* [Precedent and uniformity...], passim. According to other opinions, the transgression of the literal border of interpretation, understood as the linguistic meaning of a given statement, is simply an analogy. Compare, L. Morawski, *Wykładnia w orzecznictwie sądów* [Interpretation of law in the court judgments], Toruń 2002, pp. 292–293.

[26] "Because of that I think that the interpretational decisions that are clearly creative in nature and are unpredictable to the addressees of legal norms should be binding in the future". Compare, L. Morawski, *Precedens…* [Precedent...], p. 12.

[27] Compare, J. Wróblewski, *Rozumienie prawa i jego wykładnia* [Understanding of law and its interpretation], Warsaw 1990, pp. 55–56.

5. TRANSPOSITION OF SEMANTICS AS A LINGUISTIC PHENOMENON

Since a precedent is explained as the replication of the interpretation of law in two formulas: the "transposition" of semantics and an interpretational mechanism consisting in exegetic activity in this way, there have been attempts to find out which linguistic mechanisms are most similar to such a definition of a precedent.[28] Also in the Anglo-Saxon culture, "the use of modern philosophy of language and the philosophy of interpretation (hermeneutics), and the formulation of argumentation and communication theories applied to law changed the modern vision of law and the concept of a precedent".[29] Therefore, referring to the output of the linguistics sciences is in a way "at the root" of an instrument of a precedent treated as appropriate.

W. Quine, who does not use the concept of transposition of semantics alone, writes about similar linguistic mechanisms. However, he formulates a series of comments concerning the methods of constructing interpretations describing cognitive mechanisms responsible for the production of meanings in an interpreter's mind, following a scheme resembling "precedential" action. It must be indicated that the conception of a precedent as transposition of semantics meets both above criteria giving up only the aspect of institutional binding. The concept of transposition includes an element of transferring not only the "ready-made" semantics but also duplication of the process leading to its production.

W. Quine's basic statement consists in an observation that language is a socially established disposition to react to specific impulses (by means of learnt habits).[30] Thus, the use of language follows the principle of re-cognition: comparison of the relation "name – name" rather than "designate – name", i.e. it consists in duplicating identical pragma-linguistic behaviour of other language users.[31] It is important to mention that such use of language is a certain natural mechanism, which takes place independently as an inborn disposition to react to some stimuli. Thus, naming objects and acquiring meaning takes place in the form of reconstruction of a pattern of another language user's action, which leads to the creation of an identical name. Therefore, identical semantics come to existence following the duplication of language users' mechanisms of action and not the other way round. This comment is especially important in the statutory law culture for the search of such law application bodies' interpretational behaviour that would have the semantics duplicating features in the course of their transposition.

It is also worth indicating here that such an interpreter's action would result, as it has been mentioned above, from cognitive features of reconstructing any meanings. Thus, the mechanism would be responsible for their development also

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[28] "Precedent" within the philosophy of language was also analysed by M. Matczak. Compare, M. Matczak, *Teoria precedensu czy teoria cytowań*, [Theory of precedent or theory of quotations], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens w polskim…* [Precedent in the Polish...], passim.

[29] Citation, T. Stawecki, *Precedens jako zadanie…* [Precedent as a task...], pp. 230–231.

[30] Compare, W.O. Quine, *Słowo i przedmiot* [Word and Object], Polish translation by C. Cieśliński, Warsaw 1999, p. 1.

[31] Compare, *ibid*., pp. 13–15.

in legal discourse, including the discourse on law application. This might explain the intuitive mechanism known to everybody who experienced the specificity of operational interpretation of law: searching first of all interpretational patterns from the judicature and the doctrine. This way, a precedent would be a natural basis of reconstructing meanings, and only the lack of possibility of their duplication would result in the necessity of implementing any known methods of law interpretation. This type of features, resulting e.g. in the development of the adjudication policies by means of the worked out standards of interpretation, are based on the mechanism of duplicating similarities. This means that a certain number of cases are adjudicated similarly and do not only introduce a given rule but also standardise the method of its introduction both pragmatically (methods of working with a text) and non-pragmatically, both negatively and positively (to what meanings the interpretation may lead or which meanings are obtained). W. Quine lists the following conditions for such a mechanism:[32]

