Judicial Precedent in Civil Law: A Critical Perspective on the Slovenian Approach*

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ABSTRACT

The so-called precedential effect of a judgment, which means that it is binding both on the court that decided the dispute and on all the lower courts within a given jurisdiction, is typical of the common law courts, since it has historically replaced the legislature and provided a certain order and stability in the mass of judicial decisions and tribunals at different instances. However, since the great families of common law and continental European law have converged considerably over time, we can speak of certain precedential effects also in the case of continental courts, including in Slovenia. These are still lagging behind the normative force of the precedential effects of common law judgments, but they are important developments that should be taken into account. We are talking about vertical precedential effects as well as horizontal ones, which are a particular problem in Slovenia.

Keywords: Judicial precedent, common law, civil law, Slovenia, vertical precedential effect, horizontal precedential effect, settled case law.

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Sodni precedens v civilnem pravu: kritičen pogled na slovenski pristop

POVZETEK

Pomen sodne veje oblasti se kaže tudi v zavezujočem učinku sodnih odločb. T. i. precedenčni učinek sodbe, ki pomeni njen zavezujoč pomen tako za sodišče, ki je odločilo o sporu, kot za vsa nižja sodišča v krogu določene sodne pristojnosti, je tipičen za sodišča common law, saj je zgodovinsko nadomeščal zakonodajalca in zagotavljal določen red in stabilnost v množici sodnih odločb in sodišč na različnih instancah. Ker pa sta se veliki družini common law in evropskega kontinentalnega prava skozi čez precej zbližali, govorimo o določenih precedenčnih učinkih tudi v primeru kontinentalnih sodišč, tudi v Sloveniji. Ti za normativno močjo precedenčnih učinkov sodb iz common law še vedno zaostajajo, vendar gre za pomembne premike, ki jih je treba upoštevati. Sicer govorimo o vertikalnih precedenčnih učinkov kot tudi horizontalnih, ki so v Sloveniji še poseben problem.

Ključne besede: Sodni precedens – Evropsko kontinentalno pravo – pravo common law – Slovenija – vertikalni precedenčni učinek – horizontalni precedenčni učinek – ustaljena sodna praksa.

1. Introduction

One of the traditional differences between the two major legal families of civil law and common law has been their different approaches to what is considered a primary legal source. While common law has considered "court case law"[1] as the primary legal source, civil law emphasizes the prime importance of the legislation. The importance of the secondary legal sources, i.e. legislation in the common law world and court case law in the civil law, lagged very much behind the primary legal sources. Through history that changed, thus today both legal families recognize the mentioned two legal sources as very important in their legal systems. However, differences in what they consider the most im-

[1] Whenever I use the syntax »case law« in this article, I basically mean the case law of courts.

portant in their legal systems remain but are much more subtle and detailed than before.[2] Nevertheless, I insist that the emphasis on how case law in the civil-law legal family is treated is still less sophisticated than in common law, and there are a few places where civil law could learn from common-law practices and improve its shortcomings.[3]

I do not intend to idealize the common-law approach to case law and precedent.[4] After all, is there a single approach to these issues in common law? I would guess there is not since many (small) differences could be found if we only travel from the UK to the USA. And, I am sure, there are (dis)advantage concerning case law and precedent that need to be addressed when we travel around the globe and visit common-law countries and compare them first among themselves, to finally compare them with civil law systems. In this article, I mainly take ideas for comparison from, but not exclusively, the common law of the United States of America.

What is my intention in this article is to point to certain bad practices of dealing with the issue of judicial precedent in Slovenia, provide reasons why I consider them bad, compare them with better solutions from the common-law environment, and suggest certain improvements to the situation in Slovenia. Such solutions could either follow from common-law better practices or are particularly related to the problems distinct for the civil-law systems, for which the common-law approach could not provide any solutions.

