Part 4. Studia Iuridica Lublinensia vol. XXVII, 1, 2018
DOI: 10.17951/sil.2018.27.1.143

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Precedent Ideology and Judicial Legitimacy in Slovenia – An Outline

Ideologia precedensu i sądowa prawowitość w Słowenii – zarys zagadnienia

SUMMARY

Within the broader framework of the discussion of the potential of judicial precedent for statutory legal systems, this paper focuses on certain sociological aspects of the role a system of judicial precedent can have in the functioning of a judicial system. Proceeding specifically from the Slovenian legal context, the paper outlines the importance of openly and explicitly cultivating a commitment to a system of judicial precedent or unified and settled case-law in legal discourse, on the level of legal culture or ideology. It is argued that acknowledging the manner in which a system of judicial precedent can contribute to the rule of law has the potential to increase public trust and confidence in the judiciary and thus judicial legitimacy.

Keywords: judicial precedent; case-law; rule of law; judicial legitimacy; precedent ideology; legal culture

INTRODUCTION

Within the broader framework of the discussion of the potential of judicial precedent for statutory legal systems, this paper focuses on certain sociological aspects of the role a system of judicial precedent[1] can have in the functioning of

[1] I will use the concept of precedent in a broader sense than it is traditionally understood in the context of *common law*. "Any prior court decision which has or, at least, may have a normative, binding effect on a subsequent court's legal discretion is taken as a precedent in the civil law context". R. Siltala, *A Theory of Precedent*, Oxford–Portland (Oregon) 2000, p. 66. Unless indicated otherwise, concepts such as *precedent* and *(unified and settled) case-law* will be used interchangeably.

a judicial system. A full and open recognition of the active role of the judiciary in the law-making process that is implied by the growing importance of judicial precedents is sometimes objected on the basis that it is at odds with the principles of the separation of powers and democratic legitimacy. As I have already demonstrated elsewhere[2], this objection can be dissolved if we are prepared to look beyond traditional, plain-view interpretations of our political and constitutional concepts that are sometimes still found in political rhetoric. In this paper, however, I want to go a step further. Proceeding from the Slovenian legal context, I *outline* the argument that openly and transparently acknowledging a commitment to a system of judicial precedent can contribute to judicial legitimacy.

THE ISSUE OF JUDICIAL LEGITIMACY

A consistently (relatively) low degree of public confidence or trust in the judiciary has been one of the most pressing concerns with regard to the proper functioning of the judicial system in Slovenia throughout the last decade. To illustrate, according to a survey carried out in 2015, less than a quarter of the respondents trust or completely trust the courts in Slovenia[3]. As regards (state) institutions, only the Government and the Parliament enjoy less public confidence than the judiciary. This, however, is hardly any consolation for the fact that for years now more than half of the public have explicitly declared that they more or less (completely) distrust the courts[4].

The reasons for this lack of trust are manifold and complex and have not yet been systematically analysed. Generally, despite recent positive trends, the overall backlog of cases that remains relatively high and the excessive length of judicial proceedings are still regarded as the major reasons underlying this legitimacy deficit.

In this paper, however, I want to draw attention to what I believe to be a different source of distrust in the way the courts operate that has usually not been considered as one of the relevant factors by empirical research on judicial legitimacy in Slovenia. It is an issue at the intersection of several factors and mostly concerns *consistent*, *non-arbitrary administration of the law* and the concern for *equality* as well as *certainty* and *predictability*. It is illustrated by the fact that, according to a European study, 58% of the respondents in Slovenia completely disagree with the statement that

[2] T. Štajnpihler, *Within Democracy's Reach? Revisiting Some Objections to Judge-Made Law*, [in:] *The Rule of Law and the Challenges for Jurisprudence – Series Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook*, eds. P. Cserne, M. Könczöl, M. Soniewicka, Frankfurt a. Maine 2014, p. 89.

[3] J. Vrabec et al., *Zadovoljstvo javnosti z delovanjem sodišč v Republiki Sloveniji*, Supreme Court of the Republic of Slovenia, Ljubljana 2016, pp. 12–13.

