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Precedent in the Decision-Making Process. Point of Legal Theory and Judicial Practice

Precedens w procesie decyzyjnym. Ujęcie teorii prawa a praktyka sądowa

SUMMARY

This publication encompasses the presentation of precedent as a legal category in the context of practical (judicial) approach and in the light of the theory of law. After introducing the term "precedent", which is both universal and relevant to the codified law order, the question of distinguishing its particular kinds is described, which appears in the Polish science of law, mainly in the theory and philosophy of law. In the practical part, precedent is treated as a part of judicial practice, which in case of the codified law order constitutes a qualified form of applying a prior judicial decision. The most significant features of this practice are covered within the framework of the legal reasoning (with regard to validation and interpretation), which occurs during the decisional process, as well as the quality of justification of the judicial decision as regards law enforcement.

Keywords: precedent; the Polish science of law; judicial practice; codified law order

INTRODUCTION

The subject-oriented publication encompasses two parts. In the first one, precedent is presented as a legal category in the universal and relevant for the codified law order context of this term, which is followed by the presentation of its particular kinds (in the context of the Polish science of law, mainly, theory and philosophy of law). Part two, on the other hand, describes a precedent as a part of the decision-making practice, which in case of the codified law constitutes a qualified form of applying a prior judicial decision, fulfilling the given requirements with regard to both legal reasoning (validation and interpretation) in the decisional process, as well as the style and argumentative content of the decision justification.

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PRECEDENT AS A LEGAL CATEGORY – THEORETICAL APPROACH

1. Formed within the Anglo-American *common law* judicial practice, precedent has become a present-day universal legal category. This means that considerations regarding the role of a precedent may be referred to legal orders other than Anglo-American ones, including the codified legal order. In such a case, a comparative analysis of both 'source' doctrinal arrangements and judicial practice achievements of the *common law* order is indispensable.

As a relevant category in the codified law order, a precedent may be considered such a prior decision on law enforcement which is applied as a basis of a subsequent decision, in the context of both establishing the content of the latter one and applying the legal reasoning in the current decisional process, which has been performed in this process.

The above mentioned understanding of a precedent does not differ from approaches that are encountered and well-established in Anglo-Saxon literature. It refers to a precedent understood as: "An adjudged case or decision of a court, considered as furnishing an example or authority for identical or similar case afterwards arising or a similar question of law […]. A rule of law established for the first time by the court for a particular type of case and thereafter referred to in deciding similar cases […]. A course of conduct once followed which may serve as a guide for future conduct"[1] or "decision that functions as a model for later decisions"[2], "decision which serves as a guide for present action"[3] or "decision […] that has a special legal significance […] being regarded as having practical […] authority over the content of the law"[4]. This approach also correspondences with the definition coined by J. Wróblewski, which identifies a precedent with a decision that impacts – in a normative or factual manner – taking yet another decision[5].

2. With regard to the latter definition, it should be mentioned that the precedent issue has been of interest to the Polish science of law as far back as since the 1960s and 1970s, despite unfavourable circumstances that hindered emphasising the role of judicial practice in the legal order formation process in the doctrine.

The theoretical approach was particularly reflected in the concept by J. Wróblewski, who, apart from classifying various manners of referring to other de-

[1] *Black's Law Dictionary*, St. Paul, 1990, p. 1176.

[2] D.N. MacCormick, R.S. Summers, *Introduction*, [in:] *Interpreting Precedents. A Comparative Study*, eds. D.N. MacCormick, R.S. Summers, Dartmouth 1997, pp. 1–2.

[3] N. Duxbury, *The Nature and Authority of Precedent*, Cambridge 2008, DOI: https://doi.org/10.1017/CBO9780511818684, p. 1.

[4] G. Lamond, *Precedent and Analogy in Legal Reasoning*, http://plato.stanford.edu/entries/legal-reas-prec [acccess: 26.10.2016], pp. 1–2.

[5] J. Wróblewski, *Precedens i jednolitość sądowego stosowania prawa*, „Państwo i Prawo" 1971, z. 10, p. 525.