1) Striving for objectiveness because we want to solve interpretational problems in the same way, which results from a natural dislike for the production of meanings other than those produced by other members of the community taking part in communication;
2) Social "legitimisation" of the meaning because both the "entry" system in the process of perception (the object perceived) and the "exit" system (final "adjudication" on semantics) create "the same stimuli system"; we all want to achieve the same or as similar as possible final result.

The above indicates that W. Quine unambiguously assumes that, although we "produce" meanings independently, we duplicate patterns of their reconstruction based on other people's behaviour and that this is a mechanism naturally conditioned and socially strengthened. It plays an important role in the reduction of antagonisms at the level of inborn behavioural reactions in the field of language use. It also ensures the possibility of standardisation of methods of language use.[33]

Reference of the observations to the issue of law interpretation and the adoption of an assumption that it also takes place at the level of cognitively conditioned mechanisms of language use create a specific situation of original conformism in the process of interpretation, which results in the continental formula of a precedent. If we assume that the search for identical or similar interpretational patterns, leading to the same or similar semantics, has a strong psychological foundation, the mechanism of something that in law can be called "precedential thinking"[34] will take place as an initial phase of every type of interpretational behaviour, also in the continental culture. On the other hand, final situations consisting in the decision whether transposition of semantics would really take place and adjudication would be issued based on the "precedential" mechanism are a completely different matter.

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[32] Compare, *ibid*., p. 20.

[33] Compare, *ibid*., p. 34.

[34] Following the pattern of multicentric thinking. Compare, E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje* [Multicentricity of the contemporary legal system and its consequences], Państwo i Prawo No. 4, 2005, p. 3.

First of all, it should be noticed that such a definition covers judgments commonly recognised as "precedential", although they do not possess such features at all. It concerns in particular such cases that have not been adjudicated on based on a specific validating basis because of the unusualness of an actual state. As a result, a subject to a norm has never been the subject of a court's judgment before due to the lack of judgments in this scope.[35] The judgment might have been precedential if, in order to issue it, the mechanism of duplicating a pattern of reconstruction of semantics had been used and a judgment had been made based on another case recognised as "similar". However, the conception of "multiple consolidation"[36] presented in the literature as the formula of a real precedent ("non-binding judicial precedent") has nothing in common with the exposed mechanism of transposition of semantics. In short, it consists in indicating cases of real precedents in the form of their intuitive recognition in legal circles, i.e. "reference made to other judgments", which "makes it possible to explain that, in the system of law that is not based on a binding precedent, reference to judicial judgments is an element of an analysis of the meaning of a legal text (…) because they are other uses of the terms by the members of the given communication community".[37] The conception of transposition of semantics presented here is a much narrower approach. Firstly, it does not admit speaking directly about a precedent in the statutory law culture, and secondly, it focuses on the phenomenon of a precedent placing it in the linguistic mechanism of reproduction of a pattern of an action of an interpreter, who causes the development of semantics, which can, although does not have to, become "multiply consolidated".

The attractiveness of the proposed precedent formula in the statutory law culture makes it possible to explain many mechanisms governing the specificity of an operational interpretation. It should be indicated straight away that cases of issuing judgments in such a "precedential" way are not numerous and difficult to "detect" in the analyses of judgment justifications. The fact that exegesis, first of all, cognitively looks for a possibility of applying transposition of semantics does not result in the fact that the process will take place and will be exclusively responsible for an interpretational decision constituting the basis of a given judgment.

Factors determining the mechanism of transposition of semantics within the operational interpretation include:

1) Legitimacy (legitimization before the community, sometimes called an internal aspect of justification, i.e. arguments concerning the meaning of law before the closest communication community, mainly judges of the same court, chamber, etc.[38]).

