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THE ROLE OF CASE LAW IN JUDICIAL DECISION-MAKING: A SOCIOLOGICAL PERSPECTIVE²

Uloga precedentnog prava u sudskom odlučivanju: sociološka perspektiva

ABSTRACT: *The article attempts to verify a common conception that has by now become an integral part of legal culture in civil law jurisdictions, namely, the conception that despite its unresolved legal status, case law (i.e. the body of past judicial decisions) is widely used by the courts when they are justifying their interpretative choices. For this purpose, an exploratory empirical study of court citation practices was conducted. The study focused on a sample of the officially reported decisions of the Supreme Court of the Republic of Slovenia and the appellate (Higher) courts on civil matters in 2011 that were publicly accessible on the official internet database of the Slovene courts. The aim of the study, which provides the first systematic outline of the use of case law in the judicial decision-making process within the Slovene legal system, was to verify whether case law in fact constitutes an important factor in judicial decision-making. It did so by focusing on the extent and the manner in which Slovene courts refer to case law, as these may be inferred from the reasoning of their decisions.*

KEY WORDS: Case law, legal precedent, judicial decision, courts, adjudication, sociology of law

ABSTRAKT: *Ovaj tekst pokušava da verifikuje uobičajenu pretpostavku, koja je do sada postala integralni deo pravne kulture u sistemi kontinentalnog prava da precedenti (to jest, skup prethodnih sudskih odluka), iako imaju nerešen pravni status imaju široku upotrebu od strane sudova kada obrazlažu svoje odluke. Za ove svrhe, sprovedeno je eksplorativno empirijsko istraživanje o praksi citiranja*

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2 A draft of this article was presented as a paper at the Conference *Citizens, Societies and Legal Systems: Law and Society in Central and South Eastern Europe* held on 21 November 2014 in Belgrade. In preparing the article I profited from the remarks and comments of the conference participants; I am indebted especially to the discussant for my paper at the conference, Zsolt Zódi, Institute for Legal Studies, Centre for Social Sciences, Hungarian Academy of Sciences.

sudskih odluka od strane sudova. Studija je zasnovana na uzorku zvaničnih odluka Vrhovnog suda Republike Slovenija i apelacionog Višeg suda u građanskim pitanjima iz 2011. godine, a koje su bile javno dostupne na zvaničnoj internet bazi slovenačkih sudova. Cilj ove studije, koja daje prvi sistematski uvid u upotrebu precedenata u praksi sudskog odlučivanja u slovenačkom pravnom sistemu, jeste da verifikuje da li precedenti zaista predstavljaju važan faktor u sudijskom odlučivanju. To je postignuto analizom obima i načina na koji slovenački sudovi referiraju na precedente u obrazloženjima svojih odluka.

KLJUČNE REČI: precedentno pravo, pravni precedenti, sudske odluke, sudovi, presuđivanje, sociologija prava

1. The initial hypothesis: an apparent contradiction

Case law, i.e. the entire body of decisions that (Slovene) courts adopted, is one of the factors that decisively characterises the process of judicial decision-making. This statement, however, is not entirely self-evident. The Supreme Court of the Republic of Slovenia expressed its prevailing theoretical position regarding the role of case law in the following manner: “In Slovenia case law does not constitute a formal source of law. [...] In the Slovene continental legal system courts are not bound by decisions of higher instance courts outside the scope of a concrete case” (The Supreme Court, 2009). While this categorical statement is indicative of the general mindset of Slovene legal culture, at the same time, it is true that precedents are nevertheless widely used by courts in the continental legal systems, the Slovene legal system being no exception (e.g. MacCormick and Summers, 1997: 531*f.*). When studying the role of case law, we thus encounter somewhat of a dilemma. At the intersection of different positions regarding this question, the silhouette of a paradox begins to appear: on the one hand, judicial decisions are not and cannot be formal sources of law; on the other hand, however, our intuition tells us that they nevertheless play an important role in judicial decision-making.³

Legal theory is tackling this apparent paradox by attempting to clarify and to some extent give a new meaning to certain fundamental legal concepts, such as *the source of law*, that lie at the core of this problem and frame our considerations of judicial decision-making and of law in general (e.g. Pavčnik, 2011: 274*ff.*; Štajnpihler, 2012: 59*ff.*). Such a conceptual breakdown also contributes to a more detailed definition of the role of *case law* in the context of judicial decision-making, as one of the *factors* that a judge relies on when resolving concrete cases. However, we must not forget the other side of the equation constituting our initial paradox, according to which courts, regardless of its ambiguous legal nature, *in fact* apply case law as an aid when deciding concrete cases. The question here is not what is the most adequate conceptual framework to describe the nature of judicial decision-making, but rather to what extent our perception of judicial

3 “[C]oncrete legal cases cannot be a kind of ‘*de facto* legal source’ that nobody recognises as such, yet everybody nevertheless applies it” (Auersperger Matić, 2007: 87).

decision-making can be verified in practice. This shifts the focus towards an empirical study of decision-making the empirical dimension of judicial decision-making, which is first and foremost the subject of *sociological* legal research (cf. Carbonnier, 1992: 220ff.; Raiser, 2011: 275ff.; Igličar, 2009: 332f.).

2. Empirical analysis of case law references

2.1 *The chosen approach and the hypothesis*

Our empirical analysis aimed to study the presumed *de facto* influence of case law or, in other words, case law as a *factor* in the decision-making of Slovene courts.

When discussing judicial (legal) decision-making, at least two aspects have to be distinguished from the outset: (1) the process of making a decision as the cognitive or psychological process of a judge, i.e. the *context of discovery*, and (2) the process of substantiating the adopted decision that is, in particular, linked to the duty to give reasons, i.e. the *context of justification* (cf. Anderson, 2009; Feteris, 1999: 10; Alexy, 1991: 282; MacCormick, 1978: 15; Peczenik, 1989: 44ff.). While the studied phenomenon could be analysed in both contexts, I agree with those who believe that the purpose of legal reasoning or legal decision-making lies above all in the context of (*legal*) *justification*,⁴ as may also be inferred from the methodological approach that I have chosen for this research, which is presented in more detail hereinafter. I have thus only focused on one of the possible perspectives from which the main question can be addressed.

I attempted to verify whether case law in fact constitutes an important factor in judicial decision-making by focusing on the *extent* and the *manner* in which Slovene courts refer to case law, as these may be inferred from their decisions.⁵ This aspect of analysing judge-made law has already been highlighted in Slovene legal theory: “It is a matter for empirical analysis to show if and to what extent Slovene case law is creative. Its quality and legal certainty undoubtedly also depend on *whether, how often and in what manner the argument of judicial precedent is applied in the reasoning of court decisions*” (Pavčnik, 2004: 176, emphases added).⁶

I have thus applied an approach that includes counting the references to or citations of case law in the reasoning of Slovene court decisions. Such analyses

4 In this sense, the research relies mainly on the tradition of different doctrines of legal argumentation. Thus, for example, MacCormick (1978: 14f.) concludes that in legal decision-making, the essential notion is that of giving “good justifying reasons for claims defences or decisions. The process which is worth studying is the process of argumentation as a process of justification”.

5 My analysis thus entails an examination of the content of secondary materials, as one of the fundamental methods of sociology of law (e.g. Igličar, 2009: 85f.; with regard to the quantitative aspect see also in particular Carbonier, 1992: 235ff.).