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cisions in the Polish judicial practice[6], covered other issues as well, such as the manner of justification of referring to a precedent (*per analogiam* and *per rationem decidendi*)[7], kinds of connections between decisions (a precedent *sensu strictissimo*, *stricto*, *largo* and *largissimo*)[8] and the depth of such a connection. Within the framework of the latter question, the Author not only distinguishes between the precedent understood in an objective and in a formal sense, but he also distinguishes the situation of complying with the precedent (when referring to the precedent is an additional argument) and following the precedent (meaning the considerable impact of the precedent on the content of the current decision, which is particularly illustrated in the justification thereof)[9].

Developed on the foundation of the civil-law dogma, the concept by A. Stelmachowski plays a significant role in analysing the role of the judicial practice, as it connects the category of precedent with the legislative role that is ascribed to the judicial practice[10]. In the convention related to the theory of law yet another concept should be noticed, namely, the one by Z. Ziembiński, which examines the law sources in a decision-making approach, within the framework of which the position of precedent[11] was established, as well as the one by M. Zirk-Sadowski, who researched the judicial legislation in the light of the normative novelty theory[12].

The last three decades are characterised by a thriving interest in the precedent issue in the context of both position and role of the judicial practice. With regard to this, various issues are raised, such as precedent as an element of the law sources[13], precedent in the light of values of law enforcement uniformity[14], legislative character of rulings of the constitutional court[15] and administrative

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[6] See: *idem*, *Wartości a decyzja sądowa*, Wrocław 1973, pp. 141–142

[7] See: *idem*, *Precedens i jednolitość…*, p. 526 and following ones.

[8] See: *ibidem*, pp. 525–526; *idem*, *Wartości…*, p. 133 and following ones.

[9] *Idem*, *Precedens i jednolitość…*, p. 529 and following ones; *idem*, *Wartości…*, pp. 140–145.

[10] See: A. Stelmachowski, *Prawotwórcza rola sądów (w świetle orzecznictwa cywilnego)*, „Państwo i Prawo" 1967, z. 4–5, *passim*.

[11] See: Z. Ziembiński, *Teoria prawa*, Warszawa–Poznań 1974, pp. 83–85.

[12] See, e.g.: M. Zirk-Sadowski, *Precedens a tzw. decyzja prawotwórcza*, „Państwo i Prawo" 1980, z. 6, particularly p. 69 and following ones to 73; *idem*, *Tzw. prawotwórcza decyzja sądowego stosowania prawa*, „Studia Prawnicze" 1980, nr 1–2, *passim*.

[13] See, e.g.: L. Morawski, *Czy precedens powinien być źródłem prawa?*, [in:] *W kręgu problematyki władzy, państwa i prawa. Księga jubileuszowa w 70-lecie urodzin Profesora Henryka Groszyka*, red. J. Malarczyk, Lublin 1996, p. 187 and following ones.

[14] See, e.g.: L. Leszczyński, *Precedent and the Judge's Axiological Choices: Remarks on Polish Legal Culture*, [in:] *Unity of Civil Procedural Law and Its National Divergences*, ed. M. Sawczuk, Lublin 1994, p. 255 and following ones; *idem*, *Dyskrecjonalność a jednolitość stosowania prawa. Rola argumentu per rationem decidendi*, [in:] *Dyskrecjonalność w prawie*, red. W. Staśkiewicz, T. Stawecki, Warszawa 2010, p. 136 and following ones.

[15] See: R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warszawa 2008, *passim*.

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courts[16] or manners of applying the prior judicial decisions[17]. The kinds of precedents were also examined at that time – apart from referring to a classic division between legislative and non-legislative precedents[18], there are also other divisions, including *de iure* and *de facto*[19] precedents, decisive (conclusive) and interpretative precedents[20], binding and non-binding precedents[21] or specific and abstract precedents[22]. In the majority of cases, these approaches refer to the Polish legal

[16] A. Gomułowicz, *Aspekt prawotwórczy sądownictwa administracyjnego*, Warszawa 2008, *passim*; Z. Kmieciak, *Prawotwórstwo sędziowskie w sferze jurysdykcji sądów administracyjnych*, „Państwo i Prawo" 2006, z. 12, *passim*; D. Dąbek, *Prawo sędziowskie w polskim prawie administracyjnym*, Warszawa 2010, *passim*.