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[35] It is absolutely worth indicating that a "precedent" of a case is also defined this way in legal language. Compare, Article 47 §4 CPC: "The president of a court may rule adjudication of a case by a three-judge professional bench if he recognises it advisable because of special complexity and precedential character of a case."

[36] Compare, M. Matczak, *Semantyka Kripkiego-Putnama a język prawny* [Kripke-Putnam semantics and the language of law], p. 21, at: http://pts.edu.pl/teksty/marmat.pdf [accessed on 02.04.2017], passim.

[37] Citation, *ibid*., p. 21.

[38] Compare, E. Łętowska, *Czy w Polsce możemy mówić o prawie precedensowym* [Can we speak of precedent law in Poland?], [in:] A. Śledzińska-Simon, M. Wyrzykowski (ed.), *Precedens*… [Precedent...], p. 9.

In general, it concerns duplicating meanings adopted by other members of the communication community. The mechanisms that W. Quine indicates show that we do not really want to legitimise the meaning in relation to an addressee of a statement but in relation to those who, in the opinion of the interpreter, have power over the imposition of the rules of constructing the meaning.[39] The author indicates that assigning meanings is based on the same stimulus meanings,[40] which means that a stimulus is the same for a given system of signs, and a language user chooses a similar (or identical) meaning. Thus, the production of identical semantics takes place based on the fact that we observe how other language users call objects, but the mechanism responsible for that is not copying a name but copying the procedure of assigning names, although in case of specific names of empirical objects, the problem is trivial. What is important is the issue of abstract names, which plays a special role. The observation of a context in which a name occurs is of key importance because it determines its use in a particular way, sometimes based on the principle of transposition of semantics, where the component of transposition (duplicating) of the naming procedure is most important. Such a mechanism plays a special role in law interpretation, in particular within operational interpretation because identical validating bases of interpretational activities are a synonymous stimulus, in the formula of pragmatic interpretation (implementation of identical methods of interpretation) or non-pragmatic one (performance of designating operations).[41] The legitimising aspect of performing interpretational operations seems of key importance in the realities of the continental culture and similarly to the common law order is determined by an adopted habit.

2) Unification is responsible for the already mentioned possibility of explaining various issues with the use of standardisation of the methods of acting and interpretational judgments. It is a social phenomenon reducing antagonisms. In such an approach, in case of approval of the conception presented, the principle of uniformity of judgments would come into being "on its own", as a social phenomenon in a given communication group, in this particular case: judges.[42]
3) Conservatism is responsible for evolutionary and not revolutionary changes in the adopted meanings and patterns of interpretational actions. In some sense,

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[39] W.O. Quine presents a famous example of a "colour blind person" who was taught to react to certain physicochemical stimuli not based on an inborn skill to differentiate them but the system of bonuses and penalties funded by given persons responsible for assigning them. Compare, W.O. Quine, *Słowo i przedmiot...* [Word and Object...], p. 21.

[40] Concept of "synonymity of a stimulus", compare, *ibid*., p. 62.

[41] The conjunction "or" was used on purpose because the analysis of the operational interpretation indicates that the meaning is rarely obtained only by the use of interpretation methods exclusively.

[42] It is worth noticing that the claim to standardise meanings addressed to all bodies applying law does not only originate from the society but is an independent directive on the behaviour of people playing social roles in those bodies. Compare, L. Leszczyński, *Jednolitość orzecznictwa jako wartość stosowania prawa* [Uniformity of judicature as a value of application of law], [in:] *Studia i Analizy Sądu Najwyższego* [Studies and Analyses of the Supreme Court], Vol. I: M. Grochowski, M. Raczkowski, S. Żółtek (eds.), *Jednolitość orzecznictwa. Standard – instrumenty – praktyka* [Uniformity of judicature. Standard – instruments – practice], Warsaw 2015, pp. 9–11 and 13–14.