6 As will be explained below, the method applied in the present study is only capable of addressing certain aspects of the problem mentioned by Pavčnik. Since I focus only on citation patterns in judicial decisions concerning the use of case law, the substantive analysis of how the courts understand and use precedents as sources of arguments (qualitative aspect) mostly falls outside the scope of this article.

can be found in common law legal systems, as well as in the civil law legal tradition (e.g. Landes and Posner, 1976: 249ff.; Manz, 2002: 267ff.; Cross, Spriggs, Johnson, Wahlbeck, 2010: 489ff.; Wagner-Döbler and Philipps, 1992: 228ff.).⁷ My central research question was *to what extent (i.e. in what proportion of all adopted decisions) do Slovene courts refer to the decisions of their predecessors?* As before our analysis no empirical data on this question was available, we have only been able to answer this question with an assessment based on our intuition and knowledge of the conditions in the Slovene judiciary. Before I began collecting the data, I thus asked the students who assisted me in carrying out this analysis what results they expected to find. The range of their replies exposed the (in) accuracy of our perception of the frequency with which the courts rely on case law: their predictions ranged from as low as 5 to as high as 90 percent. The mean value of their replies amounted to 35 percent.⁸ I decided to also apply my students' intuition when forming my hypothesis, namely:

A reference to case law is made in a considerable number (i.e. one-third) of judicial decisions, which indicates that case law is one of the key factors that characterise the decision-making of courts.

It clearly derives from this hypothesis that I have primarily concentrated on the *quantitative* aspects of case law references (Baer, 2011: 260f.), as one might argue that we begin to apply quantitative analysis the moment we begin to explain something using fractions (Franklin, 2008: 240).

In light of the research purpose and the objectives I pursued by examining the empirical data, the analysis can be defined as a combination of *exploratory* and *descriptive* approaches (cf. Neuman, 2007: 16; Ruane, 2005: 12f.; Babbie, 2010: 92ff.) for analysing the role of case law in judicial decision-making. In fact, the analysis attempted to provide the first systematic, non-speculative presentation of the case law citation practices of Slovene courts. In the analysis, I mostly left aside the question of "why", which is a matter for explanatory (analytical) research (Ruane, 2005: 13). This study thus predominantly focuses on

7 Comparing my own analysis of citation practices of case law in judicial decisions to methodologically similar research on this issue carried out in other jurisdictions reveals that the present study is considerably limited in scope in relation to the vast majority of other research on this matter referred to in the cited sources. Studies on citation patterns of case law in German (federal) courts or in the US Supreme Court, for example, take into account court decisions spanning over several years or even decades. Similarly, other studies are substantively not limited to civil law matters, but include criminal, administrative, etc. cases. This is mostly due to a somewhat different method of obtaining citations from analysed decisions. In the present study we relied on an electronic database to determine the sample of decisions to be analysed and to provide us with the texts of the decisions selected for the sample. These decisions were then individually (and manually) examined for references to case law. In other studies the identification of those decisions that contain references to case law was done automatically by a computer programme. Neither official nor commercial databases of case law in Slovenia allow for such an automated identification of relevant material. Thus, the study in addition revealed the need to improve the (electronic) tools for collecting and analysing legal materials, especially case law in Slovenia.

8 I have applied the median as the mean value; the arithmetic mean of the responses amounted to roughly over 40 percent.

descriptive findings regarding the extent and some fundamental characteristics of the manner in which references to case law are made, while leaving aside the reasons by which the situation could be interpreted in light of the broader legal and political context.

2.2 The conceptual apparatus and parameters of the analysis

Before proceeding to the evaluation of the collected empirical data, I have to clarify what I have in mind when I speak of the courts' *references* to case law. In other words, what precisely have I been looking for in the analysed judicial decisions?

As indicated, I am mainly interested in case law as a factor in the decision-making of courts from a quantitative perspective. Such extensive research allows only for a limited exploration of the substantive (qualitative) characteristics of the studied problem, which entails that it can only encompass a certain number of the elements that define it in its entirety. In this context, a "reference" to case law must thus be understood in the broadest sense possible: I have been searching for all instances of courts *mentioning* case law *in any manner* in the reasoning of their decisions. This entails that any *explicit* quotation or citation of a judicial decision has been recorded as reference to case law.⁹

Every recorded instance of a court mentioning case law may reveal a whole range of different manners of its application, for example, with regard to the intensity of reliance on an argument derived from case law, the accuracy of the reference to case law, its summary or analysis, the relevance of its content for the decision in the case under consideration and so on (*cf.* Smyth, 2000: 851*ff.*). All of the above-mentioned variations have been considered as *references* to case law in this study. This term thus includes all possible manners of argumentation based on past judicial decisions, not only those instances where the analysed decision revealed that the court based its decision on a substantive argument that it derived from case law, regardless of whether it did so because it deemed that it was bound by the legal opinion from the past decision, or because it agreed (from a substantive point of view) with the legal solution applied in the cited case.¹⁰

The context of this analysis requires caution when drawing associative connections with concepts such as *precedent* to which the theory of *common law*

9 As can be inferred from the hypothesis, I proceeded from the position that analysing references or quotations can constitute a useful tool in assessing *influence*, specifically the influence of past judicial decisions on present ones (*cf.* Duxbury, 2001: 17*ff.*).

10 Consequently, references to case law also include instances where a court rejected the arguments of one of the parties to the proceedings that were based on case law by means of distinguishing (*cf.* Higher Court in Ljubljana Judgment No. II Cp 147/2011, dated 20 April 2011). The most unusual examples of recorded references in the analysis were instances where a court found that there exists no case law regarding a certain issue (*cf.* Supreme Court Order No. VS II DoR 640/2010, dated 27 October 2011); however, such cases were rare. For a classification of the different types of references to case law, see e.g. Štajnpihler, 2012: 165*ff.*

attributes a considerably narrower meaning.¹¹ The same warning applies to the notion of *settled case law* that developed within the framework of the *continental* legal tradition as a tool for the unification of law.¹² In the context of the research carried out, a reference to case law entails every instance where case law in any manner influenced the *line of reasoning*, i.e. where it became a piece in the *chain of arguments* that led the court to its final decision. Put differently, all instances where a court (in)directly “discursively deals” (Wagner-Döbler and Philipps, 1992: 229) with a legal question, problem or argument that it derived from case law or takes a position regarding such, illustrate the influence of case law on judicial decision-making. All such instances were recorded as references in the present study.

In spite of its *limited* qualitative range, the analysis also encompassed some fundamental characteristics of the *manner* in which case law is being referred to. I have, in particular, highlighted those characteristics of references to case law in judicial decision-making that can be recorded relatively easily and in a uniform way when analysing a large number of cases. Within this framework, I focused primarily on the following three parameters.

- a) *Individual* and *general* references to case law.¹³ Individual references include all instances in the analysed decisions of references to another concrete decision that can be individually identified (e.g. by means of its reference number). General references are instances where the courts indicated that they relied on case law without identifying a particular case.
- b) *Horizontal* and *vertical* references to case law.¹⁴ This distinction is closely linked to the hierarchical structure of the judiciary. When studying vertical references, we are interested in the extent to which lower instance courts rely on decisions of higher instance courts, while horizontal references concern the instances of courts relying on their own past decisions or decisions of other courts at the same level within the judicial hierarchy.
- c) *Original* and *derivative* references to case law. Original references entail instances where a court relied on case law of its own motion. Derivative

11 In this sense, many deem that within the framework of the *stare decisis* doctrine we can only speak of the functioning of precedent when judges rely on a past decision in deciding a concrete case because they consider themselves to be bound by it even though they believe it to be wrong (e. g. Cross, Harris, 1991: 3; Alexander, 1989: 4; Bix, 1999: 134).

12 As the principle that case law develops over a longer period of time and through a number of decisions applies, it is not possible to analyse all the characteristics, the content and the purpose of a certain legal norm on the basis of a single decision (e.g. Novak, 2009: 90; MacCormick and Summers, 1997: 538).

13 Such concerns the question of what the term case law actually entails as regards the decision-making of courts (in particular in the continental legal tradition). In a similar context Lasser argued, for example, that a reference to the French *jurisprudence* can entail (a) past court decisions in general, (b) *individual* landmark decisions that represent the foundation for further adjudication, or (c) the solution of a particular legal problem that has developed in past adjudication (Lasser, 2004: 37).