In the first chapter, I outline the historical background and relevance of case law to the European continent. History shows us roots to learn about the development of a certain legal institution.[5] Then, in the next chapter, I present the modern develop-

[2] Take for example a typical textbook used by first-year law students to learn fundamentals of legal methodology. In my Introduction to Legal Theory (Novak, 2021), in the chapter on (formal) legal sources, students will start learning general legal acts such as the Constitution and statutes, whereas in Ginsburg's Legal Methods, in a similar chapter on legal sources, they will start the discussion on the topic with case law.

[3] And there might be a case for common-law systems to learn from civilian ones to learn from their best practices with respect to statutory drafting (Zweigert, Kötz, 256 *et seq.)*. The impact of the very long tradition dating back to the first universities on the European continent, in contradistinction with a little bit than two centuries of seriously dealing with statutes is something we cannot neglect. However, due to potential complex problems in that regard it is impossible to deal with that issues in this article in a lengthy manner.

[4] For the purpose of this article, whenever I use the word precedent I mean "judicial precedent," even when I use it without the adjective judicial.

[5] In view of David and Grassmann, legal history is one of the legal disciplines that is the most relevant for comparative law (David, Grassmann, 1988).

ment of the civilian approach to the judicial precedent, which is no longer that far from the common law system than before, wherein I discuss two concepts of precedent. After that, I turn to discuss the approach to judicial precedent from the view of the Republic of Slovenia, a country from within the so-called Central European subgroup of civil law. The analysis of Slovenian similarities and differences with the common-law perspective is presented first through the discussion of the vertical effect of the precedent and, second, through discussing the horizontal effect of the same. Finally, I conclude with some thoughts summarizing the previous presentation as well with some ideas on how to continue the development of the discussed legal institution.

2. Historical Heritage of the European Continent

It is well-known that, historically, judicial precedent is an essential feature of common law. The doctrine of judicial precedent, with all its important elements (i.e. *stare decisis* and the distinction between *rationes decidendi* and *obiter dicta)* is certainly an invention of English law (Cross, 1991; Garner 2016; Black 2010; Gerhardt 2011; Duxbury 2008). It developed gradually with the increasing importance of royal courts as law-makers in many areas of social life. However, it was not until the later 16th century that past decisions were given weight,[6] and not until the 19th century that the doctrine of *stare decisis* (along with the *rationes/dicta* distinction) was fully emphasized as a peculiar characteristic of English law (Robinson, Fergus, Gordon, 2000). That was more or less successfully exported to the U. S. legal system by the colonists (Friedman, 1973), which it developed further and differently due to the size, complexity, and (federal) structure of that system.

Quite the contrary, the civil law countries have traditionally not embraced such a strong doctrine of precedent. Quite indicative historical reasons for that are, e.g., connected with pre-revolutionary France, one of the most important countries in the world at that time. In the *ancien regime* the most important courts,

[6] Evans argued that the idea of *stare decisis,* although not yet developed as a fully-fledged doctrine, had been born together with the first published judicial decisions in the Year Books (1290-1535). He believed that "judicial precedents are writing or printing are combined indissolubly" (Evans, 32-33).

royal *parlements*, were generally considered the exponents of royal power, arbitrary, and corrupt (the judicial office could have even been bought!). Thus, even the "father" of the separation of powers, Montesquieu, who came out first with the idea of three separate branches of government (the new (third) one being judicial), demanded that the judge should only be *la bouche de la loi* (mouthpiece of law) (Montesquieu, 2001). That was his pre-revolutionary reaction to the non-independent judiciary of his time. The historical roots for the present reputation of the judiciary in England (Baker, 2019) and the US (Presser, Zainaldin, 1989) were certainly very different.[7] Therefore, this was a very important reason why traditionally the European Continent has relied on legal acts created first by the executive branch (the emperor) and later by the legislature (parliament) (Zweigert, Kötz, 1998). The judiciary has traditionally not been as independent from other branches of government (Zweigert, Kötz, 1998)[8] than that was the case in Britain.