[4] *Ibidem*.

"public authorities act in a non-arbitrary way", while a staggering 82% completely disagree with the claim that "the law is applied to everyone equally and without discrimination"[5]. While the perception of judicial independence and impartiality, which guarantee "fairness, predictability and certainty of the legal system"[6], is an important issue in this context[7], the mentioned study found that it is the overall *clarity* of the functioning of courts (as well as clear and comprehensible judgements) that has a greater impact on the public confidence in the judiciary[8]. Therefore, the paraphrased saying "two [judges], three legal opinions"[9], can be interpreted as a reflection of the mentioned lack of judicial legitimacy in Slovenian legal culture.

The consistent, non-arbitrary administration of the law and the assurance of equality, certainty, and predictability as factors of public trust or confidence in the judiciary are, in turn, closely connected to the role and functioning of a system of precedent, especially with what I will refer to as the *precedent ideology* in Slovenia.

However, before I continue, I would like to provide a brief disclaimer regarding the use of public confidence and trust in the judiciary as a proxy for judicial *legitimacy* and *vice versa*. Although I am well aware that legitimacy – even if we, as I propose here, focus only on its *sociological* aspect[10] – is an extremely complex notion that can hardly be reduced to the metaphorical court of public opinion or the latest poll results, in the following sections of the present paper, public trust or confidence in the judiciary will serve as the *only* indicator of judicial *legitimacy*.

THE VALUE OF PRECEDENT

To understand the role of precedent in adjudication one must examine the axiological foundations that underlie any system of precedent. In this context, we are concerned with the theoretical rationale for using prior court decisions as arguments in legal justification. I have argued elsewhere that deontological arguments alone cannot provide a sufficient explanation or justification for the practice of

[5] European Commission, *Flash Eurobarometer 385 – Justice in the EU*, November 2013, http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_385_en.pdf [access: 10.02.2018].

[6] European Commission, *The 2017 EU Justice Scoreboard*, Luxembourg 2017, pp. 37–39.

[7] M. Bühlmann, R. Kunz, *Confidence in the Judiciary: Comparing the Independence and Legitimacy of Judicial Systems*, "West European Politics" 2011, Vol. 34(2), DOI: https://doi.org/10.1080/01402382.2011.546576, pp. 317–345.

[8] J. Vrabec et al., *op. cit.*, p. 19.

[9] Many readers might recognize this as a modification of the somewhat infamous saying "two lawyers, three legal opinions".

[10] O. Bassok, *The Sociological-legitimacy difficulty*, "Journal of Law and Politics" 2011, Vol. 26, p. 242 ff; A. Ruibal, *The Sociological Concept of Judicial Legitimacy: Notes of Latin American Constitutional Courts*, "Mexican Law Review" 2010, Vol. 3(2), p. 345 ff ; A. Hyde, *The Concept of Legitimation in Sociology of Law*, "Wisconsin Law Review" 1983, p. 386 ff.

precedent-following[11]. Thus, e.g., whereas being bound by the past is undoubtedly one of the defining characteristics of arguing from precedent, respect for tradition or the past – understood as an independent value – is not sufficient to explain why courts tend to follow the decisions of their predecessors. Therefore, we turn to a more consequential line of reasoning that proves to be more persuasive in this context: being bound by prior court decisions is not a value in its own right, but can prove to be an efficient mechanism for promoting certain fundamental legal values. After examining di□erent possibilities in this context, I have argued that the most promising way of explaining and justifying the operation of a system of judicial precedent is connecting it to certain principles of *the rule of law*[12].

