Strasbourg, 24 May 2005
CCS 2005/04

CDL-JU(2005)018
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE CONSTITUTIONAL COURT OF AZERBAIJAN

4th MEETING OF THE JOINT COUNCIL ON CONSTITUTIONAL JUSTICE
BAKU, 16-17 JUNE 2005

THE ROLE OF COMPARATIVE RESEARCH FOR CONSTITUTIONAL COURTS - THE INFLUENCE OF FOREIGN AND INTERNATIONAL CASE-LAW ON THE DECISIONS OF THE COURTS - THE CASE OF SLOVENIA

REPORT

by Mr Arne MAVCIC
(Constitutional Court, Slovenia)

Abstract:

The comparative constitutional case-law might be interesting for a legal expert who is in search of constitutional case-law that might be similar to the cases they are working on , for someone who plans to lodge an application before the Constitutional Court, for a constitutional framer or legislature as a user creating new legal rules, as well as for a constitutional court or an ordinary court as a user exercising its constitutional review and/or judicial function. Concerning the activities of constitutional courts, the recourse to the comparative legal information helps constitutional courts to guard against prejudiced one-sided information. Additionally, such sources may be employed in some cases as specific expressions of generally accepted and recognized rules. Sometimes, the usage of comparative methods in the constitutional court activities can be thought of even as necessary in order to preserve the uniformity achieved by unified rules.

The Author

Arne Mavčič, D. Law, completed his Bachelor of Law at the University of Ljubljana Law School, Slovenia in 1970, from which, after having completed his post-graduate studies in civil law at the Universities of Zagreb and Ljubljana Law Schools, he was awarded a Doctorate of Law in 1979.

From 1970 to 1973 he was legal advisor to the Slovenian Parliament; from 1974 to 1977 he was Head of the International Department of the Slovenian Health Insurance Association. From 1978 to 2002 he was the Director of the Legal Information Centre of the Constitutional Court of the Republic of Slovenia, since 2002 he has been Head of the Analysis and International Cooperation Department of the Constitutional Court of the Republic of Slovenia, a Senior Expert Councillor to the University of Ljubljana Law School, specializing in legal information systems and constitutional law, and a Professor of Human Rights Law at the Postgraduate Faculty for State and European Studies.

Dr. Mavčič is the liaison officer for Slovenia on constitutional law and legal information systems to the (Venice) Commission for Democracy through Law under the Council of Europe, the national correspondent for Slovenia on constitutional law and legal information systems to the ACCPUF Paris, and, a national member for Slovenia of the EU Network of Experts of Human Rights, a member of the International Constitutional Law Association, a member and the national President for Slovenia of the World Jurist Association, a Fulbright Scholar, an editor of the Collected Slovenian Constitutional Case-Law series, national editor of the East European Case Reporter of Constitutional Law and national author for Slovenia of Kluwer's Encyclopaedia of Constitutional Law.

He is the editor and author of several other publications in the field of constitutional law as well as an author of over 170 papers and reports on national and international conferences, seminars and workshops. Of late, Dr. Mavčič has predominantly been engaged in practical and promotional activities in the fields of comparative constitutional judiciary and human rights law.

INTRODUCTION

Comparison of the various divergent national laws is of ever-growing importance. If the constitutional courts are confronted with novel issues; if they wish to depart from a judicial practice which no longer conforms to present-day conceptions of justice, morality or equality; if, due to the small size of a country, there is very little judicial precedent – in all these (and other) cases, an open-minded judge would be well-advised to look at foreign law, be it legislation or case-law, in order to find inspiration for the best decision. Comparative legal analysis enlarges the spectrum of choice as well as various arguments for and against a particular solution. All of these must employ the methods of comparative law in order to achieve optimal solutions. In this case we can speak about the needs of **internal users – producers of constitutional case-law** to obtain comparative information.