Nevertheless, in the long run a neglect of court case-law became intolerable as it was established that the legislature could not imagine every solution to daily problems, thus some creativity of courts' interpretation was necessary, and it was deemed reasonable that such have equal implications. For that reason, the doctrine of *jurisprudence constante* has developed in France, and was also adopted in other civil-law countries(Zweigert, Kötz, 1998).[9] However, until the Second World War, they did not emphasize the importance of case law (and precedents) beyond that of only a secondary legal source, after statutes being the primary ones.[10]

Especially in the second part of the 20th century, the importance of judicial precedents and case law only continued its development on the European Continent and is today, at least in

[7] In the 17th century England, there was Coke opposing the King concerning the jurisdiction of common law courts. In the pre-US colonies judges in several cases opposed the English authorities. Do we know an important judge from the civil-law systems between, e.g., the 17th and 19th century?
[8] In the Austrian-Hungarian Monarchy at the end of the 19th century, judges were still officially called »judicial servants« (Škrubej, 2010). A remnant of the historical dependence of the judiciary on the executive branch of power in Germany, is the regulation according to which it is the Minister of Justice who is empowered to appoint judges. At some point in history, judges were employees of the Ministry of Justice Zweigert, Kötz, 1998. However, in the present situation, German as well as other civil-law judges are as a rule as equally independent as their common-law colleagues, which means that the contemporary powers of the Minister of Justice in Germany with respect to judges are merely formal.
[9] In Germany, it is called *ständige Rechtsprechung*.
[10] This has been a traditional typical difference between the two legal families (David, Grasmann, 1988). See also Reimann, Zimmermann, 2019; Orcu 2007; Bussani, Mattei, 2012.

some respects, even comparable to judicial case law in common law countries.[11]

The territory of nowadays Slovenia shared the "destiny" of bourgeois Central Europe, in which the judiciary was not fully independent particularly from the executive, all the way to World War 2, after which the introduction of communism even worsened the situation with regard to judicial independence.[12] With the fall of communism and the independence of Slovenia, the judiciary became formally independent with the 1991 Constitution, and after also joining the EU in 2004, the Slovene judiciary has been striving to be a respected member of the EU Community of judges[13] by abiding all the requirements of the basic values of that association, including judicial independence as a principle inseparable with the rule of law.

3. Modern Developments: Different Models of Judicial Precedents

After the Second World War, with the introduction of modern constitutions, constitutional courts, and constitutional democracy in general, the situation changed to some extent on the European Continent. Moreover, supreme European courts, i.e. the European Court of Human Rights and the European Court of Justice were established, thus their case law as well as that of national constitutional courts have gradually claimed a status comparable to binding common-law precedents. Therefore, the importance of judicial precedent was spreaded on the Continent top-down, from the highest courts with some resistance from lower-court judges (Novak, 2003).

Today it is possible to argue that both the major legal families, of civil law and common law, embrace the legal institution of judicial precedent (MacCormick, Summers, 1997). A simple definition of judicial precedent could be a previous judicial decision that serves as a model or pattern to adjudicate future similar cases. It

[11] See, e.g., Kühn, 2011.

[12] For the persistent problems with regard to the judicial branch in ex-communist countries of the former Yugoslavia stemming from the communist ideology (Uzelac, 2010).

[13] EU yearly measures performance of EU judiciary in relation to numerous indicators. See Justice Scoreboards of the EU Commission https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. For a critical view on the shape of Slovene judiciary, see Avbelj, Letnar Černič, 2020.

surpasses judicial decisions that have no general effect whatsoever and only apply to the immediate parties (e.g. A and B) of a particular controversy (Lat. *inter partes)*. Precedents entail judgments having a general effect (Lat. *erga omnes)* in future cases, a situation is similar as the legal effect of legislation. Therefore, the crucial difference is that the precedent (i.e. *erga omnes* effect) means binding beyond the immediate parties, which can be designated as generally binding. Relating to the adverb "generally," it is enough that it stretches to another party, in a future case, who has not been part of the dispute in which the precedent was set. Furthermore, the idea of "binding" implies normative or formal effects, meaning that it needs to be followed.

