Strasbourg, 28 October 2014

CDL-JU(2014)016
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
THE CONSTITUTIONAL CHAMBER OF THE KYRGYZ REPUBLIC
AND THE UNDP OFFICE IN BISHKEK

WORKSHOP
ON DRAFTING DECISIONS
FOR JUDGES OF THE CONSTITUTIONAL CHAMBER OF THE KYRGYZ REPUBLIC

19 May 2014
Bishkek, Kyrgystan

REPORT

"DECISION DRAFTING AND REASONING – THE SLOVENIAN EXPERIENCE"

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DECISION DRAFTING AND REASONING – THE SLOVENIAN EXPERIENCE

(This paper was prepared for the Seminar "Decision drafting and motivation" organized by the Constitutional Chamber of the Supreme Court of Kyrgyzstan and Venice Commission of the Council of Europe, Bishkek, 19 May 2014)

Abstract: Starting with 1963, a model of the Constitutional Court's decision was basically created. Later, on the basic of domestic and foreign experiences the existing model od the decision was reviewed and amended in accordance with the procedural Constitutional Court rules in force. In constitutional decisions there is important their reasoning. This decision of the constitutional court loses its political conotation and gets the required legal form. Numerous times in the reasoning of its decisions the Constitutional Court has referred to the case-law of some of the most respected foreign courts. Further, more and more attention was paid to the cooperation related to the building of foreign national and international case-law databases as well as to the improvement of the quality and standardization of primary documents (case-law and other relevant documents).

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1. SLOVENIAN CHRONICLE – FORMATION OF STANDARDS

Starting with 1963, the legal information system of the then Constitutional Court of the Republic of Slovenia[1] I included the constitutional case-law of the Slovenian Constitutional Court in the uniform legal database (based on classical records) including also the constitutional case-law of all other constitutional courts from the territory of the former Yugoslavia. At that time the compiled data on the decisions of nine constitutional courts were, however, an indispensable basis for their work. **Then in Slovenia a model of the Constitutional Court's decision was basically created.**

[1] The *Constitution of the Socialist Republic of Slovenia of 1963* (Official Gazette SRS, No. 10/63) envisaged the first (Federal Constituent Republic) Constitutional Court. This Constitution was adopted at that time when the "social needs for the deepening of the self-managing socialist democracy and additionally for more efficient protection of constitutionality and legality" appeared. In the first place, previously the judicial review (control) of legality of administrative acts was already introduced. However, the practice showed that the legislative and executive bodies (first of all for the objective reasons) were not able to review the constitutionality and legality of regulations enough efficiently and critically by themselves, because they were authors of such regulations at the same time. Similarily became evident in other countries as well. Therefore the then government decided that it would be better to introduce special, from the legislature and executive independent state bodies which would be empowered for the protection of the constitutionality and legality of regulations – likely from the establishment of the Austrian Constitutional Court onwards, more and more countries introduced such special constitutional courts.

Therefore, since the introduction of constitutional review in the former Yugoslavia in 1963[2], the then Legal Information Centre of the Slovenian Constitutional Court was engaged in a systematic acquisition and comparative processing of case-law of all former Yugoslav constitutional courts.[3] These efforts developed into comprehensive records on the case-law of Yugoslav constitutional courts (translated into one language – into Slovenian), organized in files. This was an excellent basis for transition to the later computer processing of the constitutional case-law. The above-mentioned database was computerized by 1 January 1987.

Very early, an exchange of constitutional case-law was practiced with some neighboring constitutional courts,[4] besides, in 1989 the first on-line computer communications with the then existing foreign information systems were introduced[5].

An additional goal of the then national (comparative) database(s) was to build the Court's own databases (containing the case-law and other relevant documents), which was particularly important with reference to the fact that national databases should, wherever possible, be included into international systems of similar character. This was important for several reasons: it led to an exchange and comparison of experiences and thereby to improved efficiency and quality of work. Further, more and more attention was paid to the cooperation related to the building of foreign national and international case-law databases as well as to the improvement of the quality and standardization of primary documents (case-law and other relevant documents).

Such exchange of information between the Slovenian Constitutional Court and other similar information systems, databases and other similar sources of legal information influenced the set-up of common standards especially concerning the structure of the constitutional/judicial review, the powers, the organization and the procedure before constitutional courts and/or equivalent bodies, and even the unification of some systemic legislative solutions, especially during the transitional period of the Slovenian constitutional and legal system.

On the basic of domestic and foreign experiences the existing model od the decision was reviewed and amended in accordance with the procedural Constitutional Court rules in force.

2. THE CURRENT SYSTEM: STRUCTURE OF THE CONSTITUTIONAL COURT DECISION - RULING

Creation: In principle, the draft text of the decision or order is submitted to the Constitutional Court by a judge who reported the matter at a public hearing or session.

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[2] The establishment of constitutional review was largely accredited to the support of the then political leaders, who held the review that disputes and controversies in the Yugoslav society should not be resolved politically but, rather, by means of "an objective and legal arbitration".

[3] Under the *Federal Constitution of 1963 and 1974* as well as under Member State *Constitutions of 1963 and 1974* the power of constitutional courts was based on the separation jurisdiction between the Federation and the Member States (6: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Macedonia) constitutional courts acted with due institutional independence in compliance with the powers specified in the constitution of the appropriate level, whereby constitutional courts were in no hierarchical relation to one another and the Federal Constitutional Court was not an instance above other constitutional courts, nor was the member state constitutional court an instance above provincial constitutional courts. However, the then Federal Constitutional Court was empowered to decide on the jurisdictional disputes between constitutional courts of member states and/or autonomous provinces.

[4] Constitutional Courts of Italy, Austria and Germany.

[5] Such as ECHO Luxembourg, JURIS (including all CELEX bases), Germany, and ALEXIS (including RDB Austria), Germany-Austria.

Revision: Final text of the decision and the ruling shall be produced by the Commission for the revision within seven days from the date of its adoption.

Contents: Decisions and orders contain an indication of the composition of the Constitutional Court, when the decision was taken; indication of the regulation or general or individual act which was the subject of the assessment , the operative part of the decision and the reasons for the decision; statement of the composition of the Court, in which the decision was taken; indicarion of the outcome of the vote and the judges, who voted; indication of an announced separate opinion. If the justification for the decision refers to the grounds contained in the explanatory part of some earlier decision, which was not published, the decision in course shall be accompanied by a decision to be delivered to the parties.

