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**RÉPUBLIQUE D'ALBANIE / REPUBLIC OF ALBANIA / REPUBLIK ALBANIEN /
РЕСПУБЛИКА АЛБАНИЯ**

**The Constitutional Court of the Republic of Albania
Gjykata Kushtetuese e Republikës së Shqipërisë**

Anglais / English / Englisch / английский

XVIIth Congress of the Conference of European Constitutional Courts
Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles
Questionnaire

I. The role of the constitutional court in defining and applying explicit/implicit constitutional principles.

1. Does the constitutional court or equivalent body exercising the power of constitutional review (hereinafter referred as the constitutional court) invoke certain constitutional principles (e.g. separation of powers; checks and balances; the rule of law; equality and non-discrimination, proportionality, reasonableness, human dignity, etc.) in the process of constitutional adjudication? To what extent does the constitutional court go in this regard? Does the constitution or any other legal act regulate the scope of constitutional decision-making in terms of referring to specific legal sources within the basic law that the constitutional court may apply in its reasoning?

The unambiguous and complete interpretation of constitutional principles is a very important function of the Constitutional Court case law. The main function of the Constitutional Court is focused on the control of constitutionality of legal norms, through which it reviews the compatibility of legal norms with the Constitution, ruling a conclusive decision at the end of this process. The question arises whether during the examination of applications concerning laws or other legal acts the Constitutional Court exercises its authority basing only on the concrete provisions of the Constitution or also on the constitutional principles and standards. The constitutional case law established by the Constitutional Court, which in itself constitutes a group of legal arguments, is an elaboration of certain constitutional principles. Constitutional Court enjoys the right, but at the same time is has the obligation that through guaranteeing the respect for the Constitution and making its final interpretation, remove from the legal system all the legal acts coming against it. The declaration of legal norm as coming against the constitutional principles, without quoting directly the concrete provision, is the authority of the Constitutional Court. This right derives from the fact that the Constitution itself is composed and organized not only by articles, paragraphs or preambles, but also by principles and standards from which it is guided and lead is guaranteeing the supremacy and protection of its values. Such principles as “rule of law”, “separation and balancing of powers”, “legal certainty”, “acquired rights”, “proportionality”, “independence of judiciary and of courts”, “positive discrimination”, equality of arms”, as well as many other principles generally recognized by the doctrine, have been extensively elaborated by the constitutional case law, not simply by referring to a concrete provision, but from the interpretation of Constitution as a whole.

The direct provision in the Constitution and particularly the identification by the constitutional case law of the constitutional standards and principles is an essential guide for the functioning of constitutional justice. There are numerous decisions in which the Court has reached a conclusion for the constitutionality of the legal norm, basing mostly on the

interpretation of constitutional principles and standards rather than on the concrete constitutional provisions. Such conclusion has been drawn by the complexity of the entire constitutional provisions and not by a separate constitutional provision.

2. What constitutional principles are considered to be organic in your jurisdiction? Are there any explicit provisions in the constitution setting out fundamental principles? Is there any case-law in respect of basic principles? How often does the constitutional court make reference to those principles?

The technique of sanctioning of principles in the basic law, directly or indirectly, has been followed by the Albanian Constitution maker. In the two first parts of the Constitution, entitled "Basic Principles" and "General Principles" are envisaged constitutional norms, which explicitly or implicitly, identify constitutional principles.

We find the term "principle" clearly expressed and enshrined in Article 13 of the Constitution, as the "principle of decentralization of power" exercised "according to the principle of local autonomy" and in Article 9, as an obligation that exists for political parties to be organized in accordance "with democratic principles." In some other provisions of the Constitution the principle can be evidenced through the analysis and the interpretation. The wording of some of the norms of the first part of the Constitution, "Albania is a parliamentary republic" (Article 1, paragraph 1), "The people exercise sovereignty through their representatives or directly." (Article 2, paragraph 2), "All are equal before the law" (Article 18, paragraph i) etc., represents not only a normative aspect of them, but at the same time highlights some of the fundamental constitutional principles. From all these constitutional references there are identified principles of parliamentarism, of representation, of the unitary state, of the supremacy of the Constitution, of equality before the law, etc.