For the concept of judicial precedent, two approaches have been established in common law and civil law. The first was the *stare decisis* doctrine from English law, being the cradle of common law, meaning that one only decision of a senior court, to have general consequences for future cases, is enough to constitute a precedent. I call this concept strict precedent. There is another, however, a civil-law based doctrine, *jurisprudence constante*[14] with the idea that in order to establish a precedent we need several same decisions of senior courts to become binding for future same cases. This second concept of precedent, I call loose precedent. Both concepts presuppose their binding effect in a specific jurisdiction in a vertical manner by higher courts' precedents being binding on lower courts, as well as in a horizontal way, which entails that courts are bound by their own precedents.

However, although European civil law has faced a certain level of judicialization of its legal systems and thusly case law's prominence has been raised, it still cannot be said to have reached the level of its common-law counterparts in terms of rigor and formal strength (Novak, 2007). The model of *jurisprudence constante* is normatively weaker than *stare decisis,* although as we will see in the continuation, the European Continent has also introduced a model of judicial precedent akin *stare decisis,* and thus includes both the models, the stronger and the weaker one.

Further, there remain important differences between the two legal families also concerning the *rationes/dicta* doctrine(Novak,

[14] This French doctrine has a German equivalent in *ständinge Rechtsprechung.*

2008). That is importantly based on distinguishing cases on the basis of material facts, which is in the European Continental context underdeveloped at least when mentioning the distinguishing of crucial facts in the reasoning of judicial decision is concerned(Zweigert, Kötz, 1998). European Continental judicial systems abide by the difference between *rationes* and *dicta* but their approach is more relaxed in comparison with the common law. The same would apply to the existence of separate opinion of judges, which exist in some countries of the European Continent, but mostly only at the level of constitutional and supreme courts.

Moreover, before the introduction of statutory law on a more frequent basis, judicial precedents in England were solely precedents of solution, meaning that were original creation of law, and upon more frequent legislation when the courts needed to interpret statutes, they were joined by the precedents of interpretation (MacCormick, Summers, 1997). Thus, in the modern time common/law courts deal with both the mentioned two types of judicial precedents, whereas in the civil law only the precedents of interpretation have been possible since the precedents of solution never existed, which means that judges have never been recognized the role of "original creators" of law.

4. Slovenia's Dealing with Judicial Precedents

4.1. Vertical Precedential Effects

The Slovene law is a typical Central European legal system influenced by Roman law, Austrian monarchy law, and socialist law. In terms of judicial precedent, what has traditionally applied in general was the doctrine of 'established' or 'settled' case law (basically *jurisprudence constante) (*Štajnpihler Božič, 2018),[15] which is certainly typical for the entire European continent. That changed to some extent when Slovenia adopted its new Constitution in 1991 and joined the Council of Europe as well as the EU, which in many aspects contributed to introducing also the strict or formal model of judicial precedent.

First, the strict understanding of precedent, resembling *stare decisis,* can be ascribed to the power of the (Slovene) Constitu-

[15] That doctrine applied in Slovenia even during the communist era.

tional Court[16] to strike down a statute if found unconstitutional (See Nerad, 2019, p. 448).[17] In such a case, only one Court decision is needed, and as soon as it takes effect the unconstitutional statute, or usually part of it, is "erased" from the legal system.[18] If the mentioned power of the so-called abstract constitutional review has been accepted by lower courts without any opposition or, it could be better said, they had nothing to do with that as this Court's power was exercised directly on the basis of the Constitution, whose final interpreter is the Constitutional Court, it was a bit different with respect to the power of the Court to decide in constitutional-complaint cases. That is the second important power of the Constitutional Court. Although the Court wanted these types of decisions to apply *erga omnes* as strict judicial precedents, since according to Art. 125 of the Constitution judges are bound by the Constitution and statutes, and the Constitution is also what Constitutional-Court judges say it is (See Nerad, 2019, pp. 451– 452), from time to time some lower courts did not decide to follow it in future cases, but argued instead that as other judicial decisions also this type of cases should only apply *inter partes*.