Ingredients of the decision of the Constitutional Court are : the head ; dispositiv; reasoning: A part of the particulars of the applicant and the opposing parties; Part B : substantive legal basis and contents of the reasons for the decision; Part C : procedural legal basis for the decision and the names of the members of the Constitutional Court, the result of the vote (numbered) indicating the name of the judge , who voted against ; naming the species and the author of the separate opinion.

In constitutional decisions there is important their reasoning. This decision of the constitutional court loses its political conotation and gets the required legal form. Even with the decision of the constitutional court, the finality of the decision or obligation relates only to its dispositive, but not to the grounds. Reasoning contributes to the real meaning of the disposition, but does not itself acquire the finality. Normally it is considered that rulings taken by the constitutional court shall be also reasoned. However, in some legal systems it is not always like that: in the German system of constitutional review, for example, there is no need to explain rulings which reject the application. In the same system there is no need to explain decisions of CC chambers of non-acceptance of applications in the process of constitutional complaint. But the German legal theory criticizes such constitutional complaint decisions because they are not explained and not published and because many of such “excluded”decisions were successful in the later procedure, despite of their initial fate. The same theory also supports a reasoning of the CC ruling regarding discontinuation of the proceedings.

The Slovenian constitutional case-law until 1991 was characterized by short reasonings. According to the strict observance of the self-restraint principle of the constitutional court, the then CC reasonings were on the level of interpretations of legal norms, but there were no attempts of some wider creation. They contained only a short reproduction of the proceedings, the core was a legal justification of the decision (the legal basis and the court’s statement). The reasonings didn’t refer to the legal theory and to the general principles of law, but they refer only exceptionally to the already existent (constitutional) case law. Additionally, they didn’t quote of the methods of interpretation of a particular legal rule.

3. THE CURRENT MODEL

Case number.:	**U-I-218/07**
Challenged act:	The Restrictions on the Use of Tobacco Products Act (Official Gazette RS, Nos. 57/96, 119/02, 101/05, 17/06 – official consolidated text, and 60/07) (ZOUTI), individual provisions
Operative provisions:	The first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the Restrictions on the Use of Tobacco

Products Act (Official Gazette RS, Nos. 57/96, 119/02, 101/05, 17/06 – official consolidated text, and 60/07) are not inconsistent with the Constitution. The petition to initiate the proceedings for the review of the constitutionality of the first and fifth paragraphs of Article 14 and Article 20 of the Restrictions on the Use of Tobacco Products Act is rejected.

Abstract: A statutory regulation which prohibits smoking in indoor public places and indoor working places as well as the consumption of food and beverages in smoking rooms entails an interference with the general right to act freely (Article 35 of the Constitution). However, the above-mentioned interference is not inadmissible, as only in such manner can the constitutionally admissible aim pursued by the legislature be effectively achieved, i.e. the protection of employed persons and all persons against the adverse effects of second-hand smoking and environmental tobacco smoke.
Considering the characteristics of spending time and socializing in hospitality establishments, they cannot be regarded as association within the meaning of the second paragraph of Article 42 of the Constitution, as such is not an organised and permanent community of individuals who are closely connected in order to pursue common interests, nor can it be regarded as assembly within the meaning of the first paragraph of Article 42 of the Constitution, as they are in general coincidental, they do not entail a group expression, and also the element of the internal connection of visitors in general does not exist.

Thesaurus: 1.5.51.1.13.1 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In abstract review proceedings - Finding that a regulation is in conformity - With the Constitution. 5.3.27 - Fundamental Rights - Civil and political rights - Freedom of assembly. 5.3.4 - Fundamental Rights - Civil and political rights - Right to physical and psychological integrity. 3.16 - General Principles - Proportionality. 5.2 - Fundamental Rights - Equality. 1.4.9.2 - Constitutional Justice - Procedure - Parties - Interest. 1.4.51.4 - Constitutional Justice - Procedure - Procedural requirements (in all proceedings except in constitutional-complaint proceedings) - Legal interest to file a petition. 1.5.51.1.2.1 - Constitutional Justice - Decisions - Types of decisions of the Constitutional Court - In abstract review proceedings - Rejection of a petition - No legal interest.

Legal basis: Člen 14.2, 35, 42, Ustava [URS] Člen 21, 25.3, Zakon o Ustavnem sodišču [ZUstS]

Notes:

Full text: U-I-218/07-8
26 March 2009

D E C I S I O N

At a session held on 26 March 2009 in proceedings to review constitutionality initiated upon the petition of Zmago Jelinčič Plemeniti, Ljubljana, and Bogdan Barovič, Ljubljana, the Constitutional Court

d e c i d e d a s f o l l o w s:

1. The first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the Restrictions on the Use of Tobacco Products Act (Official Gazette RS, Nos. 57/96, 119/02, 101/05, 17/06 – official consolidated text, and 60/07) are not inconsistent with the Constitution.

2. The petition to initiate the proceedings for the review of the constitutionality of the first and fifth paragraphs of Article 14 and Article 20 of the Restrictions on the Use of Tobacco Products Act is rejected.

R e a s o n i n g
A.

1. The petitioners, who filed a petition as both National Assembly deputies and citizens of the Republic of Slovenia, challenge Articles 4, 6, 7, and 9 of the Act Amending the Restrictions on the Use of Tobacco Products Act (Official Gazette RS, No. 60/07 – hereinafter referred to as RUTPA-C). They allege that the ban on smoking in hospitality establishments puts smokers in an unequal position, as they can no longer freely smoke in hospitality establishments and are forced to smoke in designated smoking rooms, where, however, they cannot drink or eat, as the law prohibits them from doing such. In their opinion, the challenged regulation interferes with their right to act freely (Article 35 of the Constitution), as the principle that applies is that everything which is not prohibited is permitted, whereas smoking is not declared to be a criminal offence. Therefore, in their opinion, smokers have the right to smoke. The fact that in public indoor places smoking is restricted to designated smoking rooms and that the consumption of food and beverages in such rooms is prohibited allegedly also interferes with their personal liberty (Article 19 of the Constitution), their freedom of movement (Article 32 of the Constitution), and their personality and dignity (Articles 21 and 34 of the Constitution). Allegedly no sound reason exists for the prohibition of the consumption of food and beverages in the designated smoking rooms. Furthermore, in their opinion, the legislature should allow specialized hospitality establishments with limited admission where smoking should be unrestricted. Namely, only in such a manner would smokers' right to socialize and associate, as guaranteed by Article 42 of the Constitution, be ensured. Thereby hospitality establishment owners' free economic initiative, as determined in Article 74 of the Constitution, is interfered with, as they cannot freely choose whether to have a smoking or non-smoking hospitality establishment.