in the specificity of law interpretation, it consists in the minimum consent of the decision-making body to "impose a solution concerning the approved interpretational actions. In this meaning, it is very important to notice that law interpretation theories created (developed) in general jurisprudence (e.g. clarification- or derivation-related ones) are more eagerly adopted in practice, provided that they are closer to natural language use and adequate to the specificity of this "use" in order to obtain a meaning within the given communication community. Even if a "competitive" theory has specific cognitive or methodological features, it faces difficulties concerning the establishment of adopted interpretational patterns.[43] It can be described as unwillingness to change in interpretational practice.[44]

4) Conformism consisting in cognitive conditions and social inclinations strengthening the tendency to implement the existing (known) patterns of interpretational procedure because non-conformism requires that an interpreting body should show stronger tendencies to take non-standard interpretational decisions and stronger inclination to decision-making in order to get out of the typical "feeling of the legitimisation state" concerning the meaning of law. It must be highlighted that the above features of the body's interpretational action should not be pejoratively assessed and that judicial moderation that is the basis of conformist behaviour must also result in moderate and conformist judgments.[45]

6. PRECEDENT AS THE TRANSPOSITION OF SEMANTICS – THEORETICAL CONDITIONS

The basic difference concerning the reference of an instrument of a precedent to the statutory law culture is the issue of different conditions of the process of law application. Attention is also drawn to that in the literature.[46] In case of judicial law order, the premise of actual state similarity, originally responsible for implementation of the same norm with the use of the principle of *stare decisis*, is an entry premise responsible for W. Quine's stimulus synonymity. A judge's (and every other lawyer's) reasoning sequence in the Anglo-Saxon culture is totally different from a pattern in the civil law order. Mechanisms responsible for a precedent are based

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[43] E. Łętowska indicates the phenomenon of "learnt" precedential thinking. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 10.

[44] The concept of established meanings, which were quoted, may be also referred to the factor of conditioned interpretational patterns (e.g. with regard to the use of the concept of direct understanding (the paradigm of *clara non sunt interpretanda*, etc.). Such an approach to "establishment" seems to be even more adequate than one referred to the issue of duplicating semantics. Indeed, it is difficult to distinguish when it would be repeatedly established and when it would only play the role of an argument from justification or an authority. Compare, M. Matczak, *Semantyka Kripkiego-Putnama…* [Kripke-Putnam semantics...], p. 4 ff.

[45] The issue of decision-taking conformism is referred to law interpretation and not decisions concerning the essence of the case, especially in the regime of exploratory proceedings, basically dependent on the conditions resulting from evidence collected in the case and assessed based on the directives for the assessment of facts.

[46] Compare, T. Stawecki, *Precedens w polskim porządku…* [Precedent in the Polish legal order...], pp. 62–63.

on the assessment of facts and only then lead to recognition that a case requires or not an identical normative statement. This pattern of procedure applies mainly to facts and not to exegesis.

On the other hand, in the statutory law culture, the model of law application is completely different and the system of assessment consisting in duplication of a pattern of a body's action refers to facts but of positive law in the form of a normative act. A precedent in the statutory law culture does not consist in duplicating the same validating basis and the meaning of law in relation to two similar cases. This way of defining a precedent in the specificity of statutory law results in a conceptual trap signalled a few times already, because it too extensively extends the concept of a real precedent by "first" issues, i.e. adjudication based on the norm that have never been used before from the validating perspective, as well as an act of duplicating the decision by reference to it in arguments. What determines this precedential thinking is a court's conscious use of the formula of a precedent because an interpreter's feeling that the original meaning of law is binding is so strong that there is duplication of the pattern of acquiring its meaning together with meeting the specific requirement of identity (similarly to the pattern of stimulus synonymity described above).