Within this frame of reference *formal justice* or *equality before the law* is generally recognized as a powerful justification for precedent constraint[13]. It is argued that following a precedent is nothing more than following the imperative "treat like cases alike", which is commonly considered to be synonymous to the principle of (formal) justice. With reference to the rule of law we can also focus on the value of *legal certainty* and *predictability* in connection with judicial precedent[14]. When dealing with problems of "open texture" and legal interpretation, the constraining effect of previous decisions on subsequent decision-making seems to provide an additional level of stability to case-law. In this context, we could also argue that following precedents play a significant role in safeguarding legitimate expectations. Additionally, as some have pointed out, the constraining effect of judicial precedents contributes to a relative degree of *coherence* of a legal system (or at least a certain degree of coherence in legal reasoning)[15]. It is also worth noting that a system of precedent goes hand in hand with the duty of the courts to *give reasons* for their decisions[16]. Some have tried to demonstrate that there is an intrinsic connection between the two, as "giving a reason creates a *prima facie* commitment on the part of the reason giver to decide subsequent cases in accordance with that reason"[17]. In this respect, the judicial duty to give reasons and precedent operates

[11] T. Štajnpihler, *Precedenčni učinek sodnih odločb v pravnem utemeljevanju*, Ljubljana 2012, p. 35 ff.

[12] *Ibidem*.

[13] Cf. N. Duxbury, *The Nature and Authority of Precedent*, Oxford 2008, DOI: https://doi.org/10.1017/CBO9780511818684, pp. 73–86.

[14] Cf. F. Schauer, *Precedent*, "Stanford Law Review" 1987, Vol. 39, DOI: https://doi.org/10.2307/1228760, pp. 597–598; N. Duxbury, *op. cit.*, p. 162 ff; Z. Bańkowski et al., *Rationales for Precedent*, [in:] *Interpreting Precedents*, eds. N. MacCormick, R. Summers, Aldershot 1997, p. 488.

[15] Cf. Z. Bańkowski et al., *op. cit.*, pp. 486–487; A. Peczenik, *On Law and Reason*, Dordrecht–Boston–London 1989, DOI: https://doi.org/10.1007/978-1-4020-8381-5, p. 335.

[16] F. Schauer, *Giving Reasons*, "Stanford Law Review" 1995, Vol. 47, DOI: https://doi.org/10.2307/1229080, pp. 633–659.

[17] *Ibidem*, p. 645 ff.

as a "transparency – and accountability – enhancing mechanism"[18], and therefore (to some extent) contribute to *limiting judicial arbitrariness*.

Theoretical rationales justifying a system of precedent, such as those mentioned above, are frequently derived from or connected to the *rule of law*[19]. These axiological postulates require a considerable degree of stability and consistency of judicial decision-making and that the courts generally do not act in an arbitrary and capricious manner. "Somehow, an independent judiciary must be self-enforcing", writes E. Rasmusen, "so even if the judges are entirely independent, free from external threats of dismissal or punishments they will act as the faithful agent of the legislature and the constitution. It has long been recognized that the system of precedent helps to serve this purpose"[20]. It is the constraining power of precedent, i.e., limiting judicial discretion by referring to positions taken by courts in the past, that enables this. In this respect, relying on argument from precedent can be understood as a form of "legitimacy by self-reference"[21].

In this paper, however, I am not primarily interested in theoretical debates on the value of a system of precedent in judicial decision-making. I am addressing a sociological issue, namely how some of these rule-of-law requirements, which are generally (also) reinforced by a system of precedent, are focal points of public (dis)trust of the judiciary. In other words, concerns regarding judicial legitimacy in Slovenia are, to some degree, associated with the publicly perceived uncertainty, unpredictability, inconsistency, and arbitrariness of the functioning of the courts or even of Slovenian legal culture in general.

If, as O. Bassok claims, the "sociological-legitimacy difficulty originates [at least in some part] from a clash between the promise of an expert legal authority and the indeterminacy of legal materials"[22], then reminding ourselves of the value of a system of precedent can help to relieve some of its tension. Thus, in the following sections, I will provide a brief outline of the argument about how emphasizing the outlined elements of the rule of law, which are supported by and reflected in the operation of a system of precedent, could be an important factor contributing to public trust and enhancing judicial legitimacy.

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[18] M. Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, "Washington & Lee Law Review" 2015, Vol. 72(2), p. 506.