2. With reference to Article 4 of the RUTPA-C, which prohibits persons under 18 years of age from selling tobacco products, the petitioners allege the inconsistency with Articles 14, 15, 34, 35, 49, and 66 of the Constitution. Such regulation allegedly prohibits work that persons under 18 years of age could carry out before the amendment of the Act and allegedly offends their personal dignity and integrity, as it demonstrates the legislature's lack of trust towards young people. With reference to Article 9 of the RUTPA-C, which regulates supervision of the implementation of the Act and accountability for the implementation of the ban on smoking, the petitioners claim that it does not meet the requirements laid down in Article 2 of the Constitution, as it is allegedly not determined in what manner inspectorates shall act, what is the relation between the accountability of the owners and tenants of hospitality establishments, etc. Thus, in their opinion, the state did not fulfil its obligations determined in Article 5 of the Constitution.

3. The National Assembly did not reply to the petition. In the opinion of the Government, the challenged regulation is not inconsistent with the Constitution. In its opinion, the Government reiterated standpoints which have already been stated in the legislative materials.

B. – I.

4. Anyone who demonstrates legal interest may lodge a petition requesting that the procedure for the review of constitutionality be initiated (the first paragraph of Article 24 of the Constitutional Court Act, Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA). In accordance with the second paragraph of the same article, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with his rights, legal interests, or legal position.

5. The petitioners challenge Articles 4 and 9 of the RUTPA-C. Article 4 of the RUTPA-C amends the first paragraph of Article 14 of the Restrictions on the Use of Tobacco Products Act (hereinafter referred to as the RUTPA) and adds a new fifth paragraph, whereas Article 9 of the RUTPA- C amends Article 20 of the RUTPA. The Constitutional Court thus deemed that the petitioners challenge the first and fifth paragraphs of Article 14 and Article 20 of the RUTPA. The first paragraph of Article 14 of the RUTPA prohibits the sale of tobacco products to persons under 18 years of age and persons under 18 years of age from selling tobacco products. In addition, the fifth paragraph of Article 14 requires that the prohibition of the sale of tobacco products to persons under 18 years of age is displayed visibly in shops where tobacco products are sold. The above-mentioned provisions do not directly interfere with petitioners' rights, legal interests, or their legal position, as the petitioners, who lodged the petition also as National Assembly deputies, are not persons under 18 years of age. Furthermore, also the provisions of Article 20 of the RUTPA, which regulate supervision of the implementation of the RUTPA and the accountability for the implementation of the ban on smoking, do not interfere with their rights, legal interests, or legal position. The provisions of Article 20 of the RUTPA, which regulate competence for supervision of inspection bodies for supervision of the implementation of the individual parts of the Act in and of themselves cannot interfere with the petitioners' legal position, whereas with reference to accountability for the implementation of the ban on smoking in indoor public places and indoor workplaces, the petitioners did not demonstrate that they are owners, tenants, or managers of places where the ban on smoking should be implemented. The petitioners therefore do not demonstrate legal interest for the review of the constitutionality of the challenged statutory provisions. Therefore, the Constitutional Court rejected their petition in this part (paragraph 2 of the operative part).

6. The petitioners also challenge Articles 6 and 7 of the RUTPA-C. Article 6 amends Article 16 of the RUTPA, whereas Article 7 amends the text of Article 17 of the RUTPA. The Constitutional Court deemed that the petitioners challenge the provisions of the RUTPA. With reference to such, the allegations in the petition only refer to the first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the RUTPA, therefore the Constitutional Court reviewed the RUTPA only in this part. The Constitutional Court accepted the petition for consideration in the above-mentioned part and, with consideration of the fact that the requirements laid down in the fourth paragraph of Article 26 of the CCA are fulfilled, proceeded to decide on the merits.

The Review of the First Sentence of the First Paragraph of Article 16 of the RUTPA

7. The first sentence of the first paragraph of Article 16 of the RUTPA reads as follows:
“Smoking is prohibited in all indoor public places and indoor workplaces.”

8. Articles 34 and 35 of the Constitution protect individuals' personal dignity, personality rights, safety, and privacy. The right to personal dignity ensures individuals recognition of their worth as human beings and from which there follow their ability to decide independently. Also the guarantee of personality rights stems from this human characteristic. The name itself indicates that these are the rights which a human being as a person, thus a human being as such, is entitled to. The guarantee of personality rights ensures the elements of individuals' personality that are not protected by other provisions of the Constitution (by the freedoms of conscience, expression, etc.), but only by them all together are individuals given an opportunity to develop freely and live their lives as they decide (see Constitutional Court Decision No. U-I-226/95, dated 8 July 1999, Official Gazette RS, No. 60/99 and OdlUS VIII, 174). Constitutional case-law also includes in this scope the general right to act freely (e.g. in Decision No. U-I-137/93, dated 2 June 1994, Official Gazette RS, No. 42/94 and OdlUS III, 62). This constitutional right also encompasses the principle that in a state governed by the rule of law a human being is permitted to do everything which is not prohibited and not vice versa (Decision No. U-I-290/96, dated 11 June 1998, Official Gazette RS, No. 49/98 and OdlUS VII, 124).

9. However, the general right to act freely is not an unlimited and abstract “natural” freedom. It can be exercised only within the constitutional framework. In a substantive sense, the general right to act freely entails a legally determined freedom which is limited yet protected within these boundaries**.** As members of society, individuals must endure the limitations of the general right to act freely which are dictated by the interests of others and society as a whole. These limitations in and of themselves do not entail an interference with the general right to act freely, but define its constitutionally protected substance. As regards the above-mentioned, the Constitutional Court had to first establish whether the challenged regulation concerns an interference with the constitutional right to act freely or if the challenged regulation stems from the very nature of this right as a constituent part thereof.