[17] See, e.g.: as regards the role of 'judicial quoting': M. Matczak, *Teoria precedensu czy teoria cytowania? Uwagi o praktyce odwołań do wcześniejszych orzeczeń sądowych w świetle teorii wielokrotnych ugruntowań*, [in:] *Precedens w polskim systemie prawa*, red. A. Śledzińska-Simon, M. Wyrzykowski, Warszawa 2010, *passim*; however, as regards appointing the court jurisprudence: K. Grotkowska, *Problematyka argumentu z linii orzeczniczej*, [in:] *Refleksyjność w prawie. Inspiracje*, red. J. Kurczewski, M. Żuralska, Warszawa 2013, *passim*.

[18] See: L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 1999, p. 214; R. Hauser, J. Trzciński, *op. cit.*, particularly pp. 10–13, 31–32; M. Zirk-Sadowski, *Precedens…*, particularly p. 69 and following ones to 73. See also: J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1972, p. 359 (on the subject of 'judicial law').

[19] See: M. Zirk-Sadowski, *Precedens…*, p. 71; R. Hauser, J. Trzciński, *op. cit.*, *passim*; L. Morawski, *Główne problemy…*, p. 212. Resolutions of the Polish Supreme Court happen to be regarded as a kind of precedent, based on 'the actual binding effect' (see: D. Dąbek, *Między precedensem a źródłem prawa (o uchwałach Naczelnego Sądu Administracyjnego*, [in:] *Orzecznictwo w systemie prawa*, red. T. Bąkowski, K. Grajewski, J. Warylewski, Warszawa 2008, s. 198 and following ones). However, M. Król, to a certain extent by analogy to this division, distinguishes between formal and non-formal precedents (see: M. Król, *Precedent and the Law*, [in:] *Precedent and the Law*, ed. E. Hondius, Bruxelles 2007, p. 426 and following ones).

[20] L. Morawski, *Główne problemy…*, p. 214; M. Zirk-Sadowski, *Precedens…*, p. 73.

[21] Distinguishing a binding precedent is often accompanied by an expressive declaration about its lack in the Polish legal system (see: J. Wróblewski, *Precedens i jednolitość…*, pp. 528–533). However, this distinction at the constructive level is signalised is numerous publications, e.g.: L. Morawski, *Czy precedens…*, s. 199; *idem*, *Główne problemy…*, p. 208, 212; *idem*, *Precedens a wykładnia*, „Państwo i Prawo" 1996, z. 10, pp. 5–12 (whereby the binding question is distinguished from legislation – e.g. p. 5); M. Król, *op. cit.*, pp. 425–426; A. Orłowska, *Moc wiążąca precedensu*, „Przegląd Sądowy" 2000, nr 7–8, *passim*. See: three various kinds of the binding precedent in form of a resolution on the Polish Supreme Court: D. Dąbek, *Między precedensem…*, p. 194 and following ones (among which a binding that 'discourages' the subsequent decision-makers from departing was distinguished). Various aspects of the binding precedent in the common law order, see, e.g.: N. Duxbury, *op. cit.*, p. 58 and following ones; M.J. Gerhardt, *The Power of Precedent*, Oxford 2008, DOI: https://doi.org/10.1093/acprof:oso/9780195150506.001.0001, p. 151 and following ones as well as p. 177 (where the concept of 'super precedent' appears, which is understood as precedents that bind for long and exceptionally strong). Various practices within the framework of this issue in selected codified law orders (Italy, France, Germany, Finland), see: R. Siltala, *A Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law*, Oxford–Portland 2000, pp. 127–150.

[22] See: L. Morawski, M. Zirk-Sadowski, *Precedent in Poland*, [in:] *Interpreting Precedents…*, p. 229.