Additionally, the legal information on (comparative) constitutional case-law as supported by different means of communication or media, taking into consideration the principle of the public nature of the activities of the Constitutional Court, circulate from the Constitutional Court as a decision issuer, to **the public, external users - the potential applicants before the Constitutional Court**, who receive information which may motivate their new applications. This stream of information (including also information on comparative constitutional case-law) constitutes a certain procedural circle due to the nature of proceedings before the Constitutional Court, which are in principle proposed proceedings (*juridiccion voluntaria*) : only a permanent inflow of applications to the Constitutional Court actually justifies the existence, function and activities of the Constitutional Court. The constitutional case-law system should further insure the rapid spread of new constitutional and legal principles and should contribute to greater legal safety. Accordingly, the comparative constitutional case-law might be interesting for a legal expert who is in search of a constitutional case-law that might be similar to the case they are working on, as well as for someone who plans to lodge an application before the Constitutional Court, or for a constitutional framer or legislature as a user creating new legal rules, as well as for a constitutional court or an ordinary court as a user exercising its constitutional review and/or judicial function.

METHODS OF COMPARISON USED BY CONSTITUTIONAL COURTS

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).

4. Sources of information

Looking at the decisions of the Slovenian Constitutional Court, it is apparent that their most important source of information on foreign law is the German comparative literature. And in fact, comparative interest and learning is well developed in Germany, so that a rich source of information is available to legal experts. Recourse to German comparative literature has the additional advantage that one may expect, at least in general, a balanced account of the foreign law in question; this helps the Court to guard against prejudiced one-sided information.

There were cases when international conventions were taken as an expression of the legal situations in foreign countries. This is a doubtful makeshift solution. By contrast, international conventions may be employed in certain cases as specific expressions of generally accepted and recognized rules.

How do the constitutional courts obtain access to foreign legal material? The practice of the Slovenian Constitutional Court – which cannot, however, be generalized for courts in general – the Analysis and International Cooperation Department was founded, preparing reports about the legal situation in foreign countries.

JUSTIFICATIONS FOR THE USE OF FOREIGN LAW

A general postulate, such as Drobnig-van Erp's characterization of usage of foreign legal sources would help to ascertain the different justifications for recourse to foreign law:

1. Cases of necessary comparison do not require any analysis or justification.

2. Voluntary comparison of norms related to foreign countries comprises quite diverse situations that should be analysed with regard to the kind of link which the relevant national provision has to foreign law.

a) For national provisions which are based on international uniform rules, comparison with the laws of the other contracting parties should be thought of as necessary in order to preserve the uniformity achieved by unified rules. Therefore, the task of comparison is basically the performance of a duty derived from public international law.

b) For European law, the preceding argument for preserving uniformity is even more compelling.

c) Where national provisions were adopted from or inspired by foreign legal systems, comparison with the state of origin can be understood and justified as a resort to the legislative history of the national provision.

3. Matters are quite different with regard to norms not related to foreign countries. In these cases recourse to foreign law is exceptional and here it is more difficult to explain its necessity or to justify its application. A survey of a national case-law, with respect to these genuinely "domestic" provisions of national law, suggests a classification according to the three functions which may be fulfilled by comparative law. First, legal comparison helps to fill gaps in the national law, especially if novel problems are arising in more than one country. Secondly, a similar but independent function of comparative law is to help develop the national law, if need be, even against the clear wording of the relevant statutory provision. Both are cases of creative development of law by judges, on the one hand by filling legal gaps, and on the other by overcoming a positive rule. Thirdly, the Constitutional Court has employed recourse to foreign law to control the constitutionality of constitutional norms, with the help of generally accepted constitutional standards or principles which were gained through comparative inquiry.

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.

Hitherto, we should not forget the respective first attempts in this field: when a long time ago such as the very concrete project was explained on the occasion of the Seventh Conference of European Constitutional Courts, held in Lisbon from 27 to 29 April 1987. It was a progressive and visionary joint project of the then Italian and German constitutional courts which aimed at the concentration of comparative constitutional case-law available for constitutional courts and other users, located at the University of Bologna. Unfortunately, this project has not been understood by participants and therefore not realized at that time.