14 The definition of this parameter coincides with the differentiation between horizontal and vertical precedent in common law (cf. Shiner, 2005: 34; Schauer, 2009: 36f.).

references, however, concern instances where the court considered an argument from case law because a party to the proceedings raised it in an application or a lower instance court referred to it in the proceedings in question.

An analysis of the extent of references to *legal doctrine* was carried out simultaneously, and the obtained results were compared to the results regarding the references to case law. The role of argument derived from legal doctrine in the decision-making of courts raises similar questions as the effect of case law (*cf.* Peczenik, 2005: 14ff.; Duxbury, 2001).¹⁵ In the continental legal tradition, arguments from legal doctrine are, even to a greater extent than arguments derived from case law, perceived as one of the *factors* that *de facto* help to guide the process of judicial decision-making, i.e. provide support to judges in the interpretation of law or the reasoning of their interpretative choices (*cf.* Raisch, 1995: 200ff.; Müller and Christensen, 2004: 382ff.).

2.3 The framework of the study: the empirical data and the sample

The present study focused on the decision-making of *courts of general jurisdiction*. To this end, the following, the following conditions or restrictions have to be noted:

- 1) The *level* of adjudication: The study contains an overview and analysis of decisions of the appellate, i.e. Higher Courts (Ljubljana – LJ, Maribor – MB, Celje – CE, and Koper – KP) and the Supreme Court of the Republic of Slovenia.
- 2) The *accessibility* of decisions: The analysis encompassed (only) the published decisions of the relevant courts, i.e. decisions that were freely accessible on the website of the Slovene courts (<<http://www.sodisce.si/>>).
- 3) The *subject matter* of the decisions: The analysis was aimed exclusively at decisions of the *civil law* departments of the Higher Courts and the civil law department of the Supreme Court.
- 4) The *timeframe*: The analysis only included decisions adopted in 2011.

From the entire body of decisions obtained by the application of the above-stated conditions, the following *sample* was defined for further analysis: From the initially obtained set of decisions listed in the order in which they had been provided by the search engine of the website of the Slovene courts (<<http://www.sodisce.si/>>) on 14 October 2012, the *first* and then *every second* decision were analysed.

15 Lasser argues, for example, that in the French legal system, legal doctrine occupies a kind of middle ground – on the one hand, it is certainly not an official product of the legislature or one of the other branches of government and thus it spoils the official perception of the legality principle in France (i.e. that decisions of courts may only be based on statutory law), while, on the other hand, it is in fact “the most important reason due to which the French legal system can (and obviously also does) function” (Lasser, 2004: 39ff.).

Table 1

Sample	Supreme Court	Higher Courts			
		CE	KP	LJ	MB
No. of decisions: <i>sample</i>	549	65	76	930	53
No. of decisions: <i>published*</i>	1,099	130	152	1,860	106
No. of decisions: <i>total**</i>	1,601	2,081	2,023	10,081	3,633

* The total number of decisions in civil law cases *published* in 2011 that were accessible on the website of the Slovene courts (<<http://www.sodisce.si/>>).

** The total number of cases resolved in 2011 by second instance courts in civil law cases (Cp), disputes regarding enforcement of civil and commercial law decisions (Ip), various civil law disputes (R), and Land Register disputes (Cdn). Source: Judicial statistics 2011. This only concerns such types of civil law cases as are represented in the sample (although in very different proportions).

2.4. Presentation of the results

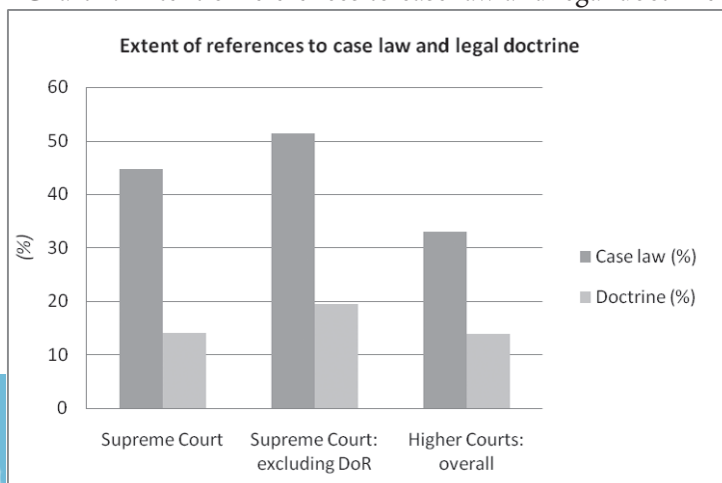
With regard to the central research question– i.e. *to what extent do courts refer to case law* – which is also linked to the main research hypothesis, the analysis of the sample yielded the following results:

Table 2

Extent of references to case law and legal doctrine	Supreme Court		Higher Courts			
	Total	Excluding DoR*	CE	KP	LJ	MB
Case law (%)	44.63	51.32	27.69	22.37	34.09	35.85
Doctrine (%)	14.03	19.47	7.69	2.63	14.95	18.87

* Decisions regarding the granting of leave to appeal to the Supreme Court (cases with the ref. No. DoR) were excluded from the sample of the analysed Supreme Court decisions (for explanation see below). This applies with regard to all indications “Excluding DoR*” hereinafter.

Chart 1. Extent of references to case law and legal doctrine



Before proceeding to the analysis of the extent of the references to case law, let us compare references to case law and references to legal doctrine.¹⁶ The results of the conducted research revealed that in this “competition”, case law is clearly in the lead as far as the frequency of both types of references for adjudication is concerned. The collected data clearly showed that in substantiating their conclusions, courts referred to their predecessors’ arguments *at least twice as frequently* as they referred to arguments developed by legal doctrine. Even though there were substantial differences between the individual Higher Courts regarding the number of references to legal doctrine, *on average* the references of Higher Courts to legal doctrine (13.88 percent) did not diverge greatly from the Supreme Court’s references (14.03 percent). The relative importance of case law in comparison to doctrine is further illustrated by the fact that in the majority of cases the courts referred to doctrine alongside a simultaneous reference to case law as can be seen from the table below:

Table 3

Relationship between references to case law and legal doctrine	Supreme Court		Higher Courts			
	Total	Excluding DoR	CE	KP	LJ	MB
References to doctrine (without simultaneous reference to case law – %)	28.57	28.38	20.00	50.00	39.57	30.00
References to doctrine (with simultaneous reference to case law – %)	71.43	71.62	80.00	50.00	60.43	70.00

In more than 60 percent of the cases in which the Higher Courts referred to arguments developed by legal doctrine, they thus simultaneously referred to arguments derived from case law. For the Supreme Court, this proportion exceeded 70 percent. It should, however, be noted that during the analysis I encountered some cases where a court supported its reasoning through a direct reference to doctrine (for example the commentary of a law or a monograph), but the reference in fact cited, summarised, analysed, or otherwise referred precisely to arguments that originated from case law.¹⁷

16 What counts as a “reference” to doctrine in this context should be understood parallel to the meaning of a “reference” to case law as defined above. Methodologically, in recording references to doctrine and case law the same principle was applied. Thus any explicit quotation or citation of a doctrinal source has been recorded as a reference to doctrine. This includes, for example, a direct textual quotation from a specific doctrinal source, such as a monograph or a scientific article, citing or referencing a specific source when summarizing or paraphrasing its content, as well as instances where the courts explicitly refer to “doctrine” in general, without specifying any individual sources. However, the analysis did not include what might be called implicit references to doctrine, i. e. instances, where a court relies on an argument that was developed by doctrine, but it does not explicitly acknowledge the source of the argument, not even by mentioning in passing that it was derived from “doctrine”.