The condition does not concern the real aspect of a case but a court's recognition that there is identity in two spheres: (1) the choice of a validating basis of the judgment, i.e. which normative act and which fragments of it will be necessary to issue a decision on the specific type of law application; (2) the transfer of the method of acquiring the meaning of law in the formula of identical interpretational actions, i.e. the implementation of the same system of methods, directives or arguments justifying the interpretational decision from another judgment, maybe issued in a case concerning a different actual state.[47] This is why, the concept of transposition of semantics is useful, because transposition refers to the course of action and not an individual body's activity. What is also necessary is an interpreter's self-conscience that he duplicates the method of acquiring the meaning of law from another court's judgment for the case he adjudicates on. Such cases are rare because they do not concern the transfer of the meaning of law alone.[48]

It must be highlighted that a precedent defined this way differs from its common understanding,[49] especially presented in public discourse, where it is understood as a judgment issued based on law "unused" so far, i.e. regulations that have not

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[47] It is the broadest approach to the term "law interpretation". As a rule, the stand of the theory of law is presented as one separating the sphere of interpretation from justification of (arguments for) an interpretational decision but in the practice of law application, the concepts are very often, if not most often, treated as synonyms. Compare, M. Zieliński, Z. Ziembiński, *Uzasadnianie twierdzeń, ocen i norm w prawoznawstwie* [Justification of statements, assessments and norms in jurisprudence], Warsaw 1988, p. 6.

[48] These are cases of those established meanings or uses of arguments of an authority (the judgment and a body issuing it are responsible for an "authority", e.g. a higher instance court) characterised by the fact that they are easy to support an interpretational opinion.

[49] In particular, it differs from the practice of "collecting" "random judgments from Lex" in a procedural document or justification. Such construction of justification of a judgment has nothing in common with the instrument of a precedent. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 11.

been a basis of court decisions before. What is important in a "common" precedent is the validating issue, regardless of the method of acquiring semantics because in analyses it focuses on how this "unused" law shapes the judgment (concerning the essence of the case), while the transposition of semantics concerns focusing on the mechanisms of duplicating a judge's interpretational action. The issue of judgment remains insignificant from the point of view of transposition of semantics.

This way, a precedential judgment, as defined by the mechanism of transposition of semantics, may be only one that was issued after an interpretational decision taken in specific conditions, within an interpreter's specific action. The conditions include:

1) A lack of intuition about the meaning of law. It concerns cases where there is no possibility that a judge makes use of the state of "direct interpretation" of a legal text or can make use of a legal maxim: "clear phrases are not interpreted" (*clara non sunt interpretanda*).[50] Thus, it concerns cases when the meaning of law is either not conceptualised at all and a judge draws a conclusion that he must interpret it by looking for "ready-made" meanings worked out by only one judicature (this is very important and only based on that we can speak about a precedent), or transfer a determined system of interpretational methods and establish the sense (meaning) of selected fragments of a legal text, i.e. transfer a system of reasoning from the area of linguistic-logical, purpose-related or systemic methods. This condition is very important and makes it possible to differentiate, in the conditions of the continental culture, between a court's use of a "precedent" and the use of arguments of the existing judgments or the doctrine (which most often takes place jointly in the form of reference to output, if it exists, from both sources);
2) Evoking a state of synonymity of a stimulus by establishing that there is another judgment the reasoning pattern of which is suitable for transposition to an adjudicated case. There is no requirement for the identity of a factual state of a case, which is irrelevant. A court adopts the establishment that there is a judgment issued in a specific factual state the interpretational pattern of which may be transposed to the adjudicated case. The stage can have in two variants.

   The first one consists in duplicating the pragmatics of interpretation, i.e. undertaking identical interpretational actions, application of the same approach to specific interpretational methods, reasoning included in them, the sequence of their use, etc. It concerns a situation when, expressing it colloquially, "I will do the same as another court" but, what is very important, without the knowledge of or a possibility of transposing the semantics. In the literature, similar situations are sometimes described as "rules of adjudicating on a certain category of cases".[51] It is very important to acknowledge that only then, and totally externally (as it were from a position of an observer), it can be established that:

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[50] There is no room in the present article for a discussion of theoretical conceptual differences between the two institutions of exegesis.

[51] M. Matczak uses the concept, although in a little different context. Compare, M. Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa* [*Summa iniuria*. On the error of formalism in applying the law], Warsaw 2007, p. 79.

