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REPUBLIC OF CROATIA / REPUBLIQUE DE CROATIE /
/REPUBLIK KROATIEN / РЕСПУБЛИКА ХОРВА́ТИЯ

The Constitutional Court of the Republic of Croatia /
La Cour Constitutionnelle de la République de Croatie /
Das Verfassungsgericht der Republik Kroatien /
Конституционный суд Республики Хорватии /
Ustavni sud Republike Hrvatske

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REPUBLIC OF CROATIA

**CONSTITUTIONAL COURT**

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# ANSWERS TO THE QUESTIONNAIRE FOR THE XVII$^{th}$ CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

(Batumi, 29 June to 1 July 2017)

Subject:

"Role of Constitutional Courts in upholding and applying constitutional principles"

Zagreb, October 2016

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## *Main abbreviations and acronyms*

**Amendments to the Constitution/2010** – Amendments to the Constitution of the Republic of Croatia (Official Gazette No. 76/10)

**ECtHR, European Court** – European Court of Human Rights in Strasbourg

**ECJ, CJEU** – Court of Justice of the European Union

**EU** – European Union

**ECHR, Convention** – European Convention on Human Right and Fundamental Freedoms

***Narodne novine*, NN** – Official Gazette of the Republic of Croatia

**RC** – Republic of Croatia

**Constitution** – Constitution of the Republic of Croatia

**CCRC, Constitutional Court RC, Constitutional Court, Court** – Constitutional Court of the Republic of Croatia

**CACCRC, CACC, Constitutional Act** – Constitutional Act on the Constitutional Court of the Republic of Croatia

# 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?**

In its case law, the Constitutional Court of the Republic of Croatia invokes constitutional principles to the extent to which it alone, as an independent body, finds it necessary considering the particular circumstances of each individual case.

Indeed, pursuant to Article 127 of the Constitution of the Republic of Croatia (hereinafter: the Constitution),[1] vital issues for the performance of duties and the work of the Constitutional Court are regulated by a constitutional act adopted in accordance with the procedure determined for amending the Constitution. Pursuant to Article 2.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: CACCRC),[2] the Constitutional Court guarantees compliance with and the execution of the Constitution and bases its work on the provisions of the Constitution and the CACCRC. The Constitutional Court is independent of all state bodies.[3] The internal organisation of the Constitutional Court is regulated by its Rules of Procedure[4] adopted by the Court itself.[5] These provisions provide the constitutional basis for the independence of the Constitutional Court and constitute a prerequisite for its role as the 'guardian of the Constitution'.[6]

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[1] Official Gazette nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14.

[2] Official Gazette nos. 99/99, 29/02 and 49/02 – consolidated text.

3 Article 2.2 CACCRC.

[4] Official Gazette nos. 181/03, 16/06, 30/08, 123/09, 63/10, 121/10, 19/13, 37/14 and 2/15.

[5] Article 127.3 of the Constitution and Article 2.3 CACCRC.

[6] In the Court's decision no. U-VIIR-4696/2010 of 20 October 2010 (Official Gazette no. 119/10), in the procedure of determining whether all the conditions for holding a referendum had been met, the Court noted as follows:

> "25.1. (...) Considering that the relevant provisions of the Referendum Act have not been completely elaborated, which makes it possible to disregard the purpose for which the voters gave their signatures in this case, the Constitutional Court has the constitutional obligation to institute – in its interpretation of the Constitution and of the Referendum Act in the light of the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution) – a rule for this particular case. This is, therefore, not a general rule that would hold for all cases of the same kind, because a rule of that kind may only be passed by the Croatian Parliament as the highest representative body of citizens and the holder of legislative power in the Republic of Croatia (Article 70/71/ of the Constitution).
>
> Contrary to the legislator, the Constitutional Court, as the 'guardian of the Constitution', has the duty to watch over the realisation of the highest values of the constitutional order of the Republic of Croatia in such a way that it uses its special institutional powers to compensate for the weaknesses of the insufficiently developed democratic state

There is no positive law provision of constitutional force (either in Title V of the Constitution dealing in its entirety with the Constitutional Court, or in CACCRC) to regulate the scope of constitutional decision-making in terms of referring to special legal sources laid down in the Constitution that the Constitutional Court can apply in its reasoning. It must be emphasised that such restriction does not exist for ordinary or specialised courts, either. Namely, in Title IV of the Constitution (Organisation of Government), Section 4 (Judicial Power), Article 115.3 of the Constitution lays down the following: "Courts shall administer justice according to the Constitution, law, treaties and other valid sources of law".

**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 Constitution does not explicitly determine which principles are organic and which are not. It includes provisions that speak of values, principles and guarantees. For example, Title II of the Constitution provides fundamental provisions (Articles 1 to 13). In this Title of the Constitution, not only is the notion of "principles" explicitly mentioned (e.g. the principles of the separation of powers in Article 4), but also the notion of "values" (e.g. respect for human rights, the rule of law and a democratic multiparty system in Article 3). In addition, some constitutional provisions deal with principles, although they are not explicitly called 'principles'. For example, Article 5.1 provides that laws must comply with the Constitution, and that other regulations must comply with both the Constitution and law (in other words, the principle of constitutionality and legality is provided for). Article 1.1 of the Constitution defines the Republic of Croatia as a democratic and social state.

The Constitution does not explicitly lay down fundamental principles, but in Article 3 the highest values of the constitutional order are listed as the basis for its interpretation. This provision reads as follows:

> "Article 3
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> Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution."