Second, by joining the EU in 2004, Slovenia subordinated part of its sovereignty to the jurisdiction of the Court of Justice of the EU (hereinafter: the CJEU), which is empowered to provide uniform interpretation of EU legislation. EU law is considered part of "domestic law" in member states that needs to be applied by national courts whenever parties submit their cases to the national courts based on alleged violations of EU law. Thus, whenever a national court finds an EU law (usually a regulation or directive) unclear it may adjourn proceedings - but the highest national courts must do the same in such a situation - and request the CJEU to give interpretation of that EU act, following which the national court finally decides the case. Such interpretation by the CJEU, which is to ensure the uniform understanding and application

[16] The model of constitutional review that was adopted in Slovenia is European (Mavčič, 2018). Our "neighbor," Hans Kelsen, the father of the European model of constitutional review, was also very much influential in other areas of law in Slovenia, like legal theory.

[17] See Nerad, 2019, p. 448, claiming that Constitutional Court decisions are binding having erga omnes effects.

[18] See a similar view for Germany, in Opperman 107-120 and Stainer and König 121-130. However, if the Court finds that striking down a statute or part of it might cause a gap in the law, it establishes its unconstitutionality and calls the parliament to amend it within a specific deadline.

of EU law throughout the entire EU, is binding *erga omnes*[19] and can be considered strict or formal judicial precedents in all EU members.

Third, in the early nineties of the previous century, when becoming independent Slovenia joined the Council of Europe, whose most important judicial institution is the European Court of Human Rights (hereinafter: the ECtHR). That Court's judgments are rendered upon applications by individuals who claim the violations of human rights under the European Convention for the Protection of Human Rights after all the domestic remedies have been exhausted against their state. The "usual" ECtHR decisions are considered having *inter partes* effects. However, when the ECtHR finds that in addition to establishing a human rights violation, there are also structural deficiencies in the violating state to be remedied, they issue the so-called pilot judgment, by which they call for structural reforms in such a country, usually to adopt a specific statute or amend legislation. Since such a judgment has *erga omnes* effect for such a state, it could also be considered as a version of the strict or formal judicial precedent.[20]

Fourth, according to the Courts Act, the Supreme Court of Slovenia, which is empowered according to that Act to unify lower courts' case law, may issue general opinions reached at a plenary session (Pavčnik, 2004). In this manner, such opinions would be formally binding on itself and all other lower courts. This would be considered having the same value as strict or formal precedents with *erga omnes* effects. The problem is that the Supreme Court very rarely meets at a plenary session to consider and issue such opinions.

Furthermore, by the latest amendment of the Civil Procedure Act, the Supreme Court was given another tool to unify case law. When a judgment of the court of appeals is rendered, the parties who opine that the case law is not uniform enough, in the sense that other courts of appeal have decided differently in the same case, may file a special revision (as an extraordinary legal remedy) with the Supreme Court to unify the case law. In such a situation the Supreme Court would accept such a revision and

[19] See also Avbelj, 2009.
[20] In the view of both Zupančič and Zobec, the very existence of ECtHR pilot judgments demonstrate the non-existence of the erga omnes effect of »ordinary« ECtHR judgments (Zupančič, 2004; Zobec, 2018).

through its decision make the case law of lower courts coherent. Such a Court decision is considered binding *erga omnes*, in the same manner as case law that has been established, and can be considered as a strict or formal judicial precedent. The problem is that this remedy is only possible in the civil procedure, and not in other areas of law (there are five areas of law covered by the jurisdiction of the Supreme Court) because only the Civil Procedure Act was amended.

Fifth, case law that is considered as established (i.e. *jurisprudence constante)* is binding *(erga omnes)* on the courts and can be considered to have similar effects as strict or formal judicial precedents. Moreover, an important step was made in Slovenia in the early 90s, when the Constitutional Court found courts' arbitrary departure from settled case law a violation of the human right of equal protection of rights (Article 22 of the Slovene Constitution). That means that if there is established case law, no court may ignore it although they can decide the case differently by distinguishing it from the case law established (Galič, 2019). However, the problem is that it is not entirely clear how many same cases need to be decided for case law to be considered established. In one opinion the Constitutional Court said that one or two cases decided in a same manner do not already constitute such. Consequently, there need to be at least three same decisions in order for the case law to be considered established (Galič, 2003).