– in the "original" case, the source of synonymity of a meaning stimulus, is a precedential judgment because it will result in the possibility of semantic transposition in the future;
– in a case in which there is duplication of the pattern of an interpreter's action, the proper semantic transposition is the above-mentioned formula of a precedent which, in the specificity of the continental culture, consists in duplicating an interpreter's action.

This element would be responsible for the equivalent of the components of a precedent looked for in the statutory law in the form of the principles of *ratio decidendi* and *stare decisis*. The former results from motives behind a court's choice of the state of synonymity of a stimulus, and the latter was responsible for the feeling of the state of binding, however, by maintaining interpretational sovereignty of a judge.

The second variant consists in the transposition of the meaning of law alone and it is, in principle, an analogy to which a court does not confess because of some reasons. It is worth indicating that such assessment is not unknown in the Polish literature, and a precedent in the continental culture is sometimes associated only with some forms of reasoning *per analogiam*.[52]

In order to acknowledge that the pattern of an interpreter's action is possible to be transferred to a case adjudicated, one can also, for descriptive purposes, use a concept of equivalent facts. In the statutory law culture, they are not related to the issue of factual establishment but to facts established by a court concerning the circumstances of the course of interpretation in a "similar" case and an assumption that it is possible to use the identical interpretational pattern.

3) The third stage is the development of semantics, or the meaning of law. Regardless of the form: the pattern of an interpreter's action or that "hidden" analogy, the meaning alone always results from transposition and is not an independent effect, even if the decision-making body is not aware of it or the decision-making process was not complex. This last stage is very important and makes it possible to maintain the condition of continental culture identity, which means taking final interpretational decisions independently by a court without a possibility of assuming that a judgment of another court has a validating status. It is a court's sovereign decision what the shape of the semantics of a legal text is and whether it is identical or only similar as a result of transposition of patterns of interpretational action from a different judgment. Therefore, a precedent in a formula of semantic transposition is a form of a real precedent, a non-binding one but

[52] A. Korybski presented such a stand during the conference; by this author, *Precedens a rozumowanie per analogiam legis* [Precedent and the *per analogiam legis* reasoning], conference on 20 March 2017. Everyone who had an occasion to see the practice of judicial application of law knows cases of implementation of analogous meaning of law without verbal expression of that fact in the justification of a judgment. Especially, as such operations are fully admissible in the law of the procedure and substantive law if they do not result in the deterioration of the legal interest of a party. Also compare, T. Stawecki, *Precedens jako zadanie…* [Precedent as a task...], pp. 242 and 245–246.

formulating very precise conditions of its institutional being in continental legal systems. It is not an interpretational precedent, which is sometimes distinguished in the literature.[53]

7. PROS AND CONS OF THE TRANSPOSITION OF SEMANTICS AS A PRECEDENT FORMULA

The considerations in this section have the features of an auto-reflexive research basis with an aim to indicate strengths and weaknesses of the presented concept of a precedent. It seems that the arguments for linking transposition of semantics with the continental formula of a precedent are as follows:

1) Strong explicating power because the presented formula allows one to easily reject the null hypothesis stating that there are no precedential judgments in the population of judgments in the statutory law system of an X state and, as a result, prove the alternative hypothesis, i.e. one stating that a precedential judgment can be found in such a system. This observation and the assessment results from the simple constatation that judgments described by the formula of the semantic transposition are just issued even if it is a rare phenomenon[54] because it is limited by strict requirements.
2) The conception presented is compatible with the canons of the continental exegetic thought – a legal body performs transposition; it is its sovereign decision.[55] It does not make it exempt from responsibility for:
   a. undertaking the procedure of semantic transposition (of a precedent);
   b. a judgment, which is extremely important for meeting a requirement to maintain the features of the subsumptive model of law application (including the decision-making model) and its derivatives, including taking into account the principle of jurisdictional independence.