Although the Constitution does not *expressis verbis* determine the highest values of the constitutional order as principles, functionally they are principles. These are generally accepted ethical values both in society and in law. They are given a regulative role *sui generis*, and in the Constitution they are defined as the basis for its interpretation, thus making it possible for the Constitutional Court to interpret the constitutional provisions progressively and dynamically in the light of these "living" and conceptually and methodologically complex

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> founded on the proclaimed rule of law, and this also includes its insufficiently developed and imperfect legal framework. By resolving the complex social conflicts that appear because of the insufficiently developed and imperfect legal order, the Constitutional Court fulfils its constitutional task of creating a balance between normatively expressed values and the positive legal rules that make up the framework of the State."

value concepts. Namely, these principles make it possible for judges to adjudicate not only on facts but also on law, and, in such a way, by applying these principles, they avoid unacceptable and unforeseeable consequences of the application of some positive law provisions. This provision gives the Constitution a certain flexibility it would otherwise not have.

The fundamental value concepts of the Constitution are not only the principles laid down in Article 3, but also those of other provisions. For example, Article 1.1 of the Constitution defines the Republic of Croatia as a unitary and indivisible democratic and social state, and paragraph 2 of the same Article contains the principle of people's sovereignty.

The Constitutional Court has added to the constitutional identity of the Republic of Croatia the highest values of its constitutional order by stating that they are those laid down in Articles 1 and 3 of the Constitution.[7]

The only value that up to now has not been subject to any further interpretation in the case law of the Constitutional Court is peace-making. In its case law, the Court has elaborated in more detail many principles, including fundamental ones, such as: the principle of democracy, the principle of people's sovereignty, the concept of the rule of law, the concept of a social state, respect for human rights, inviolability of ownership, the principle of equality, and many others.

To conclude, since 2000, the Constitutional Court has more frequently invoked fundamental principles, and since 2008 has done so regularly.

**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? Do they originate from certain legal sources (e.g. domestic constitutional law or the constitutional principles emanating from international or European law; newly-adopted principles or ones re-introduced from the former constitutions)? Has academic scholars or other societal groups contributed in developing constitutionally-implied principles?**

Yes, there are some implicit principles that are considered to be integral parts of the Constitution. They can be found when the constitutional text is analysed or read between the lines. These are usually concepts with a high level of generalisation (for example, from the concept of the rule of law, a whole series of implicit principles have emerged in the Croatian

[7] Decision of the CCRC no. U-VIIR-1159/2015 of 8 April 2015 (Official Gazette no. 43/15) establishing that the referendum question of so called 'outsourcing' is not in compliance with the Constitution:

> "33.4. In the constitutional legal order of the Republic of Croatia that is in force today, the Constitutional Court decides whether referendum questions are in compliance with the Constitution. However, the framer of the Constitution has not explicitly specified the issues that are under the exclusive competence of a body of representative democracy. They are derived from the Constitution as a whole.
>
> Indeed, when we speak about amending the Constitution, it is the Constitutional Court's obligation, on the basis of general control powers, not to allow any referendum 'when it determines such a formal and/or substantive unconstitutionality of the referendum question, or such a grave procedural error that threatens to undermine the structural characteristics of the Croatian constitutional state, i.e. its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution) ... In such cases, the Constitutional Court, in its assessment, takes into account the Constitution in its entirety."

legal system adopted from foreign legal sources). They can also be "hidden" in a relevant moral and political context (such as freedom and types of equality).

The reasons for the existence of implicit principles should be sought in the abstract and static quality of the constitutional norms on the one hand, and in the specific and dynamic character of society on the other. Implicit principles ensure the flexibility of the Constitution because they allow for its interpretation adjusted to the relevant changes in society, as well as for the protection of its fundamental values. These principles in the constitutional jurisprudence ensure the consistency of the Constitution with current (domestic, foreign and international) social values, circumstances and expectations. In its case law, the Constitutional Court uses implicit (and explicit) principles as guidelines to understand and interpret constitutional provisions and to create legally binding decisions. The Court uses these principles to give more legal force to its statements of reasons in its decisions. These statements of reasons are stronger if the principles are homogeneously defined in domestic and foreign constitutional case law, and in international and regional instruments, or 'hard' and 'soft' international law. Homogeneously defined principles are those that are understood in practice and are applied identically and not differently. Such homogeneously defined principles ensure (and enable) the harmonisation of individual constitutional orders (in particular those of countries in transition) mutually, as well as with those of Europe. They are the bridges between international and domestic law, thus enabling the incorporation of international legal concepts into national legal orders.

In brief, implicit principles make it possible to progressively interpret the Constitution.

In Croatia, implicit principles are derived from domestic constitutional law and European and international law (including soft law such as, for example, the opinions, reports, and studies of the Venice Commission). However, even principles that have their roots in domestic constitutional law have their sources, in terms of content, in regional and international sources of law, particularly those dealing with human rights, as well as in foreign constitutional case law (in particular the case law of the German Federal Constitutional Court).

In brief, implicit principles, as a rule, spring from generally recognised legal principles, the principles of European and international law, and human rights. Today, many human rights are viewed as principles (e.g. the prohibition of discrimination and the equality of all before the law). However, different from implicit principles, human rights are codified and can be found in constitutions or in charters or conventions from which they derive their legal force.

One of the largest sources of implicit principles is the concept of the rule of law from which many principles are derived, such as the principle of legal certainty, legitimate expectations, the clarity and precision of legal provisions, a fair trial and the prohibition of arbitrariness. In the Croatian Constitution, the rule of law is not precisely defined but is simply described as one of the highest values of the constitutional order. The Constitutional Court has defined the content of the concept of the rule of law in its case law (see the second example in answer to the questions in I.6) on the model of the European concept of the rule of law.[8]

[8] European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist, CDL-AD(2016)007.

Yet another interesting example which has occurred in Croatian constitutional law relates to the principle of proportionality, i.e. its transition from an implicit to an explicit principle now contained in Article 16.2 of the Constitution (see the first example in answer to the questions in I.6.