10. The general right to act freely gives individuals the right “to do what one will with oneself” and with all aspects of one’s person, without external interferences. It is namely important that individuals are able to choose their own lifestyle, develop their personality, and live their personal life as they choose. [1] The general right to act freely thus also comprises the individuals' right to decide whether to smoke or not. The individuals' choice necessarily includes their free will. [2] With reference to the use of tobacco products, also the fact that such cause addiction, which can to a certain extent exclude the freedom of choice not only of smokers but also of users of other tobacco products, must necessarily be taken into consideration. [3] Regardless of the existence of addiction to tobacco products, the use of tobacco products is not an inborn need of men, such as eating, drinking, sleeping, moving about, and voicing one's opinion, but at least in the beginning [4] (before addiction develops) it is their free choice.

11. As applies for all human rights and fundamental freedoms, it also applies for personality rights, which are protected by Article 35 of the Constitution, that they are not absolute and unlimited. In accordance with the third paragraph of Article 15 of the Constitution, they are limited by the rights of others and in such cases as are provided by the Constitution. The Constitutional Court holds that the challenged statutory regulation which prohibits smoking in indoor public places and indoor workplaces, entails an interference with the general right to act freely (Article 35 of the Constitution). Interferences with human rights or fundamental freedoms are, in accordance with the established case-law, admissible if they are consistent with the principle of proportionality. The Constitutional Court carries out a review of whether an interference with a human right is admissible on the basis of the so-called strict test of proportionality (see Decision No. U-I-18/02, dated 24 October 2003, Official Gazette RS, No. 108/03 and OdlUS XII, 86; paragraph 25 of the reasoning). The Constitutional Court must first establish (review) whether the legislature pursued a constitutionally admissible aim.

12. As follows from the legislative materials, [5] the aim of the challenged statutory regulation is to ensure employed persons in all occupational groups full protection from exposure to the adverse health effects of tobacco smoke in workplaces and all persons full protection from exposure to the adverse health effects of tobacco smoke in public places, to reduce demand for tobacco products, to reduce smoking among young people and adults alike, and to increase the number of persons that give up smoking. The Constitutional Court holds that the above-mentioned suffices for the conclusion that the legislature had a constitutionally admissible aim in limiting the petitioners' general right to act freely, as protected within the framework of Article 35 of the Constitution.

13. In addition to the conclusion that the interference pursues a constitutionally admissible aim and that it is not inadmissible from this point of view, it must also always be reviewed whether such is consistent with the principles of a state governed by the rule of law (Article 2 of the Constitution), and thus with that constitutional principle which prohibits excessive interferences (the general principle of proportionality). The review of whether an interference is excessive is carried out by the Constitutional Court on the basis of a strict proportionality test. The test comprises a review of three aspects of the interference: (1) whether the interference is at all necessary (needed) in order to achieve the pursued aim; (2) whether the evaluated interference is appropriate for achieving the pursued aim in the sense that such aim can in fact be achieved by the interference; (3) whether the weight of the consequences of the reviewed interference with the affected human right is proportionate to the benefits which will result therefrom (the principle of proportionality in the narrower sense or the principle of proportionality). Only if the interference passes all three aspects of the test is it constitutionally admissible (see Constitutional Court Decision No. U-I-18/02).

14. Within the framework of the review of the necessity of the interference, the Constitutional Court reviews whether the interference is at all necessary (needed) in the sense that the aim in question cannot be achieved without an interference in general (i.e. by means of some manner of interference) or that the aim cannot be achieved without the reviewed (concrete) interference but by means of some other interference which would be less severe in nature. These requirements are met regarding the challenged regulation on the ban on smoking. As is true for active smoking, second-hand smoking is also harmful

to one's health. The first paragraph of Article 8 of the WHO Framework Convention on Tobacco Control. (Official Gazette RS, No. 16/05, IT, No. 2/05 – hereinafter referred to as the FCTC), which is binding on the Republic of Slovenia, requires that parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease, and disability. Second-hand smoking or environmental tobacco smoke is the combination of smoke emitted from the burning end of a cigarette or other tobacco products and smoke exhaled by the smoker. [6] Environmental tobacco smoke contains thousands of known chemicals, at least 250 of which are known to be carcinogenic or otherwise toxic. [7] Evidence on the adverse health effects of exposure to tobacco smoke has been accumulating for nearly 50 years. In this period, the link between environmental tobacco smoke and the following illnesses has been established: coronary heart disease, lung cancer, breast cancer, respiratory symptoms and illnesses, whereas among children exposure to tobacco smoke effects asthma (exacerbates preexisting asthma and causes new-onset asthma), lung growth and development, and middle-ear disease (*otitis media*). [8] According to the data contained in the legislative materials, [9] as many as 65% of all adult residents of the Republic of Slovenia are exposed to tobacco smoke (with different durations and frequencies). 57% of non-smokers were exposed to tobacco smoke. As many as 60% of all adult residents were exposed to tobacco smoke in hospitality establishments, among which one quarter was exposed to it every day or almost every day. Slightly more than 27% of adult residents of the Republic of Slovenia were exposed to second-hand smoke every day or almost every day. Most often they were exposed to tobacco smoke in hospitality establishments, at their workplace, and in a home environment. On average these persons spent somewhat less than 3 hours per day in smoky places, in a timeframe from a few minutes to more than 16 hours. Almost one half of the group of exposed persons were non-smokers.