Last but not least, a constitutive part of the doctrine of precedent is also distinguishing between *rationes decidendi* and *obiter dicta,* as between binding and persuasive authority. Only *rationes* are binding. The highest Slovene courts, i.e. the Constitutional Court and the Supreme Court accept the differentiation between the two but when they discuss or distinguish previous cases as precedents in the reasoning of their decisions they do not pay as much attention to material facts as is the practice of common-law courts. This also follows from the headnotes summarizing their cases where mainly crucial reasons are presented without including the material facts.[21] However, the culture of precedent with also distinguishing between rationes and dicta has been strength-

[21] See, more generally, about a similar practice of other Continental courts, in Zweigert and Koetz, 1998, where they criticize them for approaching headnotes as if statutory (abstract and general) provisions are dealt with.

ened by introducing the possibility of all Supreme Court judges to write their separate opinions. For the judges of civil and penal departments of the Supreme Court that became possible based on explicit grounds in the Civil Procedure Act and the Criminal Procedure Act, whereas for administrative judges through the subsidiary application of the Civil Procedure Act in proceedings dealing with the judicial review of administrative acts.

Accordingly, in the recent decades the Slovene legal system has witnessed quite a few changes towards embracing a more formal approach to judicial precedent. The vertical concepts of the Continental version of *stare decisis* discussed above, as well as also the doctrine of settled jurisprudence, entail that lower courts (more or less) follow the case law established by higher courts, which is also the case in Slovenia. From this point of view, as a general tenet, like other Continental legal systems also the Slovene legal system is no longer that far apart from common-law ones, however, several specific significant differences are still persistent.

4.2. Horizontal Precedential Effect Problems

Horizontal *stare decisis* is generally considered as a softer version of judicial precedent because in its framework precedents are considered persuasive, not formally or strictly binding. It relates to both (i) courts' own previous decisions and the (ii) decisions of courts of the same level. With respect to (i), in general, both common law and civil law (including Slovenian) courts abide by their previous decisions and occasionally overrule them, by finding new reasons for reaching different decisions. To this point, there is no difference between civil and common law courts. Modern courts no longer consider themselves strictly (formally) binding by their previous decisions like it was the case, e.g., with the British House of Lords until the late sixties of the previous century (Zweigert, Kötz, 1998). In a fast-changing world, in which the social context of judgments is being changed instantaneously, it would be impossible to maintain strict obedience to former decisions. However, unlike the common-law courts, their civil-law counterparts are not that consistent, analytical, and detailed, especially concerning the cases' material facts, when providing distinguishing reasons to overturn their previous decisions (Zweigert, Kötz, 1998).

But, at least when the Slovenian courts are concerned, there is even a greater difference with common-law courts as regards (ii). Although the horizontal effect of judicial precedent does not imply formal bindingness, common-law courts are generally not completely free to disregard the previous decisions of different panels of the same court or the courts of the same level within the same jurisdiction. They are bound to follow even persuasive authorities based on the principle of judicial comity, which means that the horizontal *stare decisis* is more rigid than one would think from a first glance. For example, U.S. federal courts of appeal have adopted rules imposing on judges the duty to defer to previous decisions of their colleagues either in other panels of the same court (intracircuit) or at the same level (extracircuit), although the intracircuit comity is generally followed whereas the extracircuit comity is followed much less.[22]

Similarly, in Canada, in a recent decision (R v. Sullivan*,* 2022, SCC 19, prs. 1–3), the Supreme Court held that decisions of the same court should be followed as a matter of judicial comity. A decision may not be binding if it is distinguishable on its facts or if the court has no practical way of knowing it existed. If it is binding, however, a trial court may only depart from it in the following one of three narrow circumstances: (a) the rationale of an earlier decision has been undermined by subsequent appellate decisions; (b) the earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or (c) the earlier decision was not fully considered (e.g. taken in exigent circumstances). Consequently, the conventional principles of horizontal *stare decisis* govern the manner in which previous declarations of unconstitutionality subsequently constrain courts of coordinate jurisdiction in a province (Stanca, 2022).