From the point of view of constitutional case-law usage, the documents shall be collected as full texts, possibly without selection. The selection shall always be subject to the fact by which it is to be performed: in principle, the producer of documents is the only one authorized to it. The selection shall always be sufficiently representative. The user's interest shall always be taken into account. In my opinion, the information process is optimum when the user does not have the data served by the producer but is free to select them. Concerning the Slovenian Constitutional Court's practice, there are the following types of information necessary for any form of comparative constitutional-law issues:

- Constitutional case-law;
- General opinions taken by constitutional courts;
- Theory on constitutional review;
- Regulations on constitutional matters (provisions of the Constitution, laws on constitutional institutions or institutions with similar competence, rules of procedure and other internal regulations of constitutional courts etc.).

The exchange of such circle of information should further provide quicker spreading of new legal principles and should contribute to greater legal safety. In compliance with the above concept, each individual document might be interesting for a wide range of external users, i.e. regarding the contents of a definite decision of the constitutional court or the contents of any other text from the practice and theory of constitutional courts. It could be duly anticipated from the Slovenian experience that the final user of legal information would be less interested in more bibliographic data than in more substantial information.

The comparative constitutional case-law study functions as:
- Aid to the constitutional court activities;
- Scientific contribution to the theory on constitutional review;
- Historical survey of constitutional review;
- Practical aid in the domain of implementation of law.

Information on the constitutional case-law is classified under scientific information of the vast domain of law and legislation. This encompasses the use of specific knowledge from the domain of constitutional justice. As a matter of fact, this area includes information on anomalies in law. The information on the practice of constitutional courts is relevant for the investigation of systems of constitutional review from the comparative point of view. On the other hand, the information in question is designed for monitoring social phenomena that are relevant for safeguarding the rule of the Constitution and the law and that are reflected in the practice of constitutional courts. A complex solution of any social case, however, requires a high level of technical, scientific and research work whereby information on the standpoints of constitutional justice might be useful as well.

THE SLOVENIAN CHRONICLE - FORMER EXPERIENCES OF THE CONSITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA

Starting with 1963, the Legal Information system of the Constitutional Court of the Republic of Slovenia included the constitutional case-law of the Slovenian Constitutional Court in the uniform legal database including also the constitutional case-law of all other constitutional courts from the territory of the former Yugoslavia. The compiled data on the decisions of constitutional courts were, however, an indispensable basis for their work. Therefore, since the introduction of constitutional courts in the former Yugoslavia in 1963, the Legal Information Centre of the Slovenian Constitutional Court was engaged in a systematic acquisition and comparative processing of decisions of all former Yugoslav constitutional courts. These efforts developed into comprehensive records on the decisions of Yugoslav constitutional courts (translated into Slovenian), organized in files. This was an excellent basis for transition to computer processing of the constitutional case-law. The mentioned database was computerised in 1987. The database was based on the full-text program packages and was open to the public at many locations. The database included full-text documents (covering constitutional practice and theory) and was subject to monthly updating.

Very early, an exchange of constitutional case-law has been practiced with the constitutional courts of Italy and Germany; besides, in 1989 the first on-line computer communications with foreign information systems were introduced, such as ECHO, Luxembourg, JURIS (including all CELEX bases), Germany, and ALEXIS (including RDB Austria), Germany.

The additional goal of the then national comparative database(s) was to build the Court's own databases, which is particularly important with reference to the fact that national databases should, wherever possible, be included into international systems. 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 databases as well as to the improvement of the quality and standardisation of primary documents..

The Slovenian Constitutional Court's information exchange with other similar information systems, databases and other similar sources of legal information, influenced and still influences the creation of common standards concerning the structure of constitutional review, powers, organization and procedure before constitutional courts, and even the unification of some systemic legislative solutions.