15. In order to ensure employed persons in all occupational groups full protection against exposure to the adverse health effects of tobacco smoke, smoking must be banned in all indoor public places and indoor workplaces. A hospitality establishment is a workplace for persons employed in the hospitality sector and protecting such employees from second-hand smoking can only be ensured by the complete prohibition of smoking in hospitality establishments. The measures laid down in the RUTPA before the implementation of the RUTPA-C, which comprised the prohibition of smoking in public places except in parts which were specially marked and separated from places designated for non-smokers, whereby it was left to the owners of hospitality establishments to designate such special places for smokers as well as their size, did not achieve their objective. The RUTPA before the implementation of the RUTPA-C did not enable employed persons in all positions of employment or workers in all occupational groups appropriate protection from tobacco smoke. [10] In addition, employed persons in the hospitality industry, who are to a greater extent and for longer periods exposed to tobacco smoke, did not exercise their right to require that their employer ensure a smoke-free work environment, as they were not aware of the adverse effects of second-hand smoking or they were afraid to lose their jobs. [11] Furthermore, in accordance with recent scientific evidence, the statutory provision of the RUTPA before the implementation of the RUTPA-C, which introduced the requirement of appropriate ventilation in order to prevent the mixing of [smoky and non-smoky] air, is no longer appropriate, as none of the accessible ventilation technologies or air purification systems can ensure protection against

exposure to tobacco smoke without extensive and impractical increased ventilation. Even separated places for smokers and non-smokers do not protect workers. What is more, there is a high concentration of carcinogens and toxins from tobacco smoke in separated places for smokers. [12] In view of the fact that there is no safe level of exposure to tobacco smoke, [13] the Constitutional Court finds that the prohibition of smoking in all indoor public places and indoor workplaces is the only measure which enables the legislature's pursued aim to be achieved, i.e. the protection of workers and other persons from the adverse effects of environmental tobacco smoke.

16. The Constitutional Court holds that the interference is also appropriate in order to achieve the pursued aim. As already explained above, the prohibition of smoking in indoor public places and indoor workplaces is the only measure which can ensure effective protection from the adverse effects of tobacco smoke or from second-hand smoking. Thereby, exposure to environmental tobacco smoke and consequently the risks connected to second-hand smoking namely decrease considerably. Studies conducted in countries that have banned smoking show that indoor air quality improved considerably following the implementation of the prohibition of smoking. Reduced exposure to environmental tobacco smoke was primarily observable in places intended for leisure activities and in hospitality establishments. This is expressed in a considerable improvement in the respiratory health of workers employed in the hospitality sector and in a substantial decrease in the occurrence of heart attacks and the death rate within a few months following the implementation of the policy. [14]

17. In order for the challenged provision to pass the test of proportionality, the condition of proportionality in a narrower sense must also be fulfilled. Proportionality in a narrower sense concerns a review of whether the weight of the consequences of the reviewed interference with the affected human right is proportional to the value of the pursued aim or to the benefits which will result due to the interference. The ban on smoking limits smokers regarding their freedom to act when they are at their workplace or in indoor public places. This also applies to their visits to hospitality establishments, as such are made increasingly more difficult due to the ban on smoking, whereas visiting hospitality establishments is one of the aspects of social life. On the other hand are the individual's rights to health (Article 51 of the Constitution) and to a healthy living environment (Article 72 of the Constitution), which require that the legislature adopt appropriate measures for their provision. The FCTC also requires that Slovenia actively promote the adoption and implementation of effective legislative, executive, administrative, and/or other measures that provide for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places (the second paragraph of Article 8 of the FCTC). The challenged regulation is such a measure whose aim is to prevent or reduce the adverse effects of environmental tobacco smoke on employed persons and other persons and by which their right to health and a healthy living environment is ensured. Health is such an important value for everyone that right to act freely may be interfered with in order to ensure such. The interference with the right determined in Article 35 of the Constitution is not excessive due to the importance of the aim that the legislature pursues and due to the importance of the benefits which are protected by the challenged regulation. It is especially not excessive if it is taken into consideration that smokers can always leave an indoor public place or indoor workplace for a short period of time in order to

use tobacco products. The challenged regulation of the ban on smoking is thus not inconsistent with the general right to act freely determined in Article 35 of the Constitution.

18. The petitioners also allege that the challenged regulation is inconsistent with the right of association determined in Article 42 of the Constitution, as the state renders it impossible for them to socialize and associate in hospitality establishments and as it does not allow specialized hospitality establishments where smoking is permitted.

19. Article 42 of the Constitution establishes several constitutional rights. In the first paragraph the right of peaceful assembly and the right of public meeting are ensured. The second paragraph ensures the right to freedom of association. In accordance with the third paragraph of Article 42, legal restrictions of these rights are permissible where so required for national security or public safety and for protection against the spread of infectious diseases. A special restriction is determined in the fourth paragraph for professional members of the defence forces and the police; they namely may not be members of political parties. An assembly of people is a meeting of people – either in an indoor place or under the open sky – together with their participation in expressing or exchanging ideas or opinions. [15] It is exercised through a less formal form of a connection of people than an association, [16] which is a more organised and permanent community of individuals who are closely connected in order to pursue common interests. Due to such characteristics of association, by their very nature associating or socializing in hospitality establishments cannot be considered association within the meaning of the second paragraph of Article 42 of the Constitution.

20. The constitutional provision on the right of assembly determined in the first paragraph of Article 42 is a special provision in relation to the general right to act freely, which is protected in Article 35 of the Constitution. It entails the assembly of at least two persons, [17] which is not coincidental [18], and which requires at least some degree of internal connection of the participants. The participants must be aware of the fact that they are assembling and must wish to participate in such (the element of willingness). The right of assembly requires assembly with the intention of common expression with the objective of participating in a public expression of opinions. [19] Assembly is thus not merely a connection [of individuals] or amusement, [20] therefore entertainment (e.g. public festivities) or commercial events (e.g. sporting events [21] or public parties in the open air [22]) are not considered assemblies, as they lack the element of the internal connection [of the individuals involved]. [23] Considering the characteristics of spending time and socializing in hospitality establishments, they cannot be regarded as assembly within the meaning of the first paragraph of Article 42 of the Constitution, as they are in general coincidental, they do not entail a group expression, and also the element of the internal connection of visitors in general does not exist. Therefore, the petitioners' allegation regarding the inconsistency of the challenged regulation with the right determined in Article 42 of the Constitution is not substantiated.

21. Furthermore, the petitioners allege that the challenge regulation also violates the principle of equality before the law determined in the second paragraph of Article 14 of the Constitution, as smokers cannot freely visit hospitality establishments, as non-smokers can. They claim that smokers are

severely restricted due to the ban on smoking when visiting hospitality establishments, whereas the state does not allow hospitality establishments to be specialized so that smoking is permitted in them.