Finally, academic scholars have contributed in various ways to the development of the principles laid down in the Constitution: a certain number of constitutional court judges in the Republic of Croatia have been elected from among university law professors and doctors of law; by providing their legal opinions when asked by the Constitutional Court in specific cases;[9] by participating in expert discussions organised by the Constitutional Court when necessary in order to decide on the merits;[10] and by writing (domestic and foreign) academic papers in the area of law.

**4. What role has the constitutional court played in defining the constitutional principles? How have basic principles been identified by the constitutional court over time? What method of interpretation (grammatical, textual, logical, historical, systemic, teleological etc.) or a combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon travaux preparatoires 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 Constitutional Court has taken an active approach in determining and formulating constitutional principles. Academic scholars have given their opinions regarding such approaches and regarding when they are necessary.

"Constitutional provisions are in their nature more general and their importance is more a matter of principle than is the case with other legal rules. They must be properly interpreted, in line with the constitutional goals of a political community, the established fundamental values of the constitutional order (Article 3 of the Constitution), as well as by taking into account the entire constitutional and international legal order in force in the Republic of Croatia. (...) An active and independent Constitutional Court does not accept legal gaps: its primary task is to eliminate them by giving its interpretations".[11]

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[9] In decision and ruling no. U-I-2414/2011 of 7 November 2012 (Official Gazette no. 126/12), rendered in the proceedings of abstract review of the Act on Preventing Conflicts of Interest of 2012, it is stated:

> "13. (...) In these terms, the Constitutional Court accepts the opinion of Prof. Branko Smerdel, DSc, that the Constitutional Court 'has the duty to provide protection to Croatian constitutional institutions and explain it by correctly approaching international documents and recommendations' when the recommendations of international bodies and organisations are interpreted in such a way that they 'result in an unconstitutional law, as in this case'."

[10] Article 49.1 CACCRC provides:

> "The Constitutional Court holds a consultative session if it considers that a discussion with participants in the proceedings, governmental bodies, bodies of local and regional self-government, associations, scientists and other experts is needed before deciding on the substance of the matter."

[11] Smerdel, Branko, *Ustavno uređenje europske Hrvatske* ["The Constitutional Order of the European Croatia"], Narodne novine d.d., Zagreb, June 2013, p. 451.

"(...) The Constitutional Court has shown its intention to define clearly constitutional democracy and its own development, particularly in terms of the elaboration of constitutional argumentation in the statements of reasons of its decisions. This is confirmed by its decisions rendered in the proceedings of the abstract review of laws: ranging from the explicit recognition of the principle of proportionality, through a decision strongly protecting the autonomy of universities, and a decision where the Constitutional Court for the first time raises the principle of the separation of powers and the rule of law, to a decision where it directly reviews the compliance of domestic law with the Convention, and not with the Constitution."[12]

"First, awareness of an activist approach by the Constitutional Court is shown by its judges. According to the former President of the Constitutional Court of the Republic of Croatia, Petar Klarić, the operation of this institution – apart from its evolution towards increasingly more activism in applying constitutional interpretation – is also characterised by a certain degree of self-restraint, particularly in dealing with borderline issues that encroach on politics and interest relations. (…)

Second, under the direct or indirect impact of the Constitutional Court, Parliament amended Article 4 of the Constitution of the Republic of Croatia dealing with the separation of powers, Article 16 dealing with the principle of proportionality, Article 29 dealing with the right to a fair trial, as well as the Constitutional Act on the Constitutional Court of the Republic of Croatia (which extended the competence of the Constitutional Court, particularly with regard to the reasonable duration of court proceedings involving fundamental human rights, and some other issues).

Third, comparative research of constitutional judicature also shows the existence of judicial activism in Croatia (...)."[13]

"The level of judicial activism can also be established by a critical insight into the methodology and argumentation used in constitutional interpretation. (…) In its decisions, the Constitutional Court has gradually developed its interpretation capacity in the direction of methodological activism. Among several important decisions, the most significant is the decision which repealed a number of provisions in the Act on the National Judicial Council. (...) Procedural activism (...) is also manifested in the case of a wide interpretation of *ius standi* in the Constitutional Act on the Constitutional Court (1999). Starting from the principle of equality and the rule of law, judges have rejected the grammatical interpretation of the Constitution (Article 125) and the Constitutional Act (Article 62) by opting for the position that 'an applicant of a constitutional complaint can be not only a citizen (a natural person), but also any legal person ('everyone' – see Article 28.1 of the Constitutional Act)'. (...) Of all the forms of modern activist approaches, the one that has the largest number of supporters is substantive (real) activism. (...) Thus, there are constitutional decisions which (...) really contribute to safeguarding democracy. This fact is a firm justification of the conclusion about constitutional adjudication as one of the fundamental prerequisites of democracy. Such is, for

[12] Smerdel, Branko, *Ustavno uređenje europske Hrvatske* ["The Constitutional Order of the European Croatia"], Narodne novine d.d., Zagreb, June 2013, p. 452.