Yes, the constitutional jurisprudence has been expanded and enriched through the development of many of the fundamental constitutional principles, offering a wider and more complete view of the constitutional rules. For a democratic state it is essential to ensuring the supremacy of the Constitution, the protection of human rights and freedoms, the equality before the law, and to guaranteeing the right to a due process of law, free elections, separation and balance of powers, responsibility of public authorities to fulfil duties towards citizens, the democratic decision-making process, the political pluralism, the possibilities for development of a civil society etc.

In this respect, the jurisprudence of the Constitutional Court of the Republic of Albania feels consolidated in setting these constitutional standards. Especially some of most fundamental principles, such as the supremacy of the Constitution and its direct application, the integrity of the Constitution, the Rule of Law, the separation and balance of powers, the social orientation of the State, the proportionality, the equality before the law, due process of law, etc. are treated mostly in the jurisprudence of the Constitutional Court.

3. Are there any implicit principles that are considered to be an integral part of the constitution? If yes, what is the rationale behind their existence? How they have been formed over time? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?

There are some norms in the Constitution, that through their analysis and interpretation can be seen other constitutional principles. Thus, the constitutional rule that "the State aims employment under conditions suitable for all persons able to work; fulfilment of the housing needs of its citizens; the highest possible standard of physical and mental health; education and qualification of children and the young, as well as unemployed persons, according to their abilities; care and help for the aged, orphans and persons with disabilities; " etc.. (Article 59) states and concretizes the constitutional principle of social orientation of the State. The constitutional wordings: "The people, through 50,000 citizens entitled to vote, have the right to a referendum ..." (Article 150); "The representative organs of the basic units of local government are the councils, which are elected every four years by direct general elections and by secret ballot." (Article 109), etc., clarify the constitutional principle that citizens have the right to take part of the government of the country directly and through their representatives elected in a democratic way. This principle is formulated in Article 2, paragraph 2 of the Constitution: "The people exercise sovereignty through their representatives or directly." and in Article 45, paragraph 2: "Every citizen who has reached the age of 18, even on the date of the elections, has the right to vote and to be elected."

Through constitutional rules such as "In the Republic of Albania there is no official religion.", "The state recognizes the equality of religious communities." and "... is neutral on questions of belief and conscience and guarantees the freedom of their expression in public life" (Article 10), is emphasized the principle of the secularism of the state.

Constitutional norms may reflect not only the presence of one constitutional principle, but also the presence of several principles simultaneously. The rule laid down in Article 28, paragraph 2 of the Constitution, that "The person whose liberty has been taken under Article 27, paragraph 2, subparagraph c, must be brought within 48 hours before a judge, who shall decide upon his presence detention or release not later than 48 hours from the moment he receives the documents for review. ", highlights at the same time some constitutional principles, which are related to the inviolability of the individual, to the right of defence and to the guarantee of all the rights included in a due process of law.

4. What role does the constitutional court has played in defining the constitutional principles? How basic principles have been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon *travaux préparatoires* of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?

The competence of the Constitutional Court to perform the final interpretation of the Constitution derives from the principle of the supremacy of the Constitution. Being subject only to the Constitution, the Constitutional Court ensures the primacy that it has on the entire legal system.

The constitutional jurisprudence has been expanded and enriched through the development of many of the fundamental constitutional principles providing a more extensive view of constitutional rules. In a democratic state is important to ensure the supremacy of the Constitution, the protection of human rights and fundamental freedoms, the equality before the law, the system of free elections, the separation and balance of powers, etc. all of them there are principles elaborated over time by the Constitutional Court.

The Constitutional Court has used all methods of interpretation. The constitutional interpretations performed by the Constitutional Court are a clear indication of how constitutional principles are developed and have enriched even the constitutional jurisprudence itself. However, any interpretation of constitutional norms cannot go up to the extension and distortion of its true meaning. There are several decisions in which the Constitutional Court has concluded on the constitutionality of a legal norm, based not so much on the particular constitutional norm, but mostly on the analysis and interpretation of standards and constitutional principles.

5. What is a legal character of the constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon the fundamental principles by the constitutional court in relation to a particular constitutional right? Are basic principles interpreted separately from the rights enumerated in the constitution or does the constitutional court construe fundamental principles in connection with a specific constitutional right as complementary means of latter's interpretation?

The Constitution must be read, analyzed, evaluated and interpreted in an integrated manner and as an entire text, where the preamble, specific norms and principles enshrined in it, are the origin and the basis upon which the Constitutional Court concludes for the resolution of issues within its jurisdiction.