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system as an example of the codified law order, nonetheless, the background of such a perspective happens to be related to *common law*[23] or practices of other codified law orders[24], which provides such approaches with both a comparative and a relatively universal character. Comprehensive approaches are also presented in the context of either a research issue of the theory of law[25] or a law enforcement model based on the theory of law[26]. A plethora of doctrinal approaches led to their interesting juxtaposition by T. Stawecki, who distinguished between traditional, sceptical, pragmatic, and radical standpoints, with regard to the role of precedent in the Polish legal order[27].

The Polish legal doctrine approaches are hence becoming a part of a yet wider approach that encompasses comparison of both major legal cultures and singular European codified law orders, deriving from the analysis of judicial systems and manners of applying precedents, oscillating between institutional factors influencing precedents, their binding force, rationales for precedents as well as departures from precedents (in the light of distinguishing the following practices: distinguishing explaining, modifying and overruling)[28].

[23] See, e.g.: A. Ludwikowska, *System prawa Stanów Zjednoczonych. Prawo i prawnicy. Struktura władzy. Spory prawne*, Toruń 1999, pp. 49–90; R. Tokarczyk, *Prawo amerykańskie*, Kraków 2003, pp. 30–44; M. Koszowski, *Anglosaska doktryna precedensu. Porównanie z polską praktyką orzeczniczą*, Warszawa 2009, pp. 13–110.

[24] See, e.g.: B. Greczner, *Precedens jako przykład konwergencji kultur prawnych w obszarze prawa Unii Europejskiej*, „Acta Erazmiana" 2011, *passim*; A. Orłowska, *Precedens w systemach prawnych różnych krajów europejskiej kultury prawnej*, „Radca Prawny" 2000, nr 5, *passim*; M. Koszowski, *Norweska doktryna precedensu w zarysie*, „Zaszyty Naukowe Sądownictwa Administracyjnego" 2012, nr 3, p. 195 and following ones.

[25] See: T. Stawecki, *Precedens jako zadanie dla nauk prawnych*, [in:] *Precedens w polskim systemie…*, *passim*; *idem*, *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda*, [in:] *Precedens w polskim systemie…*, *passim*. Having both significant and – in some sense – summarising meaning, as it sums up doctrinal achievements and the Polish practice, the publication by L. Morawski and M. Zirk-Sadowski *Precedent in Poland* is included in anthology *Interpreting Precedents. A Comparative Study* (eds. D.N. MacCormick, R.S. Summers, Dartmouth 1997), which analyses – in comparative approach – various aspects of this category in different legal systems, as well as in the same comparative perspective in the publication by M. Król, *op. cit.*, *passim*.

[26] See, e.g.: L. Morawski, *Precedens…*, *passim*; L. Leszczyński, *Rola wcześniejszych decyzji w procesie stosowania prawa. Szkic modelu i wybrane czynniki różnicujące*, [in:] *Prawo w XXI wieku*, red. W. Czapliński, Warszawa 2006, p. 458 and following ones.

[27] See: T. Stawecki, *Precedens w polskim porządku prawnym…*, p. 59 and following ones.

[28] This issue was covered particularly in *Interpreting Precedents. A Comparative Study* (eds. D.N. MacCormick, R.S. Summers, Dartmouth 1997), in which the following judicial decision-making practises were examined: West Germany, Finland, France, Italy, Norway, Poland, Spain, Sweden, Great Britain, USA and European Union.

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PRIOR JUDICIAL DECISION AS A PRECEDENT – CONTEXT OF THE JUDICIAL PRACTICE

1. The rudimentary feature of the codified law culture applying reasoning based on prior judiciary decisions along with applicable laws that constitute a foundation for decision content (regardless of possibilities of incorporating the open criteria to the operative interpretation process and the normative content of the decision basis) is related to the question as to whether the role of arguments stemming from those decisions may be qualified, to some extent, as precedential arguments.