[13] Bačić, Petar, *Konstitucionalizam i sudski aktivizam* ["Constitutionalism and Judicial Activism"], Faculty of Law in Split, 2010, pp. 421-422.

example, decision no. U-I-177/2002 of 20 April 2006 by which the Constitutional Court of the RC repealed an Article of the Act on Amendments to the Act on Referenda and Other Forms of Personal Participation in the Performance of State Powers and Local and Regional Self-Government (NN 92/01). A provision of this Act lays down the possibility of assessing a referendum question on the basis of the Act which, in the opinion of the Constitutional Court, conflicts with the provisions of Article 86.1 and 2 of the Constitution where the questions to be asked in a referendum are listed, which means that 'the content of referendum questions is fully regulated in the Constitution and belongs to the area of so-called constitutional reservations (point 4 of the Decision)'. In addition, the legislator's engagement in the prescription of the jurisdiction of the Constitutional Court was unauthorised (which may be done only in the Constitution and in the Constitutional Act on the Constitutional Court), whereby the legislator violated Article 128 of the Constitution (points 3 and 4 of the Decision). (…) In this case, the Constitutional Court protected the citizens' right to express their opinions in a referendum as a 'basic form of direct democracy'. (…) When looking for decisions which illustrate the substantial activism of the Constitutional Court of the Republic of Croatia in the area of the protection of constitutional rights, we primarily point to decisions dealing with the principle of proportionality as the general legal principle of the constitutional order of the Republic of Croatia. (…) However, at the time when the original text of the Constitution was in force, this principle was not 'explicitly given as a general principle of Croatia's constitutional law'. (...) In its decision of 11 January 2000, the Constitutional Court continued the clarification of the request regarding the principle of proportionality. By this decision, it repealed Article 8.1 of the Act on the Restriction of the Use of Tobacco Products. (…) In its Decision U-I-902/1999 of 25 January 2000 repealing some provisions of the Act on the Institutions of Higher Education, the Constitutional Court determined the fully protected and essential content of the autonomy of the university in relation to its wider significance. This content may be limited only if the legislator proves that 'public interest to limit the autonomy of the university is stronger than the interest of the university to achieve autonomy'."[14]

Therefore, the Constitutional Court has always had an important role in defining constitutional principles. When fulfilling this role, it has used all the available methods (grammatical, systemic, historical, teleological and comparative methods), as well techniques of interpretation. "In its work, the Constitutional Court has gradually accepted specific principles of the interpretation of the Constitution. It found the basis for such action in the jurisprudence of the European Court. We are speaking here of the principle of the teleological interpretation of the Constitution, the principle of the efficiency of the protection of constitutional rights, the principle of implicit rights and implicit restrictions, the principle of democracy, the principle of the rule of law, the principle of legal certainty, the principle of legality in its specific meaning of legality of government actions, the principle of procedural fairness, the principle of a just balance, the principle of proportionality and necessity, the principle of the free judgment of the state, the principle of European unity and the argument of a 'common foundation', the principle of the evolving and dynamic interpretation of the Constitution, the principle of autonomous interpretation of constitutional concepts and the principle of prohibition of discrimination.

[14] Bačić, Petar, *Konstitucionalizam i sudski aktivizam* ["Constitutionalism and Judicial Activism"], Faculty of Law in Split, 2010, pp. 410-420.

Similarly, we also note the gradual acceptance of various techniques to determine the constitutionally relevant substrate of a concrete case and its resolution. Beside the general judicial 'step-by-step' technique, we are dealing here with the application of various tests in constitutional jurisprudence such as the test of justification, the test of proportionality, the test of necessity in a democratic society and the test of the 'very essence of law' applied by the European Court in resolving its cases."[15]

Regarding the importance of *travaux preparatoires* for the determination and formation of constitutional principles in the text of the Constitution, "[it] is worth noting that in the activities preceding the adoption of the Constitution, the main topic was the principles. Thus, Dr. Franjo Tuđman, when presenting the 'Political and methodological starting points and political and legal principles for the drafting of the Constitution of the Republic of Croatia' before the Croatian Parliament, spoke about democratic and liberal principles, as well as about ten political and legal principles that had to be elaborated in detail when drafting the Constitution and which had to be 'crucial political and legal foundations for its creation'. The following were the political and legal principles for the drafting of the Croatian Constitution: 1. The fundamental source and the aim of the Constitution are human rights (civil, political, social and cultural) and popular rights; 2. The supreme authority (sovereignty) in Croatia derives from the people and belongs to the people; 3. The power of legislation belongs to Parliament; 4. The Constitution guarantees a parliamentary democracy and the rule of law; 5. The right to freely join political, entrepreneurial and social associations belongs to all citizens; 6. The right of ownership, a market economy and free enterprise; 7. The right of all citizens (workers and employers) to freely form trade unions; 8. A social state – the guarantor of social rights; 9. The guarantee of people's rights and freedoms; 10. Securing the sovereignty of the Republic of Croatia in its relations with other nations and states'."[16]

The Historical Foundations of the Constitution (Title I of the Constitution)[17] which may be considered as the preamble "have both political and legal significance, particularly when interpreting and understanding the Constitution".[18] In its past case law, the Constitutional Court has invoked these provisions, but not too often.[19]

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[15] Omejec, Jasna, *Pitanja odgovornosti i uloga ustavnog sudovanja* ["Questions of Responsibility and the Role of the Constitutional Court"], Round Table held on 22 November 2012 in the Academy Palace of the Croatian Academy of Sciences and Arts in Zagreb, Scientific Council for State Administration, Judiciary and the Rule of Law, Zagreb 2013, p. 83.

[16] Bačić, Arsen, *Mjesto i uloga ustavnih vrednota u demokratskom konstitucionalizmu* ["The Position and Role of Constitutional Values in Democratic Constitutionalism"], Round Table held on 16 December 2010 in the Academy Palace of the Croatian Academy of Sciences and Arts in Zagreb on the occasion of the 20th Anniversary of the Constitution of the Republic of Croatia, the Croatian Academy of Sciences and Arts, Scientific Council for State Administration, Judiciary and the Rule of Law, Zagreb, 2011, p. 155.

[17] Paragraph 2 of the Historical Foundations of the Constitution: "(...) the Republic of Croatia is hereby established as the nation state of the Croatian nation and the state of the members of its national minorities: (...) and others who are its citizens and who are guaranteed equality with citizens of Croatian nationality and the exercise of their national rights in accordance with the democratic norms of the United Nations and the countries of the free world".