22. The second paragraph of Article 14 of the Constitution determines that all are equal before the law. Respecting the principle of equality and ensuring equal treatment are thus fundamental requirements which the legislature must observe when regulating rights and obligations. However, this principle cannot be viewed as simple general equality for all. In accordance with the established case-law of the Constitutional Court, the principle of equality before the law does not entail that a regulation – in cases in which the bases for different regulation are not the circumstances determined in the first paragraph of Article 14 of the Constitution – should not differently regulate the same positions of legal subjects, but that such cannot be done in an arbitrary manner, without a sound and objective reason. There must thus exist a sound reason deriving from the nature of the matter. (standardized explanation of the constitutional provision)

23. The challenged regulation, *inter alia*, pursues the aim of protecting employed persons in all occupational groups, thus also persons employed in the hospitality industry. Also the latter have the right to work in a workplace environment where they are not exposed to environmental tobacco smoke. Also persons employed at specialized hospitality establishments would have to be exposed to environmental tobacco smoke because of the nature of the matter. Finally, also the fact that the RUTPA also protects employed persons who are smokers from the adverse effects of second-hand smoking must be taken into consideration. It can namely not be deemed that because of the fact that they are smokers they consent to being exposed to environmental tobacco smoke at their workplace. It also follows from the legislative materials that the measures pursuant to the RUTPA before the implementation of the RUTPA-C, according to which it was left to owners (or tenants or managers) of hospitality establishments to designate special places for smokers as well as their size, did not achieve their objective, and workers often were not able to exercise their right to require that their employer ensure a smoke-free work environment, due to their existential dependency on their employment. The Constitutional Court finds that the protection of employed persons from environmental tobacco smoke (i.e. second-hand smoking) is not an unsound reason for the challenged regulation, in which specialized smoking hospitality establishments are not envisaged. Therefore, the petitioners' allegations regarding the inconsistency of the challenged regulation with the principle of equality before the law determined in the second paragraph of Article 14 of the Constitution are not substantiated.

24. The Constitutional Court cannot agree with the petitioners that the prohibition of smoking in indoor public places and indoor workplaces violates Article 19 of the Constitution, as it only protects individuals' personal liberty, especially from arrest and similar, and not from the fact that in certain special situations (e.g. when visiting hospitality establishments), in which individuals enter voluntarily, they are required to respect certain rules of conduct.

25. The Constitutional Court did not review the alleged inconsistency of the first sentence of the first paragraph of Article 16 of the RUTPA with Article 74 of the Constitution, which regulates free economic initiative, as the petitioners

did not demonstrate their legal interest from the viewpoint of free economic initiative, as they did not demonstrate that they are owners, tenants, or managers of a hospitality establishment. The very general allegations that the challenged regulation deprives numerous subjects on the market of the possibility of having a hospitality establishment for smokers, do not demonstrate the petitioners' legal interest.

26. As regards the above-mentioned, the challenged provision of the first sentence of the first paragraph of Article 16 of the RUTPA is not inconsistent with the Constitution.

The Review of the Fourth Indent of the First Paragraph of Article 17 of the RUTPA

27. The fourth indent of the first paragraph of Article 17 of the RUTPA determines that food and beverages may not be consumed in smoking rooms.

28. The Constitutional Court holds that the above-mentioned prohibition interferes with the petitioners' general right to act freely laid down in Article 35 of the Constitution. As already explained above (paragraph 11 of the reasoning), also personality rights, which are protected by Article 35 of the Constitution, are not absolute and unlimited, but are, pursuant with the third paragraph of Article 15 of the Constitution, limited by the rights of others and in such cases as are provided by the Constitution. The interferences with human rights or fundamental freedoms are, in accordance with the established constitutional case-law, admissible if they are in compliance with the principle of proportionality.

29. In order to ensure the possibility to work in an environment where air is not polluted and in order to prevent employed persons from being exposed to the adverse effects of environmental tobacco smoke against their will, the Constitutional Court finds that such entails that the legislature had a constitutionally admissible aim in limiting the petitioners' right to act freely, which is protected within the framework of Article 35 of the Constitution.

30. The interference must also be necessary, appropriate, and proportionate in a narrower sense in order not to be excessive. In view of the fact that the petitioners' allegations only refer to smoking rooms in hospitality establishments, the Constitutional Court limited the strict test of proportionality only to such. The Constitutional Court holds that also in the case of the prohibition of the consumption of food and beverages in smoking rooms in hospitality establishments all three conditions are still met. In the case of smoking rooms in hospitality establishments, it is namely presumed that in order to carry out their work obligations, i.e. serving and cleaning up after guests (with the exception of self-service restaurants, and even those require some cleaning up), employed persons would have to enter such. This entails that they would be exposed to environmental tobacco smoke, regarding which it follows from the scientific evidence that there is no safe level of exposure to tobacco smoke. [24] Such is particularly dangerous in separated places for smokers where a high concentration of carcinogens and toxins from tobacco smoke are present. [25] If it was allowed that food and beverages were consumed in smoking rooms in hospitality establishments, the aim that the legislature pursues would not be achieved. Thus the interference with the general right to act freely is not excessive, especially if it is considered that the

limitation is only of a temporary nature. Smokers namely stay in smoking rooms only a short time and may immediately after they leave such rooms consume food and beverages. The objective of the law is namely to protect the health of employed persons so that they are protected from second-hand smoke in situations in which they are not smoking themselves. The fourth indent of the first paragraph of Article 17 of the RUTPA, which prohibits food and beverages from being consumed in smoking rooms, is not inconsistent with the general right to act freely protected in Article 35 of the Constitution.

31. As regards the starting points of the principle of equality laid down in the second paragraph of Article 14 of the Constitution, which the Constitutional Court explained in paragraph 22 of this reasoning, the Constitutional Court has to answer the question of whether there exists a sound reason, deriving from the nature of the matter, for the prohibition of the consumption of food and beverages in smoking rooms. It follows from the legislative materials [26] that the challenged regulation ensures employed persons the possibility to work in an environment where the air is not polluted and at the same time prevents them from being exposed to the adverse effects of tobacco smoke against their will. The Constitutional Court finds that the above-mentioned reasons are not unsound and are relevant to the aims pursued by the legislature. The possibility of consuming food and beverages in smoking rooms in hospitality establishments namely presumes that employed persons will enter such rooms in order to serve guests and related activities (i.e. to bring food and beverages as well as to clean up after guests). In this manner the full protection of employed persons is guaranteed, as they do not need to enter such rooms within the scope of their work obligations and consequently they are not exposed to second-hand smoke. The allegation that the prohibition of the consumption of food and beverages is inconsistent with the fourth indent of the first paragraph of Article 17 of the RUTPA is thus not substantiated.