It seems that the codified law features lead to a general conclusion that it is not justified to assume a thesis stating that arguments of other decisions either become precedential arguments in case of each referring to them during a decision-making process (as well as in the decision justification) or that they may never acquire precedential features. As regards the role of arguments of other decisions, they are not always 'merely' a complementation to stronger arguments related to enforcement of legal provisions. The necessity of taking a middle route with regard to such a qualification means that a more precise and detailed answer to this question should be based on stating conditions, determined at a general level and relativised with regard to the given essential and variable diversifying factors (e.g. sort of the branch of the law, kind of law enforcement, level of judicial decision instance, kind of decision to be taken or social features of the legal environment), on fulfilling of which the possibility of a positive qualification of referring to prior decisions is dependent.

Those conditions may be approached in two contexts – in the rationalisation and the Socratic method. On the one hand, they are an element of the reasoning of a law applying entity, exerting an impact on this entity, so that it states all the elements of the decision-making process, including the operative interpretation. On the other hand, those conditions, or noticing their occurrence in the above mentioned reasoning, become real in the decision-making process, be it oral or written one. A positive answer to the aforementioned question is largely dependent on their presence in the justification (as well as the justification quality), assuming that the justification arguments reflect the reasoning, thus, the decision justification – along with the rationalisation function – describes to a large extent the reasoning occurring during this process.

2. The problem of referring to prior decisions of law enforcement can be encountered at various stages of the decision-making process. Firstly, it is connected with selecting reconstruction sources of the norms applied in this process (where those decisions occur together with applicable laws and open criteria), secondly, with distinctive features of reconstruction of such a norm from the justification applied in the decision (in the context of both syntactic and semantic distinctiveness of this text) as well the structure of the final normative decision basis (where the norms

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reconstructed from those decisions are connected with norms of laws in force or non-legislative norms), up until reconstruction of this basis to the decision content.

In the context of those various roles, it is particularly important that the decision-making reasoning itself (particularly the operative interpretation – in broad terms) is truly and to an appropriate extent based on prior decisions. It concerns all stages of this interpretation model, within the framework of which the role of a number of proposals should be emphasised.

First and foremost, it is essential that the question of applying a prior decision in the current decisional process should be considered at the earliest stage ('right after' identifying the applicable laws, with a prior decision 'co-exists'), so that this process could be properly located within the framework of the general jurisprudence as well as adequate prior decisions that are useful in this process.

Secondly, the choice of the decision should be connected with a 'precedential need', autonomously determined by a court, regardless of the fact, whether any decisions have appeared in the parties' motions or in the justification of the controlled decision (even though such an occurrence strengthens this need). It is based on a statement of likeliness of judicial situations as well as 'insufficiency' of a normative regulation, which becomes additionally strengthened, as a court operates within decisional discretion circumstances, resulting from e.g. general reference clauses.

Thirdly, looking for 'a decision-to-be-applied' ought to have the widest possible range as regards: identification (judgements, resolutions, orders), institution (decisions of 'their own' court and other courts), instance (decisions of courts of higher instance but also of equal or lower instance[29]) and territory (decisions of international, supranational courts, as well as courts of foreign countries which are connected by their legal culture[30]).

Fourthly, the reconstruction of a behaviour pattern (*ratio decidendi*) based on a prior judicial decision should be conducted in a direct confrontation with the factual circumstances of the issue as well as in the context of a direct adaptation (*ratio*) to the given needs of the current decision process.

Fifthly, the *ratio decidendi* reconstruction should allow for a particular style of a judiciary statement, which is different than a 'normative' style, as well as a lower degree of a semantic precision of expressions included therein (enhanced

[29] For various relations within this issue see: M. Taruffo, *Institutional Factors Influencing Precedents*, [in:] *Interpreting Precedents*..., p. 437 and following ones. For American practice see: M. Ludwikowska, *op. cit.*, pp. 61–64.