[18] Smerdel, Branko, *Ustavno uređenje europske Hrvatske* ["The Constitutional Order of the European Croatia"], Narodne novine d.d., Zagreb, June 2013, p. 277.

[19] E.g. the Court has referred to Historical Foundations in: decision no. U-II-433/1994 *et al* of 2 February 1995 (Official Gazette nos. 9/95 and 15/95), rendered in the procedure of abstract review repealing individual

In our answer to previous questions, we have already described how the Constitutional Court recognises fundamental principles. We have also explained (particularly in our answer to the questions under I.3) how the constitutional principles have required some generally accepted definitions, and when looking for these definitions, these generally recognised legal principles have played a crucial role and thus gained in importance.

**5. What is the legal character of constitutional principles? Are they considered to be the genesis of the existing constitutional framework? What emphasis is placed upon 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 a complementary means of the latter's interpretation? Can the basic principles in your jurisprudence constitute a separate ground for unconstitutionality without their connection with a concrete constitutional norm? Is there any requirement in law placed upon the judicial acts of enforcement of constitutional principles?**

Constitutional principles, unlike legal rules, have the character of guidelines. They are general and they often include several rules as their manifestations (as in the case of the principle of the rule of law). The values referred to in Article 3 of the Constitution were introduced to avoid arbitrariness in understanding and interpreting the Constitution. The aim of these values is to inspire judges when interpreting any individual provision of the Constitution, to guide the Croatian Parliament when, in its laws, it elaborates rights and freedoms, and to guide the judges of ordinary and specialised courts in resolving their specific cases (pursuant to Article 115.3 of the Constitution, judges adjudicate on the basis of the Constitution, laws, treaties and other valid sources of law). In addition, the principles explicitly laid down in the provisions of the Constitution (such as, for example, the principle of the prohibition of discrimination and equality of all before the law referred to in Article 14, and the principle of proportionality in Article 16 of the Constitution) are obligations for all, including the three branches of government. Article 5.2 of the Constitution prescribes that everyone is obliged to abide by the Constitution and the law and to respect the legal order of the Republic of Croatia. The constitutional principles that are not explicitly laid down in the Constitution but are confirmed and worded only in the decisions and rulings of the Constitutional Court are also, pursuant to Article 31.1 CACCRC, obligatory for all natural and legal persons.

Bearing in mind what has already been said on the importance of *travaux preparatoires* in answer to the questions under I.4, constitutional principles can be considered as forerunners of the existing constitutional framework of the Republic of Croatia. Moreover, fundamental principles are also emphasised in two documents dealing with the independence of the Republic of Croatia.[20] These are: the Declaration on the Proclamation of Sovereignty and

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provisions of the Statute of Istrian County; decision no. U-I-3597/2010 *et al* of 29 July 2011 (Official Gazette no 93/11) rendered in the procedure of the abstract review of the Act on the Amendments to the Constitutional Act on the Rights of National Minorities of 2010 (where it stated that the quotation of para. 2 of the Historical Foundations of the Constitution in footnote 18 determines the "constitutional identity of the Republic of Croatia"; decision no. U-III-3491/2006 *et al* of 7 July 2010 (Official Gazette no. 90/10) where, in a procedure of concrete review, it found a violation of the right of ownership.

[20] At the referendum held on 19 May 1991, the voter turnout was 84.94% and of this number 93.94% voted for a sovereign and independent Croatia. This is when the process of secession began and Croatia dissolved its bonds

Independence of the Republic of Croatia[21] and the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia. Both documents were published in the Official Gazette no. 31/91.[22] This Constitutional decision has had a "significant impact on the development of the overall system of constitutional institutions to this day".[23]

Regarding the interpretation of principles and constitutional rights, and constitutional provisions in general, the Constitutional Court took its position in ruling no. U-I-3789/2003 *et al* of 8 December 2010 (Official Gazette no. 142/10):

> "8.2. (...) the Constitution is a single whole. It cannot be approached by pulling one provision out from the entirety of the relations that it constitutes and then interpreting it separately and mechanically, independently of all the other values that are enshrined in the Constitution. The Constitution has the internal unity and the meaning of a particular part is connected to all other provisions. If it is viewed as a unity, the Constitution reflects some all-encompassing principles and basic decisions in connection with which all its individual provisions must be interpreted. Thus no constitutional provision may by pulled out of context and interpreted independently. In other words, each particular constitutional provision must always be interpreted in accordance with the highest values of the constitutional order which are the grounds for interpreting the Constitution itself. These are: freedom, equal rights, national equality and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and the democratic multiparty system (Article 3 of the Constitution)."

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with other republics of the Socialist Federative Republic of Yugoslavia. In the process of implementing the referendum decision, which was binding for all state bodies, on 25 June 1991, the Parliament rendered these two extremely important decisions.

[21] Point III of the Declaration reads:

> "III
>
> The Republic of Croatia is a democratic, legal and social state in which the highest values of the constitutional order are: freedom, equality, national equality, love of peace, social justice, respect for human rights, pluralism and inviolability of ownership, preservation of nature and the human environment, the rule of law and a democratic multiparty system. The Republic of Croatia guarantees to the Serbs in Croatia and to all national minorities living in its territory respect for all human and civil rights, particularly freedom of speech and the cultivation of their own languages and promotion of their cultures, and freedom to form political organisations. The Republic of Croatia shall protect the rights and interests of its citizens regardless of their religion, ethnicity or race.
>
> The Republic of Croatia, in accordance with the rules of international law and in its capacity as the legal successor of the former SFRY, guarantees to all states and international organisations that it will fully and conscientiously exercise all rights and perform all obligations in the part relating to the Republic of Croatia."