The question as to whether Slovenian constitutional case-law from the period after the adoption of the 1991 Constitution, in its relations to the fundamental rights and freedoms, has adapted to or is more comparable with foreign constitutional case-law, can be answered in the sense that the Slovenian constitutional case-law comes close to the foreign case-law in its approach to fundamental rights. The number of examples from this field has increased. In this respect it is necessary to bear in mind that the “frequency” of individual rights before Constitution Courts mainly depends on what kind of problem appellants place before Constitutional Court. The Constitutional Court now appears as the guardian of the constitutionality in such a way that it decides not only on the accordance of general legal acts with the constitutional provisions on fundamental constitutional rights (in the sense of abstract and specific review of general legal acts) but also on constitutional complaints against the violation of human rights and fundamental freedoms by individual acts (Para. 1 of Article 160 and Article 162 of the Constitution; Articles 50-60 of the Constitutional Court Act).

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.[1]

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 (around 30 cases) the Constitutional Court and some judges in their dissenting or concurring opinions have referred to the case-law of the German Federal Constitutional Court. This was the case regarding the following issues: the right of ownership, the prohibition on the operation of political parties, the understanding of the principle of the rule of law, the competence of a court to determine the manner of executing judgments, awarding custody of children, judicial supervision of elections, the separation between the State and religious communities, the freedom of religion, the position of the state radio and television, the equality of the voting right, protection of the rights of privacy and personal rights, Association Agreement between Slovenia and the EU, principle of equality before the law and others; for example cases Nos. U-I-91/98, Up-301/96, U-I-312/00, 92/01, U-I-54/99, Rm-1/97 and U-I-326/97.

The Constitutional Court has several times referred to the famous judgment in the Miranda case (*e.g.* in the reasoning of decision No. Up-134/97), and to other cases in the area of the protection of rights in criminal proceedings, to which also some judges in their dissenting or concurring opinions have referred. Thus, the Constitutional Court in the above-mentioned case stressed that according to a more recent understanding of the privilege against self-incrimination, which was introduced by the Miranda case, a defendant has the right to remain silent.

Under the current data, the European Convention on Human Rights has been directly cited in more than 300 decisions of the Constitutional Court, and in approximately 80 cases the Constitutional Court has directly referred to the case-law of the European Court of Human Rights in the reasoning of its decisions. Such reference can also be observed in several separate opinions filed by Constitutional Court judges. Furthermore, it must be considered that often the expert materials (the reports which are drafted by the legal advisers of the Constitutional Court), which are a basis for the decisions of the Constitutional Court, contain an overview of the case-law of the European Court of Human Rights without always directly mentioning such in the text of the decision. 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.

[1] 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."

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.

Ribičič's overview of the decisions in which the Constitutional Court referred to the European Convention on Human Rights and/or to the case-law of the European Court of Human Rights shows that most often these were cases that concerned the following rights (listed in the order of frequency of the reference): detention and other forms of the deprivation of liberty,[2] adjudication within a reasonable time,[3] the right to a fair trial,[4] the right to examine witnesses and present evidence,[5] the right to asylum and extradition,[6] inhuman treatment,[7] the right to family life and rights of children,[8] religious freedom,[9] impartiality and exclusion of a judge,[10] the adversary principle and the principle of equality of arms,[11] the free choice of a legal representative,[12] the right to judicial protection (access to court),[13] the position of minor offence judges,[14] the right to an effective legal remedy,[15] calling a public hearing,[16] privilege against self-incrimination,[17] the

[2] Compare the reasoning of the decision in case No. Up-286/01 which refers to house arrest. In its decision that in cases of house arrest it is a matter of the deprivation of liberty and restriction of personal freedom (and not only a limitation of the freedom of movement), it referred to the provisions of the European Convention on Human Rights and the case-law of the European Court of Human Rights.

[3] The Constitutional Court established a violation of the convention right to adjudication within a reasonable time, *inter alia,* in the decision in case No. Up-123/95.

[4] Compare the reasoning of the decision in case No. Up-229/96.