[30] Which is a common practice in the Anglo-Saxon culture (see, e.g.: *The Use of Foreign Precedents by Constitutional Judges*, eds. T. Groppi, M.-C. Ponthoreau, Oxford 2013, *passim*). See also: U. Drobnig, *The Use of Comparative Law by Courts*, Athens 1994, *passim*; S. Bertea, C. Sarra, *Foreign Precedents in Judicial Argument: A Theoretical Account*, "European Journal of Legal Studies" 2014, Vol. 7(2), *passim*.

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by 'foreignness' of the decisions issued by supranational courts), regardless of the fact, whether *ratio* is formulated as a separate thesis or found in a part of the justification, or 'summarised' from the lengthy justification.

Sixthly, the structure of a normative decision basis, which consists in an appropriate combination of the reconstructed patterns (*rationes*), should assume real – not formal (ornamental) – application of patterns, which have been reconstructed from the identified decisions, even though their involvement in developing the basis is merely of a supplementary-corrective character when compared to the involvement of patterns based on applicable laws (apart from loopholes requiring interference reasoning, normative collisions or normative opening for non-legal issues), and the scope of this issue should be clearly set out in the context of the particular interpretation reasoning.

3. The style of justifying the decision as regards law enforcement plays a vital role in ascribing the precedential role to the prior decisions. Even more important than referring to an applied decision and thesis underlying this decision is indicating its adaptation with regard to the established factual circumstances and the legal questions appearing in the process. It allows not only for stating a non-recurrent act of referring to a prior decision but also for forming a more permanent judicial practice, provided the current decision was to become a precedent for subsequent decisions.

À rebours, both lacking in such an argumentation in the justification and a wrong indicating of the judicial thesis or a negligent justifying of the depth between one's own thesis and a prior decision restricts the possibility of stating the precedential character of the latter one and, all the more, of forming the precedential practice.

The slightest possibilities of transforming the decision that was referred to into a precedent occur when referring to a prior decision exclusively through its reference number. If such a reference is accompanied by a quote, particularly, if it is connected with an 'adaptation' comment, the chance of noticing the precedential character of another decision becomes more likely. The above mentioned distinctions also concern applying more than one decision or the whole court jurisprudence, referring to which – along with providing reference numbers and theses of the applied rulings, together with indicating the aforementioned 'adaptation' solution, would have the strongest argumentative value.

The optimisation programme of the manner and style of justifying judicial decisions in the context of openly disclosing their connections with the prior decisions should encompass (along with the aforementioned necessity of an adaptation indicating of another decision) a number of indispensable proposals.

Firstly, applying a prior decision should be accompanied by a precise stating (explanation and 'measurement') of the likeliness range of the decisional situations, that is, likeliness of factual circumstances, of legal institutions with which both decisions are connected or of applied reasoning of the operative reasoning (in broad terms) in both decision-making processes.

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Secondly, the justification should include a precisely identified, appropriately reconstructed and generalised *ratio decidendi* (the major part of the justification that refers to the reasoning or the decision content[31]), regardless of the fact, whether the reconstruction consists merely in referring to a clearly formulated thesis ('put' before the decision text and its justification), a thesis 'found' in the justification text or an autonomously formulated thesis based on a part or the entirety of the applied justification (or justifications).

Thirdly, referring to an applied decision should include the decision content (encompassing the requirement of a precise statement of the range of 'repetition' of the very decision itself) as well as arguments of its justification (encompassing the requirement of a precise statement of the course, content and results of the given reasoning and statement of their role in one's own reasoning), as this is the most adequate manner to get to the real decision-making reasoning.

Fourthly, the justification should be built in such a manner that it is possible to find the answer to key questions therein: why this particular decision and this reasoning of the decision-making process have been (or have not been) applied in the current decision-making process, as well as to how and in what scope they have been applied.

Fifthly, the justification containing the arguments referring to prior decisions should be written in a so-called discursive style[32], that is, in connection with the requirements of linguistic clarity and precision of one's own formulated thesis in the context of the judicial decision collection, a precise indication of the scope, reasons, costs and results – not only application of the decision, reasoning or arguments of the justification but also lack of application of other potentially applicable elements.