17 Cf. Order No. VS II DoR 584/2010, dated 17 February 2011, where the Supreme Court referred to The Commentary of the Code of Obligations (rather than specific court decisions)

If we focus on the extent of references to *case law*, on the basis of the collected data (see Table 2) we can firstly confirm the implied suspicion that there exists a clear difference between the extent to which the Supreme Court and the Higher Courts refer to case law. The Supreme Court referred to case law in about *half* (51.32 percent) of the analysed cases, while the Higher Courts overall relied on case law in just under *one-third* (33.01 percent) of the analysed cases. However, we must not too eagerly derive from such findings that the role of case law is less significant in the decision-making of the Higher Courts than in the Supreme Court. Rather, the difference might be attributed to a large extent to various *systemic* factors, i.e. the legal and organisational circumstances that define the position of the Supreme Court and its importance for the system of justice. The status of the Supreme Court as the highest court in the Republic of Slovenia (Article 129 of the Constitution of the Republic of Slovenia) and the statutory mandate connected with such position that requires the Supreme Court to ensure the uniformity of case law¹⁸ can serve as examples of such systemic factors. These are, in turn, closely linked to the manner in which the Supreme Court functions. For example, the Supreme Court is entrusted with the resolution of complicated legal issues that have not been adequately resolved by the lower instance courts. In this context, a prominent role is played by legal interpretation that is *inter alia* significantly influenced by case law. The large extent of case law references in the reasoning of the Supreme Court is also a reflection of the procedural aspect of the work of the Supreme Court, as some of its competences, which are analysed below, are regulated in such a manner as to strengthen the role of case law in the Court's decision-making processes.

In connection with the analysis of Supreme Court decisions the procedure for the *granting of leave to appeal to the Supreme Court* deserves special attention. This *two-stage* procedure (Dolenc, 2009: 47f.) that was introduced into the Slovene legal system by an amendment of the Civil Procedure Act in 2008¹⁹ was specifically taken into account in analysing the collected data.

The first stage (designated as *deciding on granting leave to appeal* for the purpose of this analysis) concerns the assessment of whether a concrete case raises a legal question of such importance that it exceeds the scope of the case itself or whether there is a legal question that has to be resolved in order to ensure the normal functioning of the legal system as a whole. In accordance with the first paragraph of Article 367a of the Civil Procedure Act (hereinafter CPA)²⁰ the Supreme Court grants leave to appeal "if it can be expected that the Supreme Court decision will resolve a legal question that is important for *ensuring legal certainty, the uniform application of law, or the development of law through case law.*" Thereafter, the Act lists examples of such circumstances and all

to illustrate *the settled case law* regarding a legal question. Similarly, in Judgment No. VSL I Cp 862/2011, dated 25 May 2011, the Higher Court in Ljubljana "conducted a comparison between the case at issue and *similar cases from the case law*" [emphasis added] whereby it later emphasised that such concerns cases published in a compendium of cases regarding monetary compensation for immaterial damage.

18 See the first paragraph of Article 110 of the Courts Act (ZS), Official Gazette RS, No. 94/2007 – official consolidated text *et seq.*

19 See The Act Amending the Civil Procedure Act (ZPP-D), Official Gazette RS, No. 45/08.

20 Official Gazette RS, No. 73/07 – official consolidated text *et seq.*

of them concern legal questions in connection with *case law*, such as deviations from established case law or instances where case law is either not uniform or it has not even developed yet. The second stage of the procedure (designated as *deciding the appeal on its merits* for the purpose of the present analysis) is then intended to substantively resolve the legal question regarding which leave to appeal was granted in the first stage.

From this regulation, we can clearly see that *case law* actually plays a central role in the procedure for granting leave to appeal to the Supreme Court. I have suggested a possible manner of assessing the importance of the institution of the granted leave to appeal to the Supreme Court elsewhere (Štajnpihler, 2012: 112ff.). However, when analysing the collected data in the present study, Supreme Court decisions regarding the granting of leave to appeal had to be limited to some extent. The main reason for this lies in Article 367c of the CPA which states that “it suffices if the reasoning of an order by which leave to appeal is not granted contains a *general reference to the non-fulfilment of the conditions* determined by Article 367a of this Act”. This otherwise important procedural possibility²¹ namely entails that a significant proportion of decisions from the first stage of the procedure (i.e. deciding on granting leave to appeal) remain *without a substantive reasoning*, and, therefore, in these cases the presence of case law as a factor in judicial decision-making cannot be assessed in the manner applied by the present study. In other words, because a predominant proportion of decisions regarding the granting of leave to appeal are of a formal nature (without substantive justification), their citation pattern is irrelevant. Therefore, Supreme Court decisions on applications to grant leave to appeal (indicated by the reference “DoR”) as a whole were excluded from the sample of decisions for analysis.

Nevertheless, it appeared reasonable to separately analyse the references to case law and legal doctrine considering exclusively decisions in relation to granting leave to appeal.

Table 4

Granted leave to appeal to the Supreme Court	Proportion of all decisions (%)	Reference to case law (%)	Only original reference (%)	Only derivative reference (%)	Original and derivative ref. (%)	Reference to legal doctrine (%)
Decisions on granting leave to appeal	30.78	29.59	50.00	24.00	26.00	1.78
Decisions on the merits of the appeal	7.56	85.71	36.11	27.78	36.11	21.43

The results of this analysis support the presumption that the above-mentioned procedural framework influences the Supreme Court’s reasoning when deciding on applications to grant leave to appeal. In the first stage of the

21 The possibility that Article 367c of the CPA provides to the Supreme Court is of crucial importance for the attainment of the main objectives pursued by the introduction of the institution of granted leave to appeal to the Supreme Court, i.e. to lessen the workload of the Supreme Court or rationalise its functioning (e.g. Ude, 2009: 539; Dolenc, 2009: 48).

procedure, i.e. deciding on *granting leave to appeal*, the proportion of references to case law dropped by about *one-third* (in comparison to the proportion of case law references in all analysed Supreme Court decisions) and amounted to only a bit less than 30 percent of the decisions concerning applications to grant leave to appeal; at the same stage, a considerably greater drop occurred in references to legal doctrine, which plummeted by almost 90 percent and thus only amounted to an insignificant proportion (less than 2 percent) of all decisions on applications for leave to appeal. The second stage, wherein the Supreme Court *decides the appeal* that it granted in the previous stage *on its merits*, showed an inverse picture. In these cases, which only represent a small fraction of all analysed decisions (7.56 percent), the proportion of case law references was significantly greater than the proportion found in all decisions on applications to grant leave to appeal (29.59 percent). A comparison of the extent of case law references in the entire sample of Supreme Court decisions showed similar results (44.63 percent), exceeding 85 percent of all decisions where the Supreme Court decided appeals on their merits. While less drastic, the same trend was confirmed with regard to legal doctrine where the proportion of references with regard to decisions in this stage of the procedure increased tenfold and amounted to 21.43 percent.