[5] Compare the reasoning of the decision in case No. U-I-27/95.

[6] Compare the reasoning of the decision in case No. Up-27/94.

[7] Compare the reasoning of the decision in case No. Up-78/00.

[8] Compare the reasoning of the decision in case No. U-I-284/94.

[9] Compare the reasoning of the decision in case No. U-I-68/98.

[10] Compare the reasoning of the decision in case No. Up-270/01.

[11] Numerous decisions of the European Court of Human Rights are citied in the reasoning of the decision in case No. Up-546/01.

[12] Compare the reasoning of the decision in case No. U-I-204/99.

[13] Compare the reasoning of the decision in case No. Up-13/99.

[14] Compare the reasoning of the decision in case No. Up-159/96.

[15] Compare the reasoning of the decision in case No. U-I-272/97.

[16] Compare the reasoning of the decision in case No. Up-197/02.

[17] Compare the reasoning of the decision in case No. Up-134/97.

presumption of innocence,[18] the protection of personal data,[19] freedom of trade unions,[20] the right of residence,[21] the right to the protection of property,[22] etc.

PARTICULAR EXAMPLES OF REFERENCES TO THE FOREIGN LAW AND CASE-LAW

THE IMPLEMENTATION OF STRASBOURG STANDARDS

The Statute of the Council of Europe came into force for Slovenia on 14 May 1993. The Convention was ratified on 31 May 1994. The Ratification of the Convention Act (in respect of ratification also of Article 25, Article 46, Protocol No. 1, and Protocols Nos. 4, 6, 7, 9, and 11) was published on 13 June 1994 (Official Gazette RS, No 33/94) and came into force on the fifteenth day following publication. On 28 June 1994 Slovenia formally ratified the Convention in Strasbourg by depositing the appropriate instruments with the Secretary General of the Council of Europe. When ratifying the Convention Slovenia made no reservations because new legislation had been prepared following international standards and the Convention. It is also interesting to note that Slovenia was the first member state to ratify Protocol No. 11. Slovenia recognized the competence of the European Commission and the jurisdiction of European Court of Human Rights under former Articles 25 and 46 of the Convention for an indeterminate period. In addition, the Slovenian declarations included a restriction *ratione temporis,* to the effect that the competence of the Commission and the jurisdiction of Court are recognized only for facts arising after the entry into force of the Convention and its Protocols with respect to Slovenia on 28 June 1994.

However, some decisions of the Slovenian Constitutional Court referred to the Convention even before it became formally binding for Slovenia[23]. In this connection, the Court observed that

---

[18] Compare the reasoning of the decision in case No. U-I-289/95 and the separate opinions of Dr. Boštjan M. Zupančič and Dr. Peter Jambrek in the cited case.

[19] Compare the reasoning of the decision in case No. U-I-25/95.

[20] Compare the reasoning of the decision in case No. U-I-57/95.

[21] Compare the reasoning of the decision in case No. U-I-172/02.

[22] Compare the reasoning of the decision in case No. U-I-23/93.

[23] Decision No. U-I-98/91 of 10 December 1992 (Official Gazette RS, No. 61/92, OdlUS I, 101) The Constitutional Court decided that statutory provisions which allowed administrative organs not to state the reasons for an individual administrative decision made on the basis of discretion and which decreed discretionary decisions in a bylaw are contrary to the legal system of the Republic of Slovenia and cannot be used according to their intention. As one of the reasons for its decision, the Court recalled that Article 13 of the ECHR ensures to everyone an effective legal remedy following the violation of his or her rights and freedoms specified therein. The Court observed that Slovenia had not yet signed and ratified the Convention, but considering its desire to join the Council of Europe it would necessarily have to do so, for which reason it was appropriate that Slovenian legislation be adjusted to meet the criteria of the Convention as soon as possible.