32. As the Constitutional Court explained in paragraph 24 of the reasoning, Article 19 of the Constitution only protects individuals' personal liberty, especially from arrest and similar, and not from the fact that in certain special situations, e.g. in smoking rooms in which individuals enter voluntarily, they are required to respect certain rules of conduct. Therefore, the allegation regarding the alleged inconsistency of the prohibition of the consumption food and beverages in smoking rooms determined in the fourth indent of the first paragraph of Article 17 of the RUTPA is not substantiated. Also the allegation regarding the inconsistency of the challenged regulation with Article 21 of the Constitution is not substantiated, as the protection of human personality and dignity in accordance with this article is specifically limited to protection in legal proceedings in cases of arrest, detention, and the enforcement of punitive sanctions. In addition, the above-mentioned prohibition does not interfere with the freedom of movement determined in Article 32 of the Constitution, as such only refers to free movement, especially in the sense of choosing a place of residence, movement in and outside the country, etc.
33. Thus, the Constitutional Court finds that the first sentence of the first paragraph of Article 16 and the fourth indent of the first paragraph of Article 17 of the RUTPA are not inconsistent with the Constitution (paragraph 1 of the operative part).

C.

15. The Constitutional Court reached this decision on the basis of Article 21 and the third paragraph of Article 25 of the CCA, composed of: Jože Tratnik,

President, and Judges Dr Mitja Deisinger, Mag. Marta Klampfer, Mag. Miroslav Mozetič, Dr Ernest Petrič, Dr Ciril Ribičič, and Jan Zobec. The decision was reached unanimously.
Jože Tratnik
President

Notes:
[1] A. Kjonstad, Is it a Human Right to Smoke Tobacco?, in: R. Bainpain and G. Anderson (Editor), Smoking and the Workplace, Kluwer Law International, The Hague, 2005, p. 65.
[2] *Cf.*, M. L. Tyler, Blowing Smoke: Do Smokers Have a Right? Limiting the privacy rights of cigarette smokers, Georgetown Law Journal, 86 (1998) 1, pp. 802 – 803.
[3] See Constitutional Court Decision No. U-I-141/97, dated 22 November 2001, Official Gazette RS, No. 104/01 and OdlUS X, 193, paragraph 25 of the reasoning.
[4] *Cf*., American Federal Appellate Court Judgment in Case Palmer v. Liggett Group Inc., 825, F 2nd 680 (1st Cir. 1987).
[5] National Assembly Gazette, No. 30/07, p. 9.
[6] World Health Organisation, Protection from Exposure to Second-Hand Tobacco Smoke, Policy Recommendations, 2007, p. 4.
[7] United States Department of Health and Human Services, National Institutes of Health, National Institute of Environmental Health Sciences, National Toxicology Program, Report on Carcinogens, 11th Editions, Washington DC 2005, published at: <http://ntp.niehs.nih.gov/ntp/roc/toc11.html> (23 February 2009).
[8] World Health Organisation, Protection from Exposure to Second-Hand Tobacco Smoke, Policy Recommendations, 2007, pp. 5–6.
[9] National Assembly Gazette, No. 30/07, p. 3.
[10] *Ibidem*, p. 7.
[11] *Ibidem*.
[12] *Ibidem*, p. 8.
[13] World Health Organisation, Protection from Exposure to Second-Hand Tobacco Smoke, Policy Recommendations, 2007, p. 7.
[14] See especially the studies cited in footnotes 54-56 in the Green Paper of the Commission of the European Communities, Towards a Europe free from tobacco smoke: policy options at EU level, COM(2007) 27 final, 30 January 2007, published at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0027:SL:HTML> (23 February 2009).
[15] L. Šturm, 42. člen (Pravica do zbiranja in združevanja), in: L. Šturm (Editor), Komentar Ustave Republike Slovenije, Fakulteta za podiplomske in evropske študije, Ljubljana, 2002, p. 461.
[16] *Ibidem.*
[17] D. C. Umbach in T. Clemens (Editor), Grundgesetz, Mitarbeiterkommentar und Handbuch, Band I, C. F. Müller Verlag, Heidelberg 2002, p. 626 – hereinafter referred to as Umbach/Clemens.
[18] *Ibidem*, p. 627.
[19] *Cf.*, German Federal Constitutional Court Decision in the Loveparade Case, BVerfG, 1 BvQ 28/01, dated 12 July 2001, paragraph 16 of the reasoning.
[20] Umbach/Clemens, p. 627. The same also in H. D. Jarass and B. Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 4th Edition, Beck Verlag, München 1997, p. 241 – hereinafter referred to as Jarass/Pieroth.

[21] Jarass/Pieroth, *ibidem*.
[22] Umbach/Clemens, p. 627.
[23] Jarass/Pieroth, p. 241.
[24] See footnote 10.
[25] See footnote 12.
[26] National Assembly Gazette, No. 30/07, p. 10.

Type of document:	review of constitutionality and legality of regulations and other general acts
Type of act:	statute
Applicant:	Zmago Jelinčič Plemeniti, Ljubljana
Date of application:	25.07.2007
Date of decision:	26.03.2009
Type of judgement:	decision
Type of resolution:	establishment – it is not inconsistent with the Constitution/statute rejection
Published:	Official Gazette RS, No. 27/2009 and OdlUS XVIII, 12
Document:	AN03225
PDF format:	

4. APPLICATION OF THE FOREIGN CONSTITUTIONAL CASE-LAW IN THE CONSTITUTIONAL COURT REASONING

The practical ways used by the constitutional courts in making recourse to foreign law (legislation, case-law) are an important aspect that should not be neglected.

1*. Contents of effect of rules*

One important initial question is, whether the constitutional courts direct their attention solely to the contents of a foreign rule or whether they regard also, or even exclusively, its effects. Apparently, the constitutional courts are directing their attention mainly – in contrast to the modern legislator – to the contents of the foreign rule. For practical reasons it is, however, difficult to generalize such an approach for other courts, desirable as may be.

2. *Weight of comparative arguments*

The weight of foreign solutions is always limited. No constitutional court bases its decisions solely on rules of foreign law. The recourse to foreign law furnishes but a supplementary element for the court's reasoning. Even within these limits, it is difficult to draw general conclusions about the relative weight of foreign law. The references to foreign legal materials are sometimes extremely short, rarely more comprehensive. If courts cite foreign case-law, in most cases they describe only their results, and rarely also their reasoning.