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[31] On the subject of the precedent decision structure and *ratio decidendi* construction see, i.a.: R. Cross, *Precedent in English Law*, Oxford 1968, p. 31 and following ones; G. Marshall, *What is Binding in a Precedent*, [in:] *Interpreting Precedents…*, p. 510 and following ones; R. Siltala, *op. cit.*, p. 85 and following ones; L. Alexander, E. Sherwin, *Judges as Rule Makers*, [in:] *Common Law Theory*, ed. D.E. Edlin, Cambridge 2007, DOI: https://doi.org/10.1017/CBO9780511551116.002, p 45 and following ones; N. Duxbury, *op. cit.*, pp. 58–110.

[32] See: M. Zirk-Sadowski, *Wykładnia i rozumienie prawa w Polsce po akcesji do Unii Europejskiej*, [in:] *Polska kultura prawna a proces integracji europejskiej*, red. A. Wronkowska, Kraków 2005, p. 94 and following ones; I. Rzucidło-Grochowska, *Strategia i taktyka formułowania uzasadnień orzeczeń sądowych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2017, nr 2, p. 59 and following ones; K. Grotkowska, *op. cit.*, p. 55 and following ones (the Author confronts a reporting with an eristical style). The example of full discursiveness of the justification may be the ruling of the American Supreme Court on Planned Parenthood v. Casey, in the context of both referring to prior rulings, including the one concerning Roe v. Wade, and generalisations, including those referring to a justified departure from the already established precedent (see: 505 US 1992, particularly, pp. 854–855). See also remarks to this ruling: K. Yoshino, *What's Past is Prologue: Precedent in Literature and Law*, "The Yale Law Journal" 1994, No. 104, p. 471 and following ones.

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The above presented outline of the optimisation conditions refers mainly to written arrangements, which are of a formalised character (which facilitates examination), as well as comprehensive statements, referring to a given decision-making process and the decision taken. It seems that it allows for identifying the precedential character of a prior decision in a given decision-making process as well as forming a permanent precedential practice, built upon the accuracy and argumentative openness as regards justifying the judicial decisions.

CONCLUSIONS

Created for the codified law order, the aforementioned requirements seem to have a universal importance, but they also refer to particular decision-making processes in the already established precedential practice within *common law*. Meeting those requirements facilitates a real involvement of prior law enforcement decisions within the interpretation reasoning, the decision-making process and the decision content itself. While in the latter order they illustrate an already formed decision practice, in the case of the codified law order they may facilitate the process of forming the decision practice, which would acquire more definite and permanent features of the precedential practice.

In this context, it should be emphasised that the lack of the *stare decisis* rule in the codified law order does not hinder the process of forming of the precedential practice[33], even tough, undoubtedly, its form differs from the classic model func-

[33] In American literature, accompanied by opinions highlighting the role of the *stare decisis* formula (e.g., R.J. Kozel, *Precedent and Reliance*, "Emory Law Review" 2013, Vol. 62(8), p. 1464, in which the Author considers it as 'constitutional ideal of the rule of law', providing certainty and stability to law; W.N. Eskridge Jr., *Overruling Statutory Precedent*, "The Georgetown Law Journal" 1988, No. 76, p. 1361; or K. Yoshino, *op. cit.*, p. 471 and following ones), one can encounter opinions stating that the he binding precedent rule does not impact the practice of applying the law as strongly, as it is commonly believed. See, e.g.: F. Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, "Georgia State University Law Review" 2007, Vol. 24, *passim*; E.J. Segall, *Is the Roberts Court Really a Court*, "Stetson Law Review" 2011, Vol. 40, p. 701 and following ones, particularly p. 715; W.A. Edmundson, *Schauer on Precedent in the U.S. Supreme Court*, "Georgia State University Law Review" 2007, Vol. 24(2), p. 406 and following ones; J.M. Marshall, *Stare Decisis and Judicial Review of Public Administration in American Common Law System*, [in:] *Discretionary Power of Public Administration. Its Scope and Control*, eds. L. Leszczyński, A. Szot, Frankfurt am Main 2017, p. 281 and following ones; T.R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, "Vanderbilt Law Review" 1999, Vol. 52, p. 617 and following ones; G. Lamond, *Do Precedents Create Rules?*, "Legal Theory" 2005, Vol. 17, DOI: https://doi.org/10.1017/S1352325205050019, p. 15 and following ones (where the Author covers the subject of the precedent practice automatism, emphasising case-to-case decision-making with a restricted 'verification' of the accuracy of the applied decisions). Sometimes the roles of this formula are distinguished depending on the kind of norms and actions in the decision-making process, the sort