In addition to determining *to what extent* courts refer to case law, this study attempted to verify *how frequently* these references occur in *individual* decisions. When analysing the collected data, I thus also focused on how many references to case law appeared in each decision or, in other words, regarding how many different legal questions a court referred to case law in an individual case.²² In this context, the analysis revealed the following state of affairs:

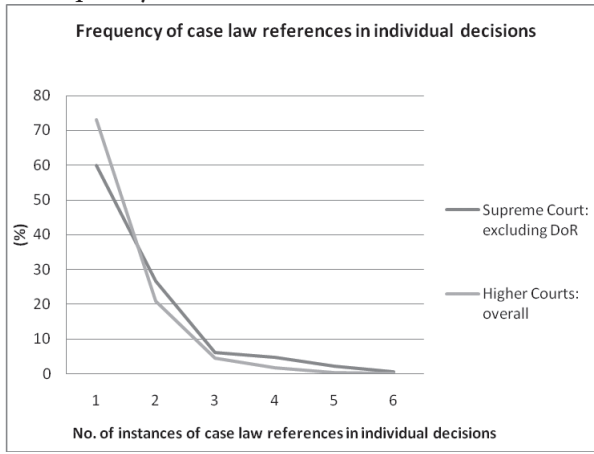
Table 5

Frequency of case law references in ind. decisions	Supreme Court			Higher courts			
	Total	Excluding DoR	CE	KP	LJ	MB	
No. of references							
1	63.27	60.00	72.22	70.59	75.08	42.11	
2	26.12	26.67	22.22	17.65	20.19	31.58	
3	4.90	6.15	0	5.88	3.47	21.05	
4	3.67	4.62	0	5.88	1.26	5.26	
5	1.63	2.05	5.56	0	0	0	
6	0.41	0.51	0	0	0	0	

22 However, determining the frequency of citations is a particularly difficult analytical question. Supreme Court Judgment No. VS II Ips 262/2010, dated 14 April 2011, in which the case law on determining the existence of a common-law marriage was one of the decisive issues addressed by the Supreme Court, may serve as an example. The Supreme Court sought support from the case law in three different instances (referring to different past decisions): firstly, with regard to the question of a child whom the partners had together; secondly, with regard to the condition of cohabitation and the exceptions to such; and, thirdly, with regard to the outward expression of the will to live together or the lack thereof. For purposes of the analysis here, due to their similar substance, I could have grouped together the references into a single set of legal questions (e.g. the criteria for establishing the existence of a common-law marriage) and could have presumed that it concerns only a single instance in which the court relied on case law. However, taking into account the variety and diversity of the analysed data, I generally treated such examples as separate case law references that provide similar, yet different legal aspects.

With regard to the obtained results, when we say that courts rely on case law, in the majority of cases this entails that they do so on *one* or *two* points of the decisions or regarding one or two legal questions that they discuss in the reasoning. In other words, only about 13 percent of the analysed Supreme Court decisions and six percent of Higher Court decisions containing references to case law did so *more* than twice. Among Higher Court cases, there were some decisions wherein the courts referred to case law *three* or *four times*²³, and there were even a few Supreme Court cases containing references on *five* or *six points* of their reasoning.

Chart 2. Frequency of case law references in individual decisions



As initially indicated, I also directed my research (though to a limited extent) to the question of *how* the courts refer to case law. In this regard, I hence focused only on the decisions containing references to case law – in one form or another. What picture do we then obtain if we turn from the *extent* of references to the basic parameters with regard to the *manner* of referring to case law?

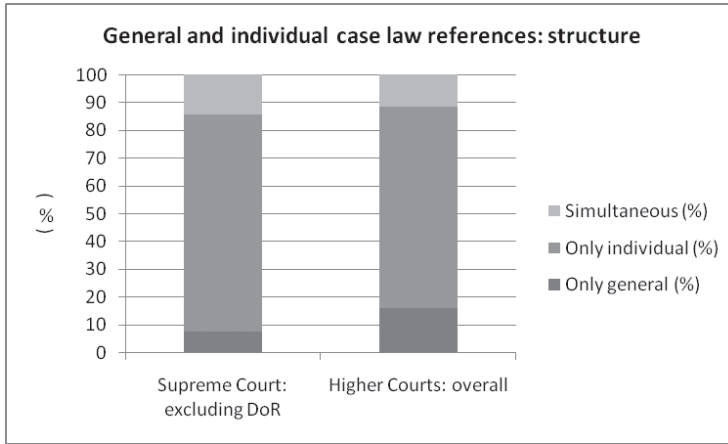
The first set of problems analysed was linked to the question of whether the court referred (a) to an argument from one or several specific past decisions that can be individually identified, e.g. by means of their reference number or the date of the session of the court at which they had been adopted; (b) to an argument from “case law” without referring to any specific individual past decisions; or (c) to both modalities of references.

Table 6

General and individual references to case law	Supreme Court		Higher Courts		
	Excluding DoR	CE	KP	LJ	MB
General (%)	22.05	16.67	47.06	24.92	57.89
Only general (%)	7.69	11.11	17.65	14.83	36.84
Individual (%)	92.31	88.89	82.35	85.18	63.16
Only individual (%)	77.95	83.33	52.94	75.08	42.11
Simultaneous (%)	14.36	5.56	29.41	10.09	21.05

23 From a total of 1,123 analysed Higher Court decisions, there was one case with five references in the reasoning; however, it represented a practically insignificant proportion (0.27 percent) of all the decisions wherein references to case law have been recorded.

Chart 3. General and individual case law references: structure



With regard to this question, the analysis demonstrated that in a vast majority of cases (around 92 percent as regards the Supreme Court and around 84 percent as regards the Higher Courts), the courts referred to specific judicial decisions by their reference number. In this context, the analysis revealed occasional deficiencies where a court cited the nominally wrong decision (i.e. a decision with an incomplete or wrong reference number). However, such references were few²⁴ and mainly concerned mistakes that could be identified through substantive analysis and an appropriate way to remedy them could usually also be found.²⁵

Even more interesting are cases in which the courts refer to concrete decisions that are *not publicly available* in the official case law database used in this analysis. Generally it is agreed that “databases of judicial decisions – non-commercial and commercial, electronic and printed – that have been developing in recent years [...] ensure the effectiveness of the prohibition of arbitrary deviations from the case law” (Galič, 2004b: 1089; cf. Duxbury, 2008: 53ff.). Therefore, if a court, when substantiating its decision, relies on the reasons of an *unpublished* past decision, one could claim that the argument has no legs to stand on. In such a case, it is practically impossible to verify whether and to what extent the argument that the court applied to justify its decision is actually true. This applies even more due to the manner in which courts usually cite decisions to support their conclusions, as they rarely engage in a

24 See e.g. Judgment No. VS II Ips 474/2008, dated 1 September 2011, wherein the Supreme Court stated by mistake that Judgments Nos. II Ips 168/2001 and II Ips 241/2006 were orders, and cited Supreme Court Judgment No. II Ips 648/2001 by stating only the numbers (648/2001), without the designation indicating the type of the decision and the court that adopted it, whereby the case law database also contains a Judgment of the Administrative Court with the same reference number (i.e. Judgment No. U 648/2001).

25 Cf. Order No. VS II DoR 154/2011, dated 15 September 2011, wherein the Supreme Court referred to its past Judgment No. II Ips 68/2001, while it clearly followed from the context of the decision and comparable cases that a typing error in the year had occurred and the court in fact meant to refer to Judgment No. II Ips 68/2011, dated 30 June 2011.

substantive analysis of the supporting decision, from which we could at least in part construe the *rationes decidendi* of that decision even though it had not been published.²⁶

This problem is most evident when we are not even dealing with individual references to specific past decisions, but the courts, instead, refer to legal solutions that are supposed to be established in *case law*, but they do not specify the relevant past judicial decisions. For the purpose of this study, such cases have been designated as general references to case law. Regarding such, the analysis showed that courts concern themselves this manner of referring to case law *in a considerably lower number of cases* than individual references (see *Table 4*). The Supreme Court, thus, applied this type of reference in just over one-fifth of its decisions (22.05 percent) and for the Higher Courts, this proportion amounted to over a quarter (27.22 percent) of the decisions in which the courts referred to case law. This study found that decisions where this was the only manner of referring to case law are far less frequent (i.e. such decisions represented less than 8 percent of the analysed Supreme Court decisions and around 15 percent of Higher Courts decisions).