[19] J. Waldron, *S Stare Decisis and the Rule of Law: A Layered Approach*, "Michigan Law Review" 2012, Vol. 111(1), p. 3 ff. For the argument on how the rule of law is more ambivalent when it comes to precedent, see for example: R.J. Kozel, *The Rule of Law and the Perils of Precedent*, "Michigan Law Review First Impressions" 2013, Vol. 111, p. 37 ff.

[20] E. Rasmusen, *Judicial Legitimacy as a Repeated Game*, "Journal of Law, Economics and Organization" 1994, Vol. 10(1), DOI: https://doi.org/10.1093/jleo/10.1.63, p. 66.

[21] S. Schäller, *Präjudizien als selbstreferentielle Geltungsressource des Bundesverfassungsgerichts*, [in:] *Die Deutungsmacht der Verfassungsgerichtsbarkeit*, Hrsg. H. Vorländer, Weisbaden 2006, pp. 210–212.

[22] O. Bassok, *op. cit*., p. 272.

THE PRECEDENT IDEOLOGY IN SLOVENIA

As indicated above, issues of judicial legitimacy are connected – among several other factors – with what I refer to as the *precedent ideology* in Slovenia[23]. In short, precedent ideology concerns a "judge's […] professional stance towards precedent-following"[24], it is a reference to "the theoretical constituents of the *ratio* of a case at the level of legal ideology"[25]. However, for the purpose of this paper, it is important that we assume a broader point of view and interpret the concept of precedent ideology as an integral part of (Slovenian) *legal culture*. In this light, precedent ideology is not only about judicial self-understanding and the role of precedent in judicial decision-making, but also about the "relatively stable patterns of legally oriented social behaviour and attitudes"[26] towards the judiciary, i.e., understanding the judiciary in the wider socio-legal context.

Following R. Siltala's typology of different precedent ideology models[27], the understanding of judicial precedent in Slovenian legal culture can be best described as being somewhere between the *model reasons approach*, a variation of the precedent ideology of *judicial analogy*, and the *revalued reasons model*, a variation of the *judicial revaluation* precedent ideology[28]. In my opinion, from a comparative point of view, the position in Slovenia in this regard is not unlike the situation in the Federal Republic of Germany[29]. As I cannot explicate these models of precedent ideology with regard to Slovenian context in detail here[30], I will only illustrate this with two examples.

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[23] I borrowed the concept from R. Siltala, *op. cit*. There are, however, several other inspirations for framing the issue in this way, such as, e.g., "ideology of judicial decision-making" (J. Wróblewski, *The judicial application of law*, Dordrecht–Boston–London 1992, DOI: https://doi.org/10.1007/978-94-015-8050-2, p. 305 ff.), "legal ideology" (R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Aldershot 2006, pp. 89–90), the "frame of mind" (J. Vranken, *Exploring the Jurist's Frame of Mind*, Deventer 2006, pp. 2–3).

[24] R. Siltala, *op. cit.*, pp. 66–67.

[25] *Ibidem*.

[26] D. Nelken, *Using The Concept of Legal Culture*, "Australian Journal of Legal Philosophy" 2004, Vol. 29, p. 1. See also: L.M. Friedman, *Legal Culture and Legal Development*, "Law and Society Review" 1969, Vol. 4(1), DOI: https://doi.org/10.2307/3052760, pp. 33–38.

[27] R. Siltala, *op. cit.*, p. 75 ff.

[28] Especially if we consider the characteristics, (i) the deontic mode, i.e. the degree of legal formality entailed in the ratio of a case, (ii) the degree of the binding force of the ratio of a case (interpreted in the light of the adopted doctrine of the sources of law) in combination with (iii) the techniques of departure from precedent. See: *ibidem*.

[29] *Ibidem*, pp. 134–135. See also: R. Alexy, *Precedent in the Federal Republic of Germany*, [in:] *Interpreting Precedents*, pp. 17–65; F. Diedrich, *Präjudizien im Zivilrech*, Hamburg 2004, pp. 204–251.