Ruling No. U-I-48/92 of 11 February 1993 (Official Gazette RS, No 12/93, OdlUS II, 15) The Constitutional Court, taking into consideration the case-law of the European Court of Human Rights concerning Article 11 of the Convention (freedom of association), decided that obligatory association with a chamber of doctors does not constitute a limitation of the constitutional freedom of association guaranteed under Article 42 of the Slovenian Constitution.

The Constitutional Court based its decision on the case-law of the European Court of Human Rights, which, when considering mandatory membership of the *Ordre des Médecins* (medical association) of Belgium, had taken the

Slovenia had not yet signed and ratified the Convention, but considering its desire to join the Council of Europe it would necessarily have to do so, for which reason it was appropriate that Slovenian legislation be adjusted to meet the criteria of the Convention as soon as possible.

There is no doubt that Slovenia has been inspired by the same ideals and traditions of freedom and rule of law principles as the framers of the Convention. While Slovenia is today reintroducing and developing the legal culture of human rights after almost half a century of arrears, it cannot be said that it has no tradition concerning the protection of human rights and fundamental freedoms.

The Slovenian Constitutional Court and the whole system of ordinary courts must ensure the conformity of domestic legal provisions with the provisions of the Convention. In addition, the provisions of the Convention complement national constitutional provisions. Beyond that, the case-law of the European Court of Human Rights is also directly applicable in the decision making process of the Constitutional and other courts in Slovenia. Thus the jurisdiction of the European Court of Human Rights and Slovenian national courts overlap in several ways.

Additionally, consideration of Strasbourg case-law is explicitly determined by the Slovenian national law: The decisions of the European Court of Human Rights are to be directly executed by the competent courts of the Republic of Slovenia (Article 113 of the Constitutional Court Act).

It was characteristic of Slovenian practice prior to 1991 concerning human rights protection (especially before the Constitutional Court) that, in comparison with Europe, it largely avoided the use of legal principles, even those explicitly included in the text of the Constitution. In common with foreign practice, however, the principle of equality greatly predominated among otherwise rarely used principles. Decisions consistently remained within the framework of legalistic (formalistic) argument and no other value references were ever allowed: the Constitutional Court respected the principle of self-restraint and stuck to the presumption of the constitutionality of statutes. There were no references to the foreign law and case-law.

The new Constitution of the Republic of Slovenia of 1991, along with the catalogue of classical fundamental rights in combination with the newly defined powers of the Constitutional Court, paved the way for the intensification of its role in this domain. It is considered that the

---

position that the Ordre des Médecins was an institution of public law exercising public control over medical practice. As such, the *Ordre* could not be considered to be an 'association' in the sense of Article 11 of the Convention. Mandatory membership of the *Ordre des Médecins* does not entail any restrictions of the right ensured by Article 11 of the said Convention.[23]

Ruling No. U-I-60/92 of 17 June 1993 (OdlUS II, 54) The Constitutional Court, taking into consideration the case-law of the European Court of Human Rights concerning Article 6 of the Convention (the right to a fair trial), Article 2 of Protocol No. 7 (the right of appeal in criminal matters) and Article 13 of the Convention (the right to an effective remedy) decided that the regulation of legal remedies before the courts of associated labour was not contrary to Article 14 (equality before law), Article 15 (the exercise and restriction of rights) Article 22 (the equal protection of rights), nor Article 25 (the right to a legal remedy) of the Constitution.

Decision No. U-I-60/03 of 23 October 2003 (OdlUS The Constitutional Court followed the practice of the European Court of Human Rights concerning Article 5. e, in particular the Winterwerp case, where the ECHR set out three basic standards which must be fulfilled for a legal detention of psychiatric patients. The Constitutional Court did not find these standards fulfilled and subsequently also found the Non-litigious Civil Procedure Act inconsistent with the Constitution.

Constitutional Court now has sufficient space for such activity. The Slovenian Constitution contains adequate definitions of rights having the nature of legal principles and thus being sufficiently open to interpretation that they require significant further construction and implementation,[24] also taking into account the provisions of the Convention and the practice of the European Court of Human Rights.