[22] Point VI of the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia reads:

> "Accepting the principles of the Charter of Paris, the Republic of Croatia guarantees to all its citizens their national and all other fundamental rights and freedoms of man and citizen, a democratic order, the rule of law and all other greatest values of its constitutional order and the international legal order."

[23] Smerdel, Branko, *Zadaće pravne znanosti i pravničke struke na dvadesetu obljetnicu "Božićnog Ustava" - ustavni izbor i procesi ostvarivanja najviših ustavnih vrednota i strateških ciljeva Republike Hrvatske*, ["Tasks before Legal Science and the Legal Profession on the 20th Anniversary of the 'Christmas Constitution' - Constitutional Choice and Processes of Achieving the Highest Constitutional Values and Strategic Goals of the Republic of Croatia"], Round Table held on 16 December 2010 in the Academy Palace of the Croatian Academy of Sciences and Arts in Zagreb on the occasion of the 20th Anniversary of the Constitution of the Republic of Croatia, the Croatian Academy of Sciences and Arts, Scientific Council for State Administration, Judiciary and the Rule of Law, Zagreb, 2011, pp. 47 - 48.

The Constitutional Court confirmed this position in its decision and ruling no. U-I-3597/2010 *et al* of 29 September 2011 (Official Gazette 93/11) by stating:

> "38. (...) The Constitutional Court also examined ..., starting from the structural integrity of the constitutional text from which results the objective order of values that the Constitutional Court has the duty to protect and promote (...)."

In addition, in its decision and ruling nos. U-IP-3820/2009, U-IP-3826/2009 *et al* of 17 November 2009 (Official Gazette no. 143/09), the Constitutional Court notes:

> "11. (...) When reviewing the constitutionality of a law the Constitutional Court starts from a comprehensive approach to the Constitution and it views its provisions as an integral whole. This also means that the Constitutional Court examines two classic groups of rights enshrined in the Constitution (the group of personal, civil and political rights, and the group of social, economic and cultural rights) as an integral whole, i.e. as coordinated and equally important protected goods."

Regarding the relationship between fundamental principles and individual constitutional rights, and the ways of interpreting these principles in relation to individual constitutional rights, the Constitutional Court has in some cases interpreted them separately, while in other cases has interpreted them in connection with specific constitutional rights. Namely, there are cases where the review of the constitutionality of a particular law (abstract review) depended only on its compliance with a particular principle (where at the time of the decision of the Court, this principle was not explicitly prescribed in the Constitution – see the first example in the answer to the questions under I.6). However, in proceedings for the protection of human rights and fundamental freedoms (concrete review), the Constitutional Court interpreted the principles only if they were in any way connected with a constitutional right (examples in both these cases are included in our answers to the questions under I.6). The highest values of the constitutional order do not constitute a direct and independent constitutional basis for protection as a result of a constitutional complaint (concrete review) but they must be taken into account in relation to other guarantees regarding rights and freedoms.[24] In its numerous

[24] In its decision and ruling no. U-III-6559/2010 of 13 November 2014 (Official Gazette no. 142/14) the Court held:

> "124. The applicant invokes in the constitutional complaint the rights guaranteed in the following Articles of the Constitution: Article 14 (guarantee of equality before the law), Article 18.1 (guarantee of the right to appeal against individual legal acts adopted in first-instance proceedings by courts or other authorised bodies), and Article 26 (guarantee of equality of aliens with Croatian citizens before courts and governmental agencies and other bodies vested with pubic authority).
>
> He also invokes Article 3 of the Constitution laying down the fundamental values of the constitutional order of the Republic of Croatia, Article 5.2 of the Constitution stating that 'All persons shall be obliged to abide by the Constitution and law and respect the legal order of the Republic of Croatia' and Article 116.1 of the Constitution laying down that the Supreme Court, as the highest court, ensures unified application of laws and the equality of all in their application.
>
> 124.1. The Constitutional Court stresses that the assessment of all alleged violations of the constitutional rights examined in these Constitutional Court proceedings were based on equality, freedom, respect for human rights and the rule of law, as the highest values of the Constitutional order of the Republic of Croatia laid down in Article 3 of the Constitution. These are values present in the entire text of the Constitution and used for its interpretation. Since Article 5, Article 14 and Article 26 of the Constitution are only special normative aspects of these values, the Constitutional Court took them into account in the assessment of alleged violations of the constitutional rights of the applicant."

decisions in the area of concrete review, the Constitutional Court has held[25] that the values referred to in Article 3 of the Constitution, or the principles referred to, for example, in Articles 5, 19.1 and 115, and Article 115.3 of the Constitution, do not include human rights and fundamental freedoms as laid down in Article 62.1 CACCRC,[26] whose protection, in accordance with the provision of Article 125, indent 4 of the Constitution, the Constitutional Court provides for when it adjudicates on applicants' constitutional complaints. Namely, in these proceedings, the applicants of constitutional complaints must invoke a particular constitutional right that they believe is violated, and not only the principle.

There is no requirement in law placed upon the judicial acts of enforcement of constitutional principles. "Constitutional Court decisions – because of their binding force – create obligatory rules of conduct in a social community, by enabling the implementation of values enshrined in the Constitution."[27]

Pursuant to Article 31 CACCRC, decisions and rulings of the Constitutional Court are binding and every natural or legal person must respect them (para. 1). All government bodies and bodies of local and regional self-government are bound, within their jurisdiction, to carry out the decisions and rulings of the Constitutional Court (para. 2). The Government of the Republic of Croatia ensures, through the bodies of state administration, the execution of decisions and rulings of the Constitutional Court (para. 3). Moreover, when, in the procedure

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[25] For example, in decision no. U-III-1125/1999 of 13 March 2000 (Official Gazette no. 38/00), the relevant part reads:

> "17. Finally, in their constitutional complaint, the applicants point to the violation of the principle of the constitutional order of the Republic of Croatia referred to in Article 3 of the Constitution and the violation of paragraph 2 of Article 5 of the Constitution.
>
> 17.1. However, in the provision of Article 3, the Constitution does not provide for freedoms and rights of man and citizen (constitutional rights). Namely, in Article 3 the Constitution lays down the highest values of the constitutional order that are elaborated and determined in other provisions of the Constitution, particularly those which guarantee freedoms and rights of man and citizen. The provision of Article 3 serves as the basis for the interpretation of the Constitution and as a guideline for the legislator when elaborating the constitutional right of citizens and it is directed at state bodies and not directly to citizens.
>
> 17.2. The provision of paragraph 2, Article 5 of the Constitution lays down everyone's obligation to abide by the Constitution and to respect the legal order. This constitutional provision, laying down the obligation of respecting the rule of law, does not contain freedoms and rights guaranteed by the Constitution to any natural or legal person (subjective constitutional rights).
>
> 17.3. Therefore, the provisions of Articles 3 and 5.2 of the Constitution lay down the highest values, or the fundamental principles on which the constitutional order of the Republic of Croatia is based and are general in their content, so they do not provide constitutional guarantees to an individual (subject)."

[26] Article 62.1 CACCRC reads: "Everyone may lodge a constitutional complaint with the Constitutional Court if he/she deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation of a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right)."

[27] Omejec, Jasna, *Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova* ["The New European Transitional Constitutions and the Transformative Role of Constitutional Courts"], Round Table held on 16 December 2010 in the Academy Palace of the Croatian Academy of Sciences and Arts in Zagreb on the occasion of the 20th Anniversary of the Constitution of the Republic of Croatia, the Croatian Academy of Sciences and Arts, Scientific Council for State Administration, Judiciary and the Rule of Law, Zagreb, 2011, p. 81.

of concrete review, the Constitutional Court accepts a constitutional complaint and repeals a disputed act, in the process of passing a new act, the competent judicial or administrative body, or a body of local or regional self-government, or a legal person with public authority, is bound to respect the Court's legal opinion expressed in the decision repealing the act whereby the applicant's constitutional right was violated (Article 77.2 CACCRC). In conclusion, the Constitutional Court itself may determine a body to which it entrusts the execution of its decision or ruling, as well as the manner of its execution (31.4 and 5 CACCRC).

**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 has the constitutional court made in forming and developing of such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.**

The rule of law, the principle of legal certainty, the principle of legality, the principle of the clarity and precision of legal norms, the principle of the prohibition of discrimination and equality of all before the law and the principle of a fair trial are the principles that most commonly arise in the practice of the Constitutional Court. Some of these principles are of extreme importance for the legal and political life of the country although they have not frequently occurred in the case law of the Constitutional Court (for example, the principle of democracy and the principles of a social state). In our answer to the questions under I.4, some principles and the relevant decisions of the Constitutional Court were mentioned, and parts of these decisions are cited below.

The contribution of the Constitutional Court in the wording and development of these principles has already been described in detail in our answer to the questions under I.3 and I.4. In brief, in its case law, the Constitutional Court has established and formulated a number of principles (examples 2 to 5) and has incorporated them in the legal order of the Republic of Croatia. The first example regards the case in which the Court's decision on repealing some provisions was based on the principle of proportionality, although at the time this decision was rendered, the principle of proportionality was not explicitly provided for in the Constitution.

Example 1 – Decision no. U-I-1156/1999 of 26 January 2000 (Official Gazette 14/00) – abstract review of the provisions of the Act on the Restriction of the Use of Tobacco Products of 1999:

> "Although the Constitution of the Republic of Croatia does not provide for any direct norms to regulate the principle of proportionality, its ubiquitous significance cannot be denied. This Court starts from the position that the fundamental freedoms and rights of citizen, as regulated by the Constitution, are limitless in principle. Any restriction of these freedoms and rights must be prescribed by law, and restrictions must be proportionate to the legitimate goal to be achieved thereby. This stems indirectly from the provisions of Article 17 of the Constitution, which provide for the possibility to restrict the fundamental freedoms and rights under the so-called extraordinary circumstances in the state. Namely, Article 17, paragraph 2 of the Constitution expressly stipulates that the extent of such restrictions shall be proportionate to the nature of the danger, and at the same time it shall preclude any impermissible consequences, i.e. those which must not be allowed to occur as a result of the implementation of such restrictions.

> In keeping with this, in a situation where the Constitution expressly compels the implementation of the principle of proportionality (the proportionality test) under extraordinary circumstances, this Court deems that this principle should be even more valid under 'ordinary circumstances' in the country."

Example 2 – Decision and ruling nos. U-I-659/1994 U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 of 15 March 2000 (Official Gazette no. 31/00) – abstract review of the provisions of the Act on the National Judicial Council of 1999 (defining the principle of the rule of law and the principle of the separation of powers):

> "11. Although it presumes full constitutionality and legality, in terms of Article 5 of the Constitution, the rule of law is more than a mere requirement for acting in keeping with the law. It also embraces the requirements that concern the contents of the law. Hence, the rule of law in itself may not be the law in the same sense as the laws that are passed by the legislator. The rule of law is not just the rule of laws, but also the rule by rights which – in addition to the requirements regarding constitutionality and legality, as the most important principles of every regulated legal order – also includes additional requirements, which are relative to the very laws and their contents.
>
> 11.1. In that sense, the Court particularly points out that within the legal order founded on the rule of law, laws must be general and equal for all, and legal consequences must be unambiguous for all those to whom the law is applied. The court also points out that legal consequences must be adequate to the legitimate expectations by the parties in every specific case where the law is applied directly to them.
>
> (...)
>
> 12. ... the Court points out that the principle of the separation of powers, pursuant to Article 4 of the Constitution, is one of the rules of the organisation of the state government which are useful to the extent that they serve the rule of law and defend it. Although it does not have an independent value in itself, the principle of the separation of powers is one of the elements of the rule of law, as it prevents the concentration of political competences in (only) one body. The Court emphasises that the separation of the three powers should not be interpreted mechanically, since all the three state powers are mutually intertwined by their functions by a multitude of different relationships and interactions, and the prevailing objective of that is mutual control."