Another crucial question when considering individual references is certainly *how many decisions* the courts in fact mention in these cases. The data obtained through this study regarding this aspect may be summarised in the following manner:

Table 7

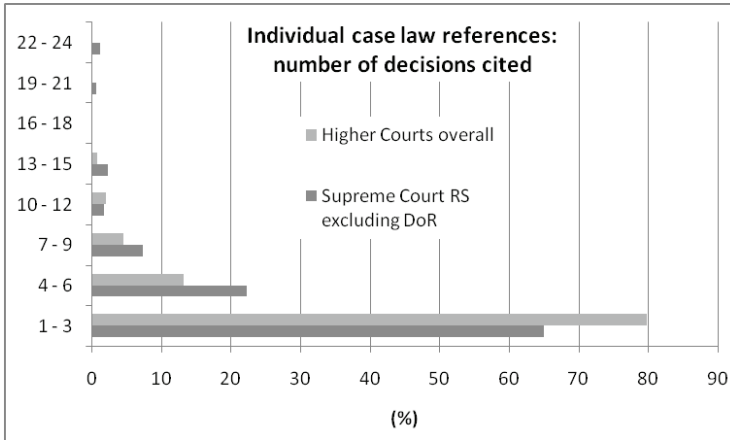
Individual case law references (%)	Supreme Court		Higher Courts			
	Excluding DoR	CE	KP	LJ	MB	
No. of decisions						
1–3	65.00	75.00	78.57	81.48	50.00	
4–6	22.22	18.75	14.29	12.59	16.67	
7–9	7.22	0	0	4.07	25.00	
10–12	1.67	0	7.14	1.48	8.33	
13–15	2.22	6.25	0	0.37	0	
16–18	0	0	0	0	0	
19–21	0.56	0	0	0	0	
22–24	1.11	0	0	0	0	

According to the analysis, when courts cited specific decisions that contained the relevant arguments (individual references to case law), in a majority of cases they used up to three decisions as sources. In the analysed Higher Court decisions, such instances amounted to a total of almost 80 percent, while the proportion in Supreme Court decisions amounts to two-thirds of the analysed decisions. Supreme Court decisions referring to four or more other decisions

26 Cf. Higher Court in Ljubljana Judgment No. VSL II Cp 4613/2010, dated 12 January 2011: "That good faith has to be established has already been held in similar cases (see Decisions of the Higher Court in Ljubljana No. II Cp 2760/2008, II Cp 2857/2008, II Cp 2032/2010)." The first of the decisions listed by the Court is not published.

were more frequent than Higher Court decisions with the same number of references. When analysing the data, I even found a few Supreme Court decisions in which the Court referred to a total of 22 other court decisions.²⁷ However, as an exception, I also found instances of Higher Court decisions referring to ten or more other decisions (these amounted to roughly over 2 percent of all Higher Court decisions contained in the research sample).²⁸

Chart 4. Individual case law references: number of decisions cited



The second set of problems related to the manner of referring to case law concerned the question of whether, in an analysed case, the court referred to (a) its own past decisions or past decisions of a court operating at the same level of the judicial hierarchy; (b) decisions of a superior (at least in certain aspects) court; or (c) both types of references simultaneously.

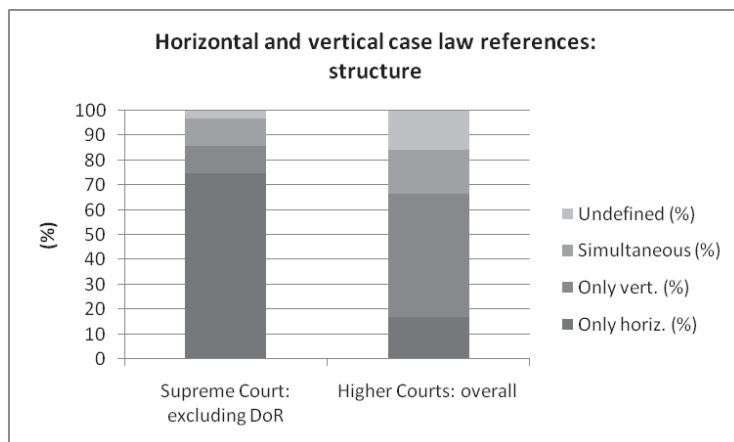
Table 8

Horizontal and vertical case law references	Supreme Court	Higher Courts			
	Excluding DoR	CE	KP	LJ	MB
Horizontal (%)	86.15	27.78	29.41	35.96	21.05
Exclusively horiz. (%)	74.87	16.67	5.88	18.30	5.26
Vertical (%)	22.05	72.22	76.47	66.88	57.89
Exclusively vert. (%)	10.77	61.11	52.94	49.21	42.11
Both simultaneously (%)	11.28	11.11	23.53	17.67	15.79
Undefined (%)	3.08	11.11	17.65	14.83	36.84

27 See e.g. Order No. VS II Ips 386/2010, dated 5 May 2011. It should be noted that all the mentioned cases concerned decisions that originated from practically identical factual circumstances; cf. Order No. VS II Ips 384/2010, dated 15 December 2011.

28 See e.g. Supreme Court Judgment No. II Cp 3797/2010, dated 19 January 2011, or Higher Court in Celje Order No. VSC Cp 310/2011, dated 21 July 2011.

Chart 5. Horizontal and vertical case law references: structure



As one might expect there was a significant difference in the source of authority cited between the references made by the Supreme Court, on the one hand, and the Higher Courts, on the other. The Supreme Court relied on *its own decisions* (including legal opinions (of principle) adopted by the Supreme Court) in the majority of cases (about 86 percent). In around 22 percent of the analysed decisions, however, the Supreme Court availed itself of vertical references and cited decisions of the Constitutional Court of the Republic of Slovenia and of supranational courts. As regards the Higher Courts, the opposite can be observed, with the difference between both types of references being less prominent. Roughly two-thirds (67.12 percent) of all Higher Court references thus concerned decisions of a higher instance court, while a good third (34.50 percent) of Higher Court references cite Higher Court decisions, whereby the relevant court either refers to its own decisions or to decisions of another Higher Court.

The findings regarding vertical references may further be broken down according to the different types of courts that adopted the cited decisions. If we examine the composition of the vertical references more closely, we may discern the following:

Table 9

Vertical case law references	Supreme Court Excluding DoR	Vertical case law references Higher Courts				
		CE	KP	LJ	MB	
-----	---	Supreme Court (%)	84.62	84.62	82.55	100.00
Constitutional Court (%)	88.37	Constitutional Court (%)	23.08	7.69	23.11	9.09
Supranational courts (%)	16.28	Supranational courts (%)	0	7.69	4.25	9.09

If we only focus on the instances when the Supreme Court did *not* refer to its own case law, almost 90 percent of such vertical references concerned

decisions of the Constitutional Court.²⁹ A significantly smaller proportion (roughly 16 percent) of vertical references entailed citations to supranational courts, whereby references to decisions of the European Court of Human Rights (ECtHR) were made most frequently, and references to decisions of the Court of Justice of the European Union (CJEU) were recorded as well. When we turn to the Higher Courts, the majority of vertical references, as expected, concerned decisions of the Supreme Court (83.94 percent). In addition, more than one-fifth (22.09 percent) of Higher Court decisions containing vertical case law references cited decisions of the Constitutional Court. Among the analysed Higher Court decisions, a small but not negligible number of references to supranational courts were also identified (4.42 percent of all the decisions containing vertical case law references).

The fact that vertical case law references prevail in the decision-making of the Higher Courts reinforces the notion that the so-called *argument of authority* (e.g. Perelman and Olbrechts-Tyteca, 2008: 305ff., Schauer, 1991: 183) constitutes one of the key elements of reasoning with arguments derived from case law.³⁰ The importance of the *hierarchical* structure of the judicial system goes beyond the right to a legal remedy in the context of a *specific* case (cf. Taruffo, 1997: 437ff., Vogel, 1998: 88f.). Or, as Duxbury put it, “[g]enerally speaking, the higher the court the stronger the precedent” (Duxbury, 2008: 62).