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.[25] 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.

THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

The Constitutional Court of Slovenia followed the practice of the Court of Justice of the European Communities (ECJ) even before the association with the European Union in May 2004. For example, in the case No. U-I-49/98 dated 25 November 1999, the Court referred to the practice of the ECJ and interpreted that the Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security does not preclude the legislator from determining different retirement ages for men and women. In its reasoning in the case No. U-I-321/02 dated 27 May 2004 the Constitutional Court stated that national law must be interpreted in light of the Community law, as it also follows from the practice of the ECJ that all the hours during the turn of duty are considered the working hours of doctors.

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.

[37] Citation from Pavčnik Marijan, 'Verfassungsauslegung am Beispiel der Grundrechte in der neuen slowenischen Verfassung', WGO Monatshefte für Osteuropäisches Recht, 1993 no. 6, pp. 345-356.

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

Both sources, the CODICES database as well as the ordinary and special editions of the Bulletin have 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.

THE PARTICIPATION IN THE VENICE FORUM

From the beginning on, the Analysis and International Cooperation Department of the Slovenian Constitutional Court has been an active participant in the Venice Forum, providing explanations, opinions and data concerning particular constitutional and/or legal issues. Such form of direct legal information exchange promotes the comparative studies of particular issues of constitutional and/or legal character.

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).

References:

A. Mavcic, The Particularities of the Legal information System of the Constitutional Court of Slovenia, ADIJ, L'Information Juridique – Congres des 22 et 23 octobre 1998, Paris, Proceedings, ISBN: 2-951 3180-0-6

A. Mavcic, Slovenian Constitutional Review, Nova Revija, Ljubljana, 1995, ISBN: 961-6017-25-X, p. 69

A. Mavcic, The Influence of the European Court on Human Rights Case-Law on Slovenian Constitutional Case-Law, Zbornik konferencie, Zjednocovanie a vyvoj judikatury ustavnych sudov, 25. – 27. oktobra 2000, Levoča, ISBN: 80-961396-6-2, p. 87

A. Mavcic: A strasbourgi birosag esetjoganak hatasa a szloven alkotmanybirosag munkajara, Fundamentum 4/2000, Budapest, ISSN: 1417-2844, p. 21

A. Mavcic, Slovenia, Fundamental Rights in Europe (R. Blackburn and J. Polakiewicz), Oxford University Press, 2001, ISBN: 0-19-924348-4, p. 781

A. Mavcic, Vpliv Evropske konvencije na judikaturo slovenskega Ustavnega sodišča, Dignitas 2/1999, Ljubljana, ISSN: 1408-9653, p. 144

A. Mavcic, The Influence of the European Court on Human Rights Case –Law on Slovenian Constitutional Case-Law: The Right to a Fair Trial, Revue de Justice Constitutionnhelle Est-Europeenne, Numero Special, Colloque, 2003, Clermont-Ferrand, ISSN: 1632-451X, p. 103

A. Mavcic, The Influence of the European Court on Human Rights Case-Law on Slovenian Constitutional Case-Law /The Right to Fair Trial), Pravo na pošteno sudjenje i razuman rok, Pravo azila, Organizator, Zagreb, 2003, ISBN: 953-6007-69-X, p. 139

V. Drobnig and S. van Erp, The Use of Comparative Law by Courts, Kluwer Law International, the Hague/London/Boston, 1999, ISBN: 90-411-1044-5

C. Ribicic, Uveljavljanje evropskih standardov v praksi slovenskega Ustavnega sodišča, Revus, 3/2004, Ljubljana, ISSN: 1581-7652, p. 69

A. Mavcic, The Implementation of the European Convention on Human Rights in the Legal and Political System of Slovenia by the Constitutional Case-Law, The Nineteenth Biennial Conference on the Law of the World, Democracy and the Rule of Law, organized by the World Jurist Association, Vienna, 3-10 October 1999, offprint