Example 3 – Decision and ruling nos. U-IP-3820/2009, U-IP-3826/2009 *et al* of 17 November 2009 (Official Gazette no. 143/09) – abstract review of the Act on Separate Tax on Wages, Pensions and Other Types of Income of 2009 (interpretation of the principle of the prohibition of discrimination and equality of all before the law, definition of a social state, interpretation of social justice as a component of the concept of a social state, interpretation of the principle of tax equity and equality, etc.):

> "12. (...) Article 14 para. 1 of the Constitution prohibits discrimination. The authority of the Constitutional Court to broaden the list of the prohibited grounds for discrimination in Article 14 para. 1 of the Constitution lies in the wording of that Article, in which the list only gives examples, as seen from the normative formulation: 'or other characteristics'. With reference to the subject of these proceedings of constitutional review, the Constitutional Court finds that the kind of work a person does may under certain circumstances and under certain preconditions also be included among the prohibited grounds for discrimination (see point 12.2).

The Constitutional Court also finds that the constitutional guarantee of the equality of all before the law (Article 14 para. 2 of the Constitution), which is a special expression of equality as the highest value of the constitutional order of the Republic of Croatia (Article 3 of the Constitution), does not demand that every citizen should contribute equally to the defrayment of public expenses. This guarantee demands that every citizen should be obliged to finance general state and public affairs in the same way, in accordance with his or her economic capabilities.

Depending on the subject that is being regulated, the principle of equality places different requirements before the legislator, ranging from the simple prohibition of arbitrary conduct to strict adherence to the principle of proportionality. Unequal treatment may have an adverse effect on the fulfilment of constitutionally protected human rights and fundamental freedoms. Article 14 para. 2 of the Constitution therefore requires that the group of addressees of a legal norm, the people to whom a law applies, is not treated differently from another group of people unless the differences among the two groups are of a kind and magnitude to justify the different treatment. It is impossible to give more specific criteria from an abstract and general position, but only in relation to specific concrete legal areas.

(...)

13.1. A social state is one of the cornerstones of European constitutional identity, which is also confirmed by the Constitution of the Republic of Croatia. It belongs to the group of so-called socially conscious constitutions.

Legal scholars (Arsen Bačić, *"Prava izgubljena u tranziciji*" [Rights Lost in Transition], Collected Papers of the Faculty of Law in Split, No. 1-2/2005) point out that the social state is a constitutional and normative concept, a constitutional form of organising a welfare state of the type that demands the realisation of social rights enshrined in the Constitution and the leading role of the state and public authorities in undertaking economic and social measures. Social states in Europe are not only obliged not to violate fundamental rights but are also obliged, they have the positive obligation, to protect and promote them.

In principle the concept of a social state fulfils three functions: it enables various forms of positive measures by the government and public authorities in the economic field, such as for example government interventionism and 'ruling from above'; it requires the government and public authorities to influence and to interfere with the market so as to ensure basic social rights, social security and equalise or decrease extreme social differences; it prohibits the erosion of the fundamental structures of the welfare state or the radical restriction of recognised social rights.

The constitutional character of social rights, as fundamental rights enshrined in the Constitution, points towards two basic requirements of the social state: the government and public authorities are bound to follow the policy of an equitable and equal redistribution of national resources so as to equalise extreme inequality; the legislative and executive powers are legally bound to achieve a balance between the limited assets of the government budget and the social goals laid down in the Constitution.

In this way individuals are guaranteed that smallest measure of welfare that the economic resources of the country permit. The satisfaction of basic social rights means compliance with and satisfaction of the 'starting minimum' of needs that are associated with respect for the dignity of every person, and this also includes benefits that go beyond the subsistence

minimum but are today socially and culturally implicit (for example, schools). This minimum is binding on the government.

Since these issues are connected with the constitutional concept of the social state, fulfilling them is directly linked with the principle of the rule of law (Article 3 of the Constitution) because in the social state the authorities must implement social activities in a statutory form and adhere to the requirements that the principle of the rule of law places before the legislator.

13.2. Social justice is a highest value of the constitutional order of the Republic of Croatia and a ground for interpreting the Constitution (Article 3 of the Constitution). In its case-law the Constitutional Court has confirmed that Article 3 of the Constitution has an additional function: besides serving as the ground for interpreting the Constitution, Article 3 of the Constitution is also a guideline for the legislator in the elaboration of particular human rights and fundamental freedoms enshrined in the Constitution.

Social justice is a component of the social state, because this kind of a state demands the establishment and preservation of social justice. Therefore, the concept of the social state is violated when the help provided for those who need it does not comply with the requirements of social justice, either because the distribution of some social benefits has been wrongly restricted, or because a social group has not been provided with social protection.

13.3. The above principles of the social state and social justice are expressed in a special way in the control of legislative activities by constitutional courts. This hinges on the following fundamental problem: how to determine the borderline on which the constitutionalisation of social rights clashes with democracy? This is a problem located at the very crossroads of two basic questions of political philosophy that are also important for contemporary constitutional policy: at the crossroads of the question of democracy and of the question of distributive justice.

In the work of constitutional courts this problem is particularly present in the control of the constitutionality of laws that deal with public policies, especially social policy. The borderline mentioned above is also the line up to which constitutional courts may control the work of the legislature from the aspect of the social state (Article 1 of the Constitution) and social justice (Article 