Due to the unique position of the Supreme Court in the judicial system, matters are a bit more complicated as regards its decision-making. On the one hand, it is the highest court in the Republic of Slovenia that, through its decisions, has to ensure the uniformity of case law. The decisions it adopts, on the other hand, may themselves – to a limited extent and only regarding certain aspects – be subject to constitutional judicial review. Consequently, it appears reasonable that the majority of the recorded Supreme Court references to case law concerned its own past decisions, as is typical for supreme courts in diffuse constitutional review systems. The non-negligible number of *vertical* references, then, has to be understood precisely in light of the fact that, as regards the protection of fundamental human rights and the review of the conformity of laws and other regulations with the Constitution, the Constitutional Court is standing over the Supreme Court. Consequently, Constitutional Court decisions

29 It should be noted that in a little over 7 percent of analysed decisions where a reference to case law was recorded (excluding DoR), the Supreme Court made a reference to a lower court (i.e. Higher Court) decision. However, the proportion of decisions where the Supreme Court referred exclusively to decisions of lower courts is insignificant (only 0.5 percent, excluding DoR). This can be attributed to the doctrine of precedent (in Slovenia) according to which higher courts do not have to take into account decisions of lower courts unless they entail settled case law. See, for example, Galič, 2004b, Štajnpihler, 2012: 108ff.

30 For example, as Perelman writes on the importance of authority in legal (judicial) reasoning (Perelman, 1966: 11): “When it is a question of decision, several theses are equally defensible, and none imposes itself with evidence. Hence, from this point on, an authority is indispensable to render certain decisions obligatory. It is because the elaboration and the application of the norms usually bring about divergencies that it is indispensable to know who has the power of making laws and who is competent to judge and terminate conflicts.”

constitute an additional frame of reference for the Supreme Court when it considers cases in the relevant legal fields.

In any event, the analysis of the collected data here leaves no doubt that when speaking of case law as one of the key factors in judicial decision-making, what we have in mind are primarily Supreme Court decisions, which, by their frequency, constitute by far the most important source within the umbrella term “case law”.

Legal opinions on questions concerning case law were treated as Supreme Court decisions in the analysis, as were *legal opinions of principle* on questions that are important for the uniform application of the laws. Both represent a particular competence of the Supreme Court (Article 110 of the Courts Act).³¹ Due to their institutionalised role in assuring the uniformity of case law (*cf.* Testen, 2004: 1060; Galič, 2004a: 327), these opinions enjoy a special position among Supreme Court decisions, and therefore references to them have been recorded separately.

Table 10

Legal opinions (of principle)	Supreme Court	Higher Courts				
	Excluding DoR	CE	KP	LJ	MB	Overall
Proportion of all case law references (%)	17.44	11.11	0	8.83	0	8.09
Proportion of references to Supreme Court decisions (%)	20.24	18.18	0	15.91	0	14.35

Before I discuss the results presented in Table 10, it is important to explain how I measured the frequency of references to legal opinions. Firstly, I chose the proportion of references to legal opinions with regard to all decisions in which a reference to case law has been recorded. Secondly, in order to obtain a realistic assessment of their weight or importance, I concentrated on the extent of references to legal opinions only in comparison to citations of Supreme Court decisions. We can then observe that such legal opinions represent slightly less than 15 percent of all references by the Higher Courts to Supreme Court case law. Regarding references by the Supreme Court to its own case law, legal opinions represent about one-fifth (20.24 percent) of all recorded references.

This depiction may mislead us into concluding that the empirical data do not support the allegedly important position of these legal opinions in ensuring the uniformity of case law. In order to appropriately assess the extent of the references to legal opinions, the following clarifications have to be made. Firstly, legal opinions represent only a relatively small proportion of the decisions

31 Hereinafter I will use the term *legal opinions* to refer to both types of these Supreme Court decisions.

adopted by the Supreme Court.³² Secondly, the Supreme Court adopts a legal opinion of principle to definitively resolve an open legal question regarding which there had been no consensus hitherto in the case law. *Immediately after its adoption*, a legal opinion of principle entails an important source of judge-made law that courts, which had been uncertain as regards the solution of the legal question at issue, (can) rely on when deciding a case. Following the Supreme Court decision, this question is settled, and therefore it is not surprising that the question itself also gradually fades into the background. As a result, the need to cite that particular legal opinion also gradually disappears. Thirdly, in later judicial decisions, the abstract legal solution of the question determined by the legal opinion of principle is *contextualised* by the concrete circumstances of new cases:³³ the case law that develops on the basis of these legal opinions gradually replaces the legal opinions themselves as the source of relevant legal arguments regarding the legal question at issue.

We can thus conclude that the *prima facie* impression that, despite their important institutionally envisaged role for the development of case law, references to legal opinions only entail a relatively small proportion of all case law references is not entirely justified.

The third set of questions in this study related to the manner in which courts refer to case law revolved around whether a court referred to (a) case law of its own motion; (b) an argument highlighted by one of the parties or a (lower instance) court in the previous stages of the proceedings in question; or (c) both of these manners of reference simultaneously.

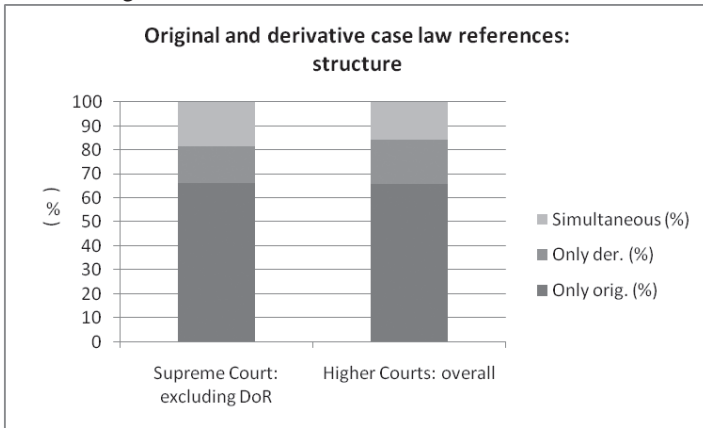
Table 11

Original or derivative case law references	Supreme Court RS		Higher Courts		
	Excluding DoR	CE	KP	LJ	MB
Original (%)	84.62	72.22	82.35	80.76	100.00
Exclusively orig. (%)	66.15	44.44	47.06	67.51	73.68
Derivative (%)	33.85	55.56	52.94	32.49	26.32
Exclusively der. (%)	15.38	27.78	17.65	19.24	0
Both simultaneously (%)	18.46	27.78	35.29	13.25	26.32

32 For example, in 2011, preparations for two plenary sessions had been carried out; however, none of the departments of the Supreme Court that had suggested the adoption of legal opinions submitted complete formal proposals for their adoption; therefore, no plenary session was carried out (Annual Report of the Supreme Court, 2011: 31). Consequently, the Supreme Court adopted no legal opinion in 2011. The situation in past years had been similar, where the Court had stated that throughout the last 15 years the number of proposals for the adoption of legal opinions had been decreasing. The Supreme Court added that in the last five years, at some of its plenary sessions, not a single proposal for the adoption of a legal opinion had been considered, while only ten years ago, the number of such proposals had regularly reached 20 or more (Annual Report of the Supreme Court, 2010: 49).

33 This is also indicated by some standpoints of the Supreme Court when defining the basic characteristics of legal opinions: "They entail exclusively definitions of principle (and not decisions in concrete cases)" (Annual Report of the Supreme Court, 2006: 30f.).