Moreover, the horizontal problems of the *stare decisis* doctrine resulting in divergent decisions at the same court are in common law usually resolved *en banc,* when all of the judges of an appellate court collectively decide a case. That occurs when the court believes that the matters are especially complex and important, or when the panel's decision appears to conflict with a prior decision of the court (Abadinsky, p. 389). According to the Federal Rules of Appellate Procedure, such a hearing may be ordered to

[22] There are even ideas that such judicial comity would need to be extended to discrict courts (Mead, 2012).

maintain uniformity of decisions within the circuit.[23] The problem is that such hearings are very rarely held (Article 35 (a)).

In Slovenia, too often occurs that different panels of the same appellate court and even different panels of the Supreme Court reach different decisions in essentially similar cases. In cases in which case law has not been established, local courts (44 in number) and district courts (11 of them in total)[24] easily reach divergent decisions even in same kind of cases (Novak, 2018, p. 137). Parties and lawyers normally complain about that (Novak, 2015).[25] There already exists the possibility of a joint session of all Supreme Court judges to be called, through which they could make case law uniform for the entire legal system, but they very rarely meet and thus do not perform well that competence given to them according to the Courts Act. For that reason, the Courts Act in Slovenia was to be amended introducing the so-called 'extended' panels at the Supreme Court whose hearing would be called by appellate courts, the task of which was to contribute to making the case law of individual panels of the Supreme Court uniform (Novak, 2018, p. 138), but that amendment unfortunately failed in the parliamentary procedure (Novak, 2018, p. 138).

The authority of judicial precedents is better upheld if all court decisions are published so that not only judges, lawyers, but also parties have an opportunity to follow previous model judgments. In contradistinction with common law systems, in which publishing especially court judgments of higher courts has been an old practice, in a civil-law system like Slovenian this has not been achieved yet. Thus far only all Constitutional Court and Supreme Court judgments have been published, but not all judgments of appellate courts, and no judgments of first instance courts although they write extensive reasoning, which mainly represent interpretations of various statutes.[26] The publication of all judgments is also a prerequisite for any use of advanced AI systems to monitor how the uniformity of case law is followed, which I

[23] Article 35 (a).
[24] In Slovenia being a unitary state, according to the Courts Act, there are local and district courts as the courts of first instance. They are divided into four jurisdictions of courts of appeal presided by one Supreme Court.
[25] Uniform case law is important because parties expect to be treated, in the manner of courts reaching decisions in their cases, in an equal manner.
[26] Five years ago, the then Minister of Justice amended the Court Rules in which he required that also all judgments of first-instance courts should be published. Following that amendment, the Supreme Court introduced a project of anonymization and publication of such judgments, which has not yet borne fruit.

believe will help improve that area in the future, as a tool assisting the courts (Sourdin, 2020).

5. Conclusion

Although the two major legal families – the common law with its original English parent and many adoptive parents, and the civil law with many more original and adoptive parents – have especially in the ear of globalization come much closer than they have even been, many differences are still perpetuated. One of them is the approach to judicial precedent. By studying the excellent works produced by the "Bielefeld Kreis",[27] it seems that the differences in the area of following and interpreting, in short the entire methodology concerning dealing with, judicial precedents have still been greater than in the area of statutory interpretation.

Having been aware of the above-said divide, I published already in 2008 a chapter entitled the Culture of Precedent in my legal philosophy and theory book,[28] where I collected and even extended my previous criticism of the civil approach to the judicial precedent. Unfortunately, nothing has really changed from those times, at least in Slovenia. But also, more broadly, in the context of the EU or Continental Europe at large, no important changes seem to be upcoming in this regard.

Maybe that is no longer a question of normativity and epistemic strength but more of (legal-cultural) identity, ideology, or simply the matter of (the right to) being different?

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[27] The group of eminent legal scholars, mainly general legal theorists, from around the globe who dealt with the interpretation of statutes and precedents under a careful editorial leadership by Professors MacCormick and Summers (see many times cited in this work).

[28] See Novak 2008.

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