   It is worth adding that it does not aim to indicate that the strong cognitive power of the theory presented originates from the fact that specific mechanisms occurring in the practice of adjudicating have been artificially included in

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[53] L. Morawski registers such a concept but does not associate the essence of a precedent with it. Compare, L. Morawski, *Precedens*… [Precedent...], p. 4. Regardless of the indefinite scope of the term, it seems that such a type of precedent concerns the first application of given arguments justifying an interpretational decision and does not concern the process of interpretation as a pattern of an interpreter's action, and especially the term is not involved in cognitive mechanisms of obtaining semantics. It seems it is based on joint treatment of interpretation and justification processes, which is inappropriate because these are two different cognitive processes and rightly, mainly within the term, the "mixture" of research ("descriptive and normative") perspectives takes place. Compare, T. Stawecki, *Precedens w polskim porządku*… [Precedent in the Polish legal order...], pp. 62 and 66–67.

[54] Practitioners share the opinion about the insignificant role of a precedent, although they define a precedent differently. Compare, T. Flemming-Kulesza, *Czy w Polsce możemy mówić*... [Can we speak of precedent...], p. 16.

[55] Regardless of how it is understood, the significance of this aspect of "precedent" in statutory law is indicated in the literature. Compare, R. Hauser, J. Trzciński, *Prawotwórcze znaczenie*… [Significance for law-making...], pp. 40–41.

the concept of a precedent in a certain formula. It would not make sense and such assessment might be made in relation to the broad definition of a *de facto* precedent. Indeed, the requirement number 2 presented here makes the strong explanatory power of the theory result from the fact that the proposed depiction of a precedent contains necessary components of this instrument of the case law order, because it focuses on searching for and describing the mechanisms of the statutory law culture that meet the requirements of a precedent in the conceptual sense. It avoids a specific error of a categorical shift, not to say that a precedent in the statutory law takes place only based on the observation of argumentative reference to judgments,[56] which as such does not contain components responsible for the essence of the mechanism in the common law culture.[57]

3) The third requirement concerns the already mentioned maintenance of the basic feature of a "precedent", which means basing on the former semantics but indicating that it is a secondary feature as the primary one consists in duplicating an interpretational pattern of behaviour (interpretational heuristics). It is worth adding that such a mechanism seems to fully correspond to the reasoning in the "original" Anglo-Saxon precedent, where "precedential" procedure occurs based on a pattern of inductive thinking and the analysis "of many former decisions".[58] Thus, the semantic transposition is a decision-making process and not an individual act of reference to pure semantics from a specific source. At the same time, the presented conception does not stand in opposition to "precedent" as it is understood in terms of legal language[59] and as commonly understood first interpretation of a specific validating basis, although only when another court duplicates the interpretational pattern, i.e. performs transposition of semantics interpreted in the "first" judgment.

Factors that show drawbacks of the conception of semantic transposition include the following:

1) A broad explicatory scope, which is an advantage, may also seem to be a drawback. Theories developed in too broad areas usually pose methodological problems because, as a rule, this multiplies research questions and theoretical disputes. The process of knowledge standardisation alone is a delicate one in accordance with the opinion that "you can't play 20 questions with nature and win".[60]

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[56] The term "free stream of associations" is especially accurate here. Compare, E. Łętowska, *Czy w Polsce możemy...* [Can we speak...], p. 12.

[57] T. Stawecki presents a similar methodological stand. Also compare, a comment by the author: "It is often stated that in the *common law* system there are no precedents *de facto*, however, in statutory law countries precedents *de iure* are not recognised". Compare, T. Stawecki, *Precedens w polskim porządku …* [Precedent in the Polish legal order...], p. 61.

[58] Compare, T. Stawecki, *Precedens jako zadanie…* [Precedent as a task...], pp. 243–245.

[59] Article 47 §4 CPC quoted above.