[30] For an overview of the status of judicial precedent in Slovenia see, e.g., M. Pavčnik, *Teorija prava*, Ljubljana 2011, pp. 268–276.

The following explanation, contained in a general statement published on the official website of the Supreme Court of the Republic of Slovenia on the position and function of case-law within the framework of the Slovenian legal system, eloquently sums up the situation in Slovenia:

> In the Slovenian continental legal system the courts are not bound by decisions of higher courts outside the scope of the specific case. […] Case-law serves as a consultative tool that a court is not obliged to consider as an absolute reference [when deciding a case]. In concrete cases, a judge must always act as if she were facing an indefinite number of cases of the same kind, although the established states of facts of different cases only rarely overlap. […] Weighty and convincing arguments used by a court when deciding a [specific] case can be quite useful in other similar cases. The purpose of the [official] collection of case-law (as well as of case-law itself) is in familiarizing oneself with cases that analytically resolve procedural or substantive legal issues and applying or further developing the reasoning [found in the case-law]. Therefore, it can be said that case-law binds courts when they decide similar cases; however, it does not bind them formally, but merely with the [persuasive] power of the reasons underlying previous decisions[31].

This general statement also resonates in the decisions of (other) courts when they decide individual cases. For example, the Ljubljana Higher Court elaborately argued as follows:

> However, the fact that an individual decision of the Supreme Court of the Republic of Slovenia has become a (vital) part of [settled] case-law does not mean that lower courts are absolutely bound by such settled case-law. Although settled case-law is an important *informal* source of law by which a court is bound when making its decision, the Constitution only guarantees the prohibition of an *arbitrary* departure from case-law. A court may not depart from uniform and settled case-law arbitrarily, i.e., without a reasonable legal justification. Therefore, even where case-law has been formulated by the Supreme Court of the Republic of Slovenia, lower courts have the *right to depart* from such case-law, subject to the condition that they provide sufficient justification for their decision that is not of an arbitrary disposition[32].

Judging by these examples, the (official) discourse on precedent exhibits that a rather modest role is afforded to judicial precedents or case-law. Judicial precedent or case-law is considered as a significant factor in judicial decision-making, however, it is (predominantly) only of *informational* value, as, referring to the example above, we can hardly claim that the courts are *bound* by it. Thus, where settled case-law is described as a *source of law*, it is also immediately pointed out that it is not genuinely such, but only *informally*, as a source of potentially convincing (substantive) reasons justifying certain interpretations of *proper* legal sources, such as legislation. In addition, courts have broad possibilities of *departing from*

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[31] Supreme Court of the Republic of Slovenia, *Kaj je sodna praksa?*, www.sodisce.si/sodni_postopki/objave/2009021320342893 [access: 30.10.2017].

[32] Ljubljana Higher Court decision No. V Cpg 338/2015 of 2 December 2015, § 34. Emphasis added.

precedent or settled case-law. This means going beyond using techniques such as distinguishing or overruling as well as engaging in the practice of *outweighing*, i.e., disregarding a legal principle (or legal policy) because of the argumentative impact of some sufficiently strong countervailing reasons[33]. As illustrated by the example above, the possibility of the courts not to follow a line of reasoning established in previous cases (by other courts), as long as they do so openly and on the basis of good reasons, could be seen as their *right*.

However, these views, although widely accepted, do not give us the whole picture of what I referred to as the precedent ideology in Slovenia. There are indications – some more vocal and declaratory, others more factual in nature – that the system of judicial precedent or unified and settled case-law is more central to the administration of justice in the courts than suggested by the above-mentioned examples. I can only provide some brief illustrations here. Thus, e.g., when courts discuss the operation of the system of precedent in Slovenia, as in the passages cited above, their introductory statements commonly include a general commitment to legal certainty and predictability and the importance of settled and uniform case-law for complying with the requirements of the rule of law[34]. Similarly, the recently appointed president of the Supreme Court of the Republic of Slovenia publically stated that one of the priorities (in the first year of his term) will include measures specifically aimed at unifying and consolidating case-law, as "inconsistent case-law raises the sense of uncertainty and distrust with the parties to court proceedings"[35]. More importantly, e.g., reforms of the civil procedure in the last decade[36] (partially) redefined some competences and the role of the Supreme Court with regard to ensuring legal certainty, the uniform application of law, and the development of law through case-law[37]. In doing so, these reforms considerably enhanced the importance of uniform case-law[38]. Finally, while *empirical* research conducted regarding

[33] In connection to the different levels of the binding force of a precedent as defined in *Interpreting precedents* (*op. cit.*, pp. 554–555).

[34] "Especially regarding reasons given for decisions, which have the constraining effect of precedent, one has to take into account the importance of the given reasons for ensuring legal certainty in connection with predictability of judicial decision-making". See again Ljubljana Higher Court decision No. V Cpg 338/2015 of 2 December 2015, § 32.

[35] Supreme Court of the Republic of Slovenia, *Otvoritev sodnega leta 2017*, Ljubljana 2017, pp. 25–26.

[36] Namely, the procedure for *granting leave to appeal to the Supreme Court*, a two-stage procedure that was introduced into the Slovene legal system by an amendment of the Civil Procedure Act in 2008. See, e.g., M. Dolenc, *O nekaterih vprašanjih v zvezi z dopuščeno revizijo po ZPP-D*, "Pravni letopis" 2009, p. 47 ff.

[37] See Article 367a of the Civil Procedure Act, Official Gazette RS, No. 73/07 – official consolidated text *et seq*.

[38] For a discussion on the importance of the institution of the granted leave to appeal to the Supreme Court in connection with a system of precedent see, e.g., J. Zobec, *Od individualnega do*

the functioning of the system of judicial precedent in Slovenia has been scarce, the exploratory research available suggests that case-law, in spite of its ambiguous legal status, is extensively used by courts and can thus be *de facto* understood as an important factor of judicial decision-making[39].

PRECEDENT IDEOLOGY AND JUDICIAL LEGITIMACY

The central claim of this paper is that drawing attention to the elements of the rule of law in the operation of the system of judicial precedent has the potential to increase public trust and confidence in the judiciary and thus judicial legitimacy. However, this potential is not fully recognized and developed in Slovenia due to the conflicting features of the precedent ideology outlined in the previous section. Such discrepancies are not specific to the Slovenian legal context. R. Siltala, e.g., observes that "the law in action of precedent-based judicial adjudication may well be based on a more-or-less incoherent set of ideological premises, to which the judicial experience drawn from [other jurisdictions] bears witness"[40]. Despite this fact, it is the unfortunate combination of these ideological premises accepted in Slovenia that *downplays* the role of precedent or case-law in providing legal stability.

While some aspects of precedent ideology, such as the authoritative status of precedents in reference to the doctrine of the sources of law and the binding force of precedents, are more overtly accepted and discussed in detail, other aspects of this ideological framework, such as the distinction between the binding element (i.e., *ratio decidendi*) of a case and its nonbinding argumentative context (i.e., *obiter dicta*) as well as the techniques of argumentation with precedent, remain less developed or merely implied[41]. Despite the fact that "the exact content of […] a precedent ideology need not be articulated in the minutest detail, […] there should be, at least, a common and widely shared understanding of the role and function of

javnega (precedenčnega) namena Vrhovnega sodišča: ustavnopravni vidik, "Podjetje in delo" 2015, Vol. 42(6–7), pp. 919–937.

[39] I refer here to my own exploratory empirical study, see: T. Štajnpihler, *The role of case law in judicial decision-making: A sociological perspective*, "Sociologija: časopis za sociologiju, socijalnu psihologiju i socijalnu antropologiju" 2015, Vol. 57(4), pp. 593–619.

[40] R. Siltala, *op. cit.*, p. 161.

[41] I have previously critically referred to the predominant way of reasoning with case-law in Slovenia as *topical* (T. Štajnpihler, *Precedenčni učinek sodnih odločb…*, p. 173). Thus, I indicated that the courts unduly use individual precedents as *topoi* that are "linguistically expressed by one (or a few) word(s) or sentence(s)" and because they are "collectively accepted by the participants in the discourse as being plausible" (G. Kreuzbauer, *Topics in Contemporary Legal Argumentation: Some Remarks on the Topical Nature of Legal Argumentation in the Continental Law Tradition*, "Informal Logic" 2008, Vol. 28(1), DOI: https://doi.org/10.22329/il.v28i1.515, p. 79.) and, therefore, needn't be articulated in detail.

precedents as a source of legal argumentation"[42]. I agree with R. Siltala that such ideological commitment to any system of precedent and the argumentative skills and integrity required for the proper functioning of such a system are among the "ideological preconditions for the pursuit of legitimacy in law"[43].

Furthermore, in certain aspects of the precedent ideology in Slovenia there are divergences between the officially proclaimed image of judicial decision-making and the image reflected in the actual application of case-law[44]. This is most evident with regard to the criteria of justice[45], where – as noted above – the "formal, abstracting and content-indifferent legal predictability" is usually nominally proclaimed as the foundation of the system of precedent[46], while the operation of precedent in practice, which reflects other aspects of the precedent ideology, is more consistent with the axiological postulate of "content-bound, substantive, individualising and case-bound correctness"[47]. As the Constitutional Court of Slovenia concisely pointed out, it is necessary to find "a balance between constancy and predictability and thus trust in the law, on the one hand, and the need to further develop the law through case-law and adapt it to the changing social conditions, on the other"[48]. My claim is simply that – according to the officially portrayed precedent ideology – we seem to be leaning heavily to the latter side, with an emphasis on the need to remain responsive to the changing social and legal context. As the courts seem to be concerned mostly with finding justice in individual cases, which rarely arise from identical factual and legal circumstances, courts have to enjoy sufficient leeway when they are confronted with standards developed in previous cases. Although there undoubtedly exist good reasons for adopting this outlook on judicial decision-making, I also believe that in doing so we risk losing sight of the potential or value of any system of judicial precedent, i.e., demonstrating that the work of courts is not pure casuistry, but anchored in principles of the rule of law, such as stability and predictability.

Thus, my argument pertains to the importance of openly and explicitly cultivating the status of a system of judicial precedent or unified and settled case-law[49]

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[42] R. Siltala, *op. cit.*, p. 173.

[43] *Ibidem*, p. 168.

[44] This roughly corresponds with the question regarding the gap between *saying* and *doing* as defined in the comparative study on precedent. See: *Interpreting Precedents*, p. 561.

[45] R. Siltala, *op. cit.*, p. 74.

[46] *Ibidem*.

[47] *Ibidem*.

[48] Constitutional Court Decision No. Up-164/15 of 18 February 2016, § 9.

[49] At this point, however, it is important to proceed with a note of caution. As, e.g., M. Lasser pointed out in his comparative analysis, the relationship between *transparency*, (judicial) *deliberation* and *legitimacy* is not straightforward and is heavily dependent on the national legal context and legal culture. See: M. Lasser, *Judicial Deliberations – A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford 2004, pp. 299–361. For a (similar) analysis from a comparative point of

in different legal contexts, as, e.g., in the legislative process or in legal doctrine, and especially in the context of the judicial system and as reflected in the opinions of courts. For instance, consider the familiar assessment of the significance of case-law in Slovenia as exemplified by the following passage from a decision of the Ljubljana Higher Court:

> As far as the plaintiff's reference to the judgement of the Ljubljana District Court is concerned, we are not dealing with an identical situation in the referenced case. However, even if we were dealing with an identical case, [individual] court decisions are not a source of law and neither is the potentially unified and settled case-law […]; in the latter situation it is only necessary to provide a reasoned justification for deviating from [such] unified and settled case-law[50].

This illustrative example subtly demonstrates how judicial discourse on precedent in Slovenia is sometimes undervaluing the potential of a system of precedent for upholding judicial legitimacy as it weakens the position of case-law in judicial decision-making. For refuting the plaintiff's argument, it would have probably sufficed if the court ended by *distinguishing* the case brought up by the plaintiff from the case at issue. However, the court decided to continue in an unnecessary and hypothetical or speculative manner of argumentation regarding the strength of arguments derived from case-law (or in fact the lack thereof) that – in sum – reflected a different, less meaningful or powerful image of case-law in general.

CONCLUSIONS

As I have *outlined* in this paper, building on the rule-of-law foundation of a system of judicial precedent can contribute to public confidence in the judiciary and its legitimacy. However, my claim does not entail that we must necessarily alter the formal framework or the "surface-structure level" of the Slovenian legal system regarding case-law (e.g., by officially implementing a doctrine of *stare decisis* as in *common law* jurisdictions), as some authors discussing the status of precedent in Slovenia have implied[51]. I am (only) suggesting that it would be worth considering how we could refocus the public and professional image of the judiciary and of judicial decision-making by reshaping the precedent ideology that constitutes the deeper, cultural level of law in order to better reflect the value of relying on precedent, such as the realisation of the postulates of the rule of law.

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view see also, e.g., J. Komárek, *Judicial Lawmaking and Precedent in Supreme Courts*, "LSE Law, Society and Economy Working Papers" 2011, No. 4.

[50] Ljubljana Higher Court decision No. I Cp 2212/2014 of 28 October 2014, § 7.

[51] See, e.g., M. Novak, *Precedens in trmasta celina*, IUS Kolumna, 7 August 2017, www.iusinfo.si/DnevneVsebine/Kolumna.aspx?Id=201276 [access: 07.11.2017].

Thus, my concern in this paper was with the "*judicial imagery*, or the prevalent conception of the role and function of the judge in judicial adjudication"[52]. On this level, it is important to challenge the image of the judge portrayed in Slovenian legal culture under the "*dispute-solving* or *contextualist paradigm* of precedent-following[53], where the judge is unconcerned with anything lying outside the scope of the individual dispute brought before court. In other words, I am referring to the possibility of modifying in part the legal ideology – as the "repository of all of contemporary legal doctrine's impossible aspirations"[54] – with regard to the functioning of judicial precedent to bring about a change, not only in legal doctrine (on judicial precedent), understood by R. Cotterrell as "norms, rules, principles, concepts and the modes of their interpretation and validation", but also in the "social understandings and structures of beliefs, attitudes and values"[55] regarding the functioning of the courts.

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[52] R. Siltala, *op. cit.*, p. 240. On the (ideological) implications of the *image* of a judge, see also, e.g., F. Ost, *Sodnika trije liki: Jupiter, Heraklej, Hermes*, "Revus" 2008, Vol. 8, pp. 85–108; A. Novak, *Imago iudicis, štiri podobe iz idejne zgodovine sojenja*, "Zbornik znanstvenih razprav" 2015, Vol. 75, pp. 67–101.

[53] R. Siltala, *op. cit.*, pp. 243–244.

[54] R. Cotterrell, *op. cit.*, pp. 89–90.

[55] *Ibidem*.

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STRESZCZENIE

Niniejszy artykuł dotyczy socjologicznych aspektów roli precedensu w funkcjonowaniu systemu sądownictwa w ramach kultury prawa stanowionego. Pełne i otwarte uznanie aktywnej roli sędziego w procesie stanowienia prawa spotyka się czasami ze sprzeciwem, ponieważ wydaje się być nie do pogodzenia z zasadami rozdziału władzy i demokratycznej legitymacji. Problem ten może zostać rozwiązany, jeżeli wyjdziemy poza tradycyjne ujęcie naszych koncepcji politycznych i konstytucyjnych. W ramach niniejszej publikacji, wychodząc z kontekstu słoweńskiego systemu prawnego, przedstawiono argument, iż otwarte i przejrzyste podejście do uznania systemu precedensu sądowego może przyczynić się do legitymacji sądowej.

Słowa kluczowe: precedens sądowy; orzecznictwo; państwo prawa; legitymacja sądowa; ideologia precedensowa; kultura prawna