The Constitutional Court interprets fundamental constitutional principles when they are related to a constitutional right concerning these principles. For example, during the examination of the claim related to the violation of the principle of equality, in the sense of Article 18 of the Constitution, the Court has deemed it necessarily connected with one of the fundamental rights such as the right of choice of a profession, the right of ownership, etc.

6. What are the basic principles that are applied most by the constitutional court? Please describe a single (or more) constitutional principle that has been largely influenced by constitutional adjudication in your jurisdiction. What contribution does the constitutional court has made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

The jurisprudence of the Constitutional Court is consolidated in establishing constitutional standards especially some of the basic principles such as the supremacy of the Constitution and its direct application, the integrity of the Constitution, the Rule of Law, the separation and balance of powers, the social orientation of the state, the proportionality, the equality before the law, the due process of law, etc.

The principle of separation and balance of powers is interpreted in many of the decisions of the Constitutional Court. The Court emphasizes that this principle does not mean that "all power is closed and uncontrolled by anyone." Separation and balance of powers requires that the legislative, executive and judicial competences are separate in terms of independence, but at the same time balanced in order that each state institution should have a determined power based on the purpose and the mission it performs. No other institution or body, depending or not by one of the three powers, can not intervene in solving the issues that may be the main object of the activity of other constitutional bodies or institutions (decision of Constitutional Court no. 11, dated 02 of April 2008.)

II. Constitutional principles as higher norms? Is it possible to determine a hierarchy within the Constitution? Unamendable (eternal) provisions in Constitutions and judicial review of constitutional amendments.

1. Do the constitutional principles enjoy certain degree of superiority in relation to other provisions in the basic law? What is the prevailing legal opinion among both academic scholars and practitioners in your jurisdiction about attaching higher value to certain constitutional principles over other provisions of basic law?

The accordance between constitutional norms means that all constitutional principles form a unique and sustainable system, which does not deny or contradict each other. Constitutional principles do not have any kind of internal hierarchy. They have equal value and don't impose obligations or restrictions to each other.

Between the constitutional rules that have the real meaning of a principle, and those classified as legal norms, the Constitution does not make any clear division. Such a division is a question regarding not only the constitutional jurisprudence, but also the doctrine that is being developed in this direction.

In the Constitution there are some formulations which due to their abstract character and the goal to consolidate a vision, a law or a certain value, can be identified with constitutional principles. Thus, notions such as stipulated in Article 3 of the Constitution as "the independence of the state", "the territorial integrity", "the human dignity", "the pluralism", "the national identity", "the cultural heritage", "the religious coexistence" "the coexistence and understanding with minorities", have not the meaning of a legal norm. All of them, they take the value of the fundamental principles, without which the state cannot exist. Meanwhile, in the Constitution there are many other provisions that clearly have the meaning of a legal norm.

2. What approach has the constitutional court taken in terms of determining a hierarchy within the constitution? Is it possible to conclude from the jurisprudence of the constitutional court that it has given principal status to some constitutional principles over the rest of the basic law?

The Constitution as the basic law of the State has the highest legal authority over all hierarchical pyramid. The jurisprudence of the Constitutional Court has identified the principle of supremacy of the Constitution as a fundamental requirement of a democratic state. This principle applies to all bodies of public authority that they exercise their powers only within the framework and on the basis of constitutional norms. Legal acts issued by these bodies must be in accordance with the highest legal acts, in both senses formal and material.

Normally, there is no hierarchy between the principles; there is no an ordering principle superior in comparison to the others. The basic requirement is that all principles must coexist. For this, the interpretation of the Constitution has less meaning if it is done article after article or part after part. The constitutional interpretation is necessarily subject to the entire Constitution and does not target specific meaning of any of these principles, but coordination among them or, if necessary, their coexistence in a framework of compliance.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between

the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law?

The procedure of amending of our Constitution is provided in Article 177 thereof. This procedure is essentially the same with the one applied for the adoption of ordinary laws, but with some changes that express a certain "difficulty". This "difficulty" is related to the qualified majority required in cases of amending, or, when this amending procedure approved by the Assembly is submitted to an optional referendum, etc.