3. Countries (case-law) used for comparison

The countries used for comparison differ widely and sometimes. It sometimes appears that the comparison is rather accidental. Often only one foreign legal solution is described by the

constitutional court, without indicating the criterion used for the choice of legal system, much less justifying it. Occasionally, an overview of more than one foreign legal solution is given. Very seldom can one find descriptions of a legal situation in geographical or political units, which are then often over simplistic.

It is plausible that geographically broader findings have a stronger persuasive value than others. This may be one reason why some "western" constitutional courts prefer to refer to general principles or standards; however, the court understandably limits its statements to particular groups of countries, e.g. to the liberal or Western democracies or to peoples with common cultural heritage..

Whether and to what extent the choice of countries used for comparison is determined or limited by practical problems or by language problems of access to information can unfortunately not be said.

However, it is possible to say that the laws of certain countries (e.g. Germany, U.S.A., Austria, France etc.) are preferred for comparisons. In this regard, the first place is taken by countries with more modern legislation (e.g. Germany).

5. SIGNIFICANCE OF (COMPARATIVE) CONSTITUTIONAL CASE-LAW INFORMATION FOR THE ACTIVITIES OF THE CONSTITUTIONAL COURT

Universal participation of constitutional courts in the modern information exchange is a very important change, in particular because until 1990 legal informatics in the domain of constitutional matters, with a few exceptions, generally speaking, did not keep up with general trends in other domains. In many cases the documents issued by constitutional courts (mainly decisions) used to be processed by other subjects, at that time more advanced in informatics.

On these grounds from the beginning on the initiative by the then founded Venice Commission of the Council of Europe was welcomed through which constitutional courts belonging to a common information centre would enable their potential users to access the information on constitutional matters. Nowadays, the number of legal information is still on the increase, which entails more troubles in orientation within one's own and other legal systems. In this situation the solutions providing appropriate professional comparative information exchange as well as comparative studies on constitutional matters are very welcome.

6. THE SLOVENIAN CURRENT PRACTICE: USAGE OF COMPARATIVE INFORMATION AND INFLUENCES OF COMPARATIVE INFORMATION ON THE COURT ACTIVITES

Numerous times in the reasoning of its decisions the Constitutional Court has referred to the case-law of some of the most respected foreign courts, particularly the German Federal Constitutional Court, the Supreme Court of the USA, and to the European as well as to the UN conventions and charters.[6]

The similarities of the constitutional system and the system of the constitutional review in Germany and Slovenia contribute to the fact that in the reasoning of its decisions the Constitutional Court and some judges in their dissenting or concurring opinions have referred to the case-law of the German Federal Constitutional Court.

[6] Compare the reasoning of the decision in case No. U-I-221/00, which refers to the right to asylum (Paragraphs 4 and 13 of the reasoning). The Constitutional Court, *inter alia,* emphasized that the UN Convention requires consideration of all the relevant circumstances: "also the fact whether in the respective state there exists numerous systematic serious, obvious or mass violations of human rights."

Since the ratification of the European Convention on Human Rights in 1994, references to the Convention and the case-law of the European Commission for Human Rights and the European Court of Human Rights has continuously increased, and as a consequence in recent years there has hardly been any important decision which has not arisen from an analysis of the decisions of the European Court of Human Rights. Thus, the Constitutional Court has referred to the European Convention on Human Rights and the case-law of the European Court of Human Rights also in cases in which the complainants have not mentioned them in their applications.

In recent years constitutional complainants have more and more often referred not only to constitutional provisions but also to the provisions of the European Convention on Human Rights, but less often, however, to the decisions of the European Court of Human Rights in cases similar to theirs. The Constitutional Court reviews constitutional complaints differently in relation to the European Convention on Human Rights as compared to the case-law of the European Court of Human Rights, and thus regarding the relation of the contents of the European Convention on Human Rights to the Constitutional provisions regulating individual constitutional rights. In such cases the providing of relevant European case-law is of the highest importance.

Slovenia has reached the standard of contemporary European legal culture in which it has become normal that domestic courts are influenced by the case-law of the European Court of Human Rights, thus raising the level of human rights protection.[7] However, a legal rule and its implementation in everyday practice are two different things. Real, half-real, and often only apparent general interests of society may be extraordinarily strong, especially if they incite national socialist, ideological, or political emotions. At such a time people may forget principles which they had followed until recently, but they still demand and efficient functioning of ordinary courts. Judicial and political independence are almost the sole guarantees against the transformation of law into a tool of some or other ideological and political movement based on impatience.

7.THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Constitutional Court of Slovenia followed the practice of the Court of Justice of the European Union (ECJ) even before the association with the European Union in May 2004 and even more after accession.

8. THE USE OF CODICES STANDARDS

From the beginning on, Slovenia has been participating in the Venice Commission activities when as early as September 1991, at the Venice meeting of the Working Group on Constitutional Justice, it was decided to establish a documentation centre to collect and disseminate constitutional case-law as well as to make such case-law as widely available as possible. The Slovenian liaison officer was appointed by the Court in 1991.

Since 1992 the Slovenian Constitutional Court has been providing not only the Slovenian version of the Court's case-law but also the English version. Additionally, the Venice systematic thesaurus translated into Slovenian and extended by particular Slovenian procedural terms has been used as a basic tool for the processing of decisions in their Slovenian and English versions. The same thesaurus has been used as an index for purposes of the Court's Official Digest.

[7] Bavcon, L., 1997,note 7 above, pp. 436-437.

In particular, the CODICES database has been used as important sources for the interested internal and external users of the information on the constitutional case-law of older and younger constitutional courts.

9. FOREIGN SOURCES IN ORIGIN - TRANSLATED SOURCES

Concerning the Slovenian practice, in principle the foreign legal sources have been used in their original languages, however in particular cases, the Analysis and International Cooperation Department has provided abstracts and/or explanations of legal issues in the Slovenian versions (providing special information for the particular case or providing general information on relevant issues for the Constitutional Court's Intranet). Additionally, also the existing Slovenian versions of certain databases have been used from time to time (e.g. Hudoc).

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