Chart 6. Original and derivative case law references: structure



The presented data do not allow the conclusion that, as regards references to case law, the courts merely respond to arguments put forth by the parties or by lower instance courts. The majority of both Supreme Court (84.62 percent) and Higher Court (81.40 percent) decisions in which a reference to case law was made namely entailed original references. However, in a non-negligible proportion of such decisions, the original reference occurred *alongside* the consideration of arguments from case law highlighted by the parties or a lower instance court: In the entire body of decisions containing references to case law, 18.46 percent of Supreme Court decisions and 15.63 percent of Higher Court decisions contained both original and derivative references. This entails that when considering legal arguments from past decisions that were highlighted by the parties or a lower instance court the courts frequently also put forth other solutions established in the case law, either in connection with the same or another question raised by the case at issue. Given the high proportion of original references, we might thus conclude that the courts perceive case law as a valuable source that they can rely on when searching for arguments that they could apply to justify their decisions, and not as an unnecessary burden that they have to deal with if a party or lower court makes reference.

However, it has to be noted that courts may not always clearly indicate that they referred to a certain judicial decision as a result of a party’s proposal. According to established constitutional case law, a court must consider all crucial statements of the parties, as well as the arguments by which they substantiate them, so such instances should, in principle, be rare. Nevertheless, while analysing the data, I found decisions where the party had referred to case law, since the court explicitly drew attention to this fact in the reasoning when summarising the party’s statements. However, when justifying its decision (i.e. in the substantive part of the reasoning), the court did not *directly* and *explicitly* mention this fact. In itself, this does not entail that the reasoning is faulty, as in these instances the court may take an indirect position on such an argument, i.e. by analysing its *substance* without specifically stressing the *source* or the *context* from which it arose.³⁴ However,

34 In the majority of such cases found during this analysis, the court, when justifying its decision, did not state the decisions to which the appeal referred in the substantive part of the reasoning; however, it agreed with the appeal regarding the relevant legal questions and

this practice should be avoided, not only in order to ensure that each concrete decision contains a coherent reasoning, but primarily because an *open* discussion of such arguments, including their explicit rejection, amendment or confirmation, is important for the further development of case law and the reinforcement of the *importance of judge-made law* that derives from it.³⁵

3. Conclusion: case law as an indispensable element of judicial decision-making

The data that was collected and analysed in this study provide us with a basic outline of what judicial decision-making looks like from the viewpoint of the Slovene courts' references to case law.

We have thus established that, when deciding concrete cases – at least as far as civil law cases are concerned – Slovene courts engage with arguments from case law in around one-third (Higher Courts) or one-half (Supreme Court) of their decisions. As has been emphasised, individual references may be substantively different in terms of the consideration given to their arguments by the referring court. However, if we focus on the parameters applied by the study, a reference to case law entails *on average* that a court applies legal arguments from previous case law once or twice in the reasoning of a decision. Such references are most frequently made to two or three prior Supreme Court decisions, and, in a majority of cases, the court makes them of its own motion rather than in reply to a reference by one of the parties or a lower instance court.

Thus, the results of the analysis confirmed the hypothesis that references to case law are made in a considerable number (i.e. one-third) of judicial decisions, which indicates that case law is one of the key factors that characterise the decision-making of courts. The findings namely support the initially introduced perception that case law, in spite of its ambiguous legal status, is *in fact* an important element of judicial decision-making.³⁶ The fact that in every second

eventually also granted the appeal. See e.g. Higher Court in Ljubljana Order No. VSL I Cp 1692/2011, dated 16 November 2011; Higher Court in Ljubljana Judgment No. VSL I Cp 920/2011, dated 28 September 2011.

35 This can be illustrated through the differences between two of the analysed decisions of the Higher Court in Ljubljana that originated from very similar factual and legal circumstances and where one of the decisive legal arguments applied reasoning derived from previous case law. In both cases, the court of first instance had relied on an argument from a past decision, and one of the parties to each of the proceedings had challenged this on appeal. In both appellate proceedings, the Court applied the same *substantive reasoning* to arrive at the same conclusion; however, in one of the cases it also added: "The court of first instance referred to an opposing argument that it derived from the Decision of the Higher Court in Ljubljana No. I Cp 3257/2010 which, however, is an isolated one, as in other similar cases the courts of appeal applied the same argument as in the case at hand" (Order No. VSL I Cp 4795/2010, dated 28 January 2011). In the other case, however, the Higher Court made no reference to the past decision in the substantive part of the reasoning, thus missing an opportunity to engage in "the discussion" with the previous court and clarify the role of arguments derived from case law (Order No. VSL II Cp 4790/2010, dated 31 January 2011).

36 Similarly some maintain that contemporary German civil law is shaped by case law at least with the same intensity as by statutory law and that this inevitably affects the manner in which courts make decisions as well as the style of their reasoning (Raiser, 2011: 294).

or third decision courts engage legal arguments that have developed in past adjudication at least once means that, in some form, case law *is widely present* in the legal reasoning of judicial decisions.

These findings reinforce the conclusion that it can no longer be disputable that courts *may* refer to case law³⁷, even though the study still identified instances where parties to the proceedings contested the court's reliance on case law.³⁸ With regard to the extent and frequency of the references to case law as they derive from the analysis, the decisive question no longer appears to be if the courts *may* (i.e. are allowed to) refer to case law, but rather to what extent they *should* be doing it.³⁹ This indicates that case law is no longer merely one of the *topoi* that courts may apply to substantiate their decisions (another example of such being arguments from legal doctrine), but it *de facto* constitutes one of the most important body of legal data (following statutory law) from which courts derive the reasons by which they substantiate their interpretative choices or decisions.⁴⁰

These conclusions obscure the border between the two sides of the initial problem: the vaguely defined legal status of case law as a source of law, on the one hand, and our intuition regarding its importance and actual presence in the decision-making of the courts, on the other. However, a certain degree of caution has to be applied when interpreting the results of the present empirical analysis, as we cannot simply draw conclusions regarding the legal nature or status of such arguments only from the fact that the courts refer to arguments from case law in a certain proportion of their cases. In fact, this exceeds the scope of the present article, as it concerns a question that has been discussed in continental legal theory since ancient times and still has no clear answer (Vogenauer, 2001: 658). A sociological insight into judicial decision-making that builds solely on the findings of an empirical analysis, such as the one that constituted the core of this article, only enables us to identify certain “statistical regularities” (Bourdieu, 1977: 29f.), behavioural patterns and practices that can be observed in the decision-making of the courts. What we have before us then is the *actual state of affairs* in the chosen aspect of judicial decision-making that can be interpreted in *different ways*.⁴¹ In any event, any future theoretical discussions of the role of

37 Cf. Constitutional Court Decision No. Up-404/01, dated 19 February 2004, Para. 8: “The complainant further alleges that the Higher Court should not have referred to the legal opinion of the Supreme Court as it is only bound by the Constitution and the laws. It is not contrary to any human right or fundamental freedom if a court interprets statutory provisions with the help of established case law. To some extent even the contrary applies [...]”

38 Cf. Higher Court in Ljubljana Judgment No. VSL II Cp 141/2011, dated 8 June 2011.

39 In this context the reference to so-called *must*, *should* and *may* sources of law is apparent (cf. Peczenik, 1989: 319ff.; Schauer, 2009: 69ff.).

40 “If we demand that the judge should not depart from previous decisions, in order that the administration of justice may be stable, the decisions are more than literature, more than non-obligatory literary views on the interpretation of a statute or the construction of a case at law; they are judge-made law” (Ehrlich, 2001:178).

41 Within the continental legal tradition, we thus often encounter the concept of the so-called *factual* or *de facto* binding effect of case law (e.g. Larenz and Canaris, 1995: 255ff.; Keil, 2007: 48ff.; Esser, 1990: 279ff.). At first glance, this concept appears to provide an elegant explanation of the role of case law in the legal system by shifting the focus of the discussion

case law in adjudication in Slovenia will have to consider the characteristics of judicial decision-making that were identified by this analysis.

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from a legal to a sociological perspective. However, if we wish to adequately explain and assess the conclusion that case law is a *factor* in judicial decision-making, it does not suffice if we only separate the *legal* effect of statutory law from the *non-legal* or *quasi-legal* effect of case law, but we have to explain what this non-legal or quasi-legal effect entails.

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