- 1. An initiative for amending the Constitution may be taken by not less than one-fifth of the members of the Assembly.*
- 2. No amendment to the Constitution may take place when extraordinary measures are in effect.*
- 3. A proposed amendment is approved by not less than two-thirds of all members of the Assembly.*
- 4. The Assembly may decide, by two-thirds of all its members, that the proposed constitutional amendments should be voted on in a referendum. The proposed constitutional amendment becomes effective after ratification by referendum, which takes place not later than 60 days after its approval by the Assembly.*
- 5. An approved constitutional amendment is submitted to referendum when one-fifth of the members of the Assembly request it.*
- 6. The President of the Republic cannot return for re-consideration a constitutional amendment approved by the Assembly.*
- 7. An amendment approved by referendum is promulgated by the President of the Republic and becomes effective on the date provided for in it.*
- 8. An amendment of the Constitution cannot be made unless a year has passed since the rejection by the Assembly of a proposed amendment on the same issue or three years have passed from its rejection by referendum.*

In the Albanian Constitution there are not missing implicit absolute limits. Thus, the fundamental principles enshrined in the first part of the Constitution or in human rights and fundamental freedoms that "... are the basis of the entire legal order", cannot be subject to constitutional changes. The principle of sovereignty of people, the principle of separation of powers, the principle of pluralism, etc. cannot be replaced and their change would bring changes in the essence and the democratic nature of the State itself. Therefore, even the broadest majority wouldn't be lawful to make such changes.

In the Albanian Constitution there is not any difference between the initial manner of the adoption of the Constitution and the existing procedures of amending the Constitution.

4. Should constitutional amendment procedure be subjected to judicial scrutiny or should it be left entirely up to the political actors? What is the prevailing legal opinion in this regard among academic scholars and other societal groups in your jurisdiction?

Currently, the Albanian Constitution does not provide any explicit rule concerning the review of the constitutional amendments. In the context of constitutional reform in the justice system that is being developed in Albania, there was also a debate about the question whether the constitutional amendments after their approval by the legislator or by referendum, should also undergo to the Constitutional Court review. This discussion is oriented in two main

directions: According to the first approach – the constitutional review interferes with the will of legislator (taking into consideration the constitutional nature of interventions) and therefore is not suitable. The second approach – (which is also the prevailing attitude) is to have a constitutional review of constitutional amendment, but it should be limited only in terms of procedure for approval of the amendments and not their essence; this second approach is supported by the Venice Commission as well. The Venice Commission has expressed an opinion on all proposed constitutional amendments, including the competence of the Constitutional Court for the review of constitutional amendments in procedural terms.

5. Does the constitution in your jurisdiction provide for constitutional overview of the constitutional amendment? If yes, what legal subjects may apply to the constitutional court and challenge the constitutionality of the amendment to the basic law? What is the legally-prescribed procedure of adjudication in this regard?

If the proposal to introduce judicial review of constitutional amendments is adopted by the legislator, the subjects that could require such control are the subjects foreseen by Article 134/1, which require the abstract control of law and normative acts. The procedure could be provided in the future in the organic law of the Constitutional Court.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds?

See reply of question 4.

In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment?

No.

What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? Please, provide examples from the jurisprudence of the constitutional court.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of constitutional court's power to check amendments to the basic law?

Yes, as stated above, there is already accepted the need for introducing this review by the Constitutional Court.

Do academic scholars or other societal groups advocate for such development? How the judicial review is observed in this regard?

Yes, they support this evolution, because the practice has shown that such control (review) will be necessary for the preservation of constitutional principles that could be affected or disrespected in a certain moment of the formation of political will to change the fundamental

law of the country. The constitutional review exercised by the Constitutional Court on these amendments would be an additional guarantee for this purpose.

Would the expansion or recognition of constitutional court's authority encourage the realisation of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

Of course, that would encourage the increasing of authority of Constitutional Court and the preservation of the constitutional principles, given the fragile democracy in Albania. In 2008 two major parliamentary parties achieved a consensus on amending some provisions of the Constitution relating to the election of the President of the Republic, a difficult procedure to ensure the majority appropriate and consequently the necessary consensus on a simplified procedure that does not require consensus among the parties but can be resolved by the ruling majority. This brought the election of a President, who does not enjoy the support of all political forces and in their eyes does not guarantee impartiality, as required by his role as head of state. After a few years, one of the biggest parties who agreed with these hasty changes publicly made an apology for this action. A possible control (review) by the Constitutional Court of those constitutional amendments would have avoided this situation. Today the prevailing opinion is that the constitutional review of constitutional amendments is necessary, but academics and experts of constitutional law are still discussing about the extension and the limits of this review.