[60] It is the title of the famous work by A. Newella of 1973 in the field of cognitive science, in which many fascinating experiments, mainly psychology-related ones, are reported. The author makes a conclusion that there is no sense and possibility of developing a coherent theory based on them aimed at the evolution of research as a whole. The work is often referred to as criticism of science integration (at different levels and in different disciplines) implemented without

2) Although the theoretical assumptions presented are in fact compatible with intuitive understanding of what a precedent is, the conclusions have been drawn without conducting formal studies, especially empiric ones. The problem seems to be a disruptive factor but it is necessary to indicate that in science there is no greater "enemy" than auto-suggestion and theories believed to be self-adaptative are usually not such, which results from the fact that phenomena are determined by many factors.
3) The conception presented is characterised by hermetic language used in this paper with some necessary simplifications. Thus, it may meet with criticism of an attempt to describe a strictly legal instrument with the use of unnecessary complicated conceptual apparatus. However, such an opinion would have to be based on a narrow positivist approach to jurisprudence and an assumption that the specificity of legal interpretation does not force its deeper linguistic analysis. However, this way law and jurisprudence concerning this phenomenon are deprived of the necessary cognitive apparatus based on other sciences as well as are led to a possibility of formulating inappropriate conclusions because they may be drawn from an incomplete picture of the actual state.

The article totally ignores the issue of assessment whether the practice of semantic transposition, as a continental mechanism of a precedent, if defined in the proposed way, is positive to some extent or not, especially if we take into consideration aspects of auto-reflection of a court, heterogenic structure of the pattern of decision reconstruction, etc.[61] The aim of the presented conception was to describe the actual state without the assessment, especially through the prism of axiology, within the area of philosophy or ethics.[62]

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PRECEDENT AS THE TRANSPOSITION OF A NORMATIVE ACT

Summary

This paper deals with precedents in civil law. The author's assumption is that the specificity and constructs of the legal culture developed in continental Europe do not give grounds for claiming that precedents in the civil law systems occur in the same way as they do in the Anglo-Saxon system. In the civil law systems, a court decision is intrinsically not a source of law. Following a brief summary of relevant views of legal academics and commentators, this paper reflects upon certain mechanisms of a judicial authority's action, which fulfils the criteria of a precedent. Parallels are sought between the semantic transposition mechanisms and the precedent formula modelled on research in linguistics is presented. Thus, the article outlines preliminary assumptions for the concept of a "precedent", which builds on the courts' practice to duplicate the meaning of law based on specific criteria set forth in this paper. Finally, pros and cons of the concept are summarized.

Keywords: precedent, language/linguistics, law interpretation, theory of law

PRECEDENS JAKO TRANSPOZYCJA AKTU NORMATYWNEGO

Streszczenie

Artykuł porusza problematykę orzeczeń precedensowych w porządku prawa stanowionego. Autor wychodzi z założenia, że z istoty specyfiki i przyjętych rozwiązań konstrukcyjnych kontynentalnej kultury prawnej nie można twierdzić, że w systemach prawa stanowionego występują orzeczenia typu precedensowego w tożsamy sposób względem tej instytucji znanej prawu anglosaskiemu. Z istoty rzeczy, w porządku prawa stanowionego orzeczenie sądu nie przynależy do katalogu źródeł prawa. W artykule podjęto natomiast refleksję, poprzedzoną syntetycznym sprawozdaniem z dotychczasowego dorobku doktryny w tym zakresie, nad pewnymi mechanizmami działania organu sądowego, które odpowiadają cechom precedensu. Autor poszukuje w tej kwestii analogii do mechanizmu transpozycji semantyki i przedstawia formułę precedensu wzorowaną na badaniach z dziedziny nauk o języku. W tym znaczeniu tekst stanowi przedstawienie zarysu, wstępnych założeń koncepcji precedensu odwołującej się do powielania przez sądy znaczenia prawa pod określonymi kryteriami, które przedstawione zostają w tym opracowaniu. W ramach podsumowania, autor dokonuje zestawienia zalet i wad proponowanej koncepcji.

Słowa kluczowe: precedens, język/lingwistyka, wykładnia prawa, teoria prawa