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tioning in *common law* (due to lack of this rule). However, taken into account the fact that various 'regional' models[34] can be found within the same order as well, the differences occurring in the codified law order as such do not deprive the judicial practice of the precedential quality.

Fulfilling certain conditions, in which the precedential practice in the codified law order may develop properly and acquire features of permanency and prevalence[35], is of paramount importance. First and foremost, these requirements include maturity (content-oriented competence) of the judicial practice, allowing for noticing one's own role (with autonomy and responsibility involved) in forming the legal order and willingness to apply one's own decision collections, formed when the given members of the court state the need to refer to particular decisions, provided that likeliness of judicial situations occurs. However, they also encompass conditions outside the judicial practice. On the one hand, the precedential practice formation may be facilitated by an appropriate legislative policy (e.g. 'opening' the decision situations), a doctrinal support, as well as IT level of the judicial practice (enabling the use of the resolution collections). On the other hand, the manner of this formation is influenced (to a large extent independently from the judicial practice) by the political system type and the collection of binding political principles in force, among which democratic principles, the rule of law, separation of powers, and judicial independence exert the greatest impact, strengthening the formation of a permanent, and a deep precedential practice (which is at the same time not dysfunctional in relation to the basic features of the codified law order).

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of the normative act and of the precedent (see: R. von Moschzisher, *Stare Decisis in Courts of Last Resort,* "Harvard Law Review" 1924, Vol. 37, DOI: https://doi.org/10.2307/1329428, pp. 419–420). For more information on the stare decisis rule context see: M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, London 2001, pp. 1380–1386.

[34] See, e.g. with regard to British and American practices: A.L. Goodhart, *Case Law in England and America*, "Cornell Law Quarterly" 1930, Vol. 15(2), *passim*; Z. Bankowski, D.N. MacCormick, G. Marshall, *Precedent in the United Kingdom*, [in:] *Interpreting Precedents*…, p. 355 and following ones; R.S. Summers, *Precedent in the United States (New York State)*, [in:] *Interpreting Precedents*…, p. 407 and following ones; M. Harding, I. Malkin, *The High Court of Australia's Obiter Dicta and Decision-Making in the Lower Courts*, "Sydney Law Review" 2012, Vol. 34(2), p. 267 and following ones.

[35] See: L. Leszczyński, *Praktyka precedensowa w porządku prawa stanowionego. Podstawowe czynniki warunkujące*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2017, nr 110, pp. 159–176.

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STRESZCZENIE

Opracowanie obejmuje prezentację precedensu jako kategorii prawnej w kontekście zarówno teoretycznoprawnym, jak i praktycznym (sądowym). Po wyprowadzeniu uniwersalnego i relewantnego dla porządku prawa stanowionego pojęcia precedensu, rozważana jest pojawiająca się w polskiej nauce prawa (głównie w teorii i filozofii prawa) problematyka wyodrębniania poszczególnych jego rodzajów. W części praktycznej precedens potraktowany został jako składnik praktyki sądowej, która w porządku prawa stanowionego stanowi kwalifikowaną postać wykorzystania wcześniejszej decyzji sądowej. Najważniejsze właściwości tej praktyki zostały ujęte w ramach występujących w procesie decyzyjnym rozumowań prawniczych (walidacyjnych i interpretacyjnych) oraz argumentacyjnej jakości uzasadnienia sądowej decyzji stosowania prawa.

Słowa kluczowe: precedens; polska nauka prawa; praktyka sądowa; porządek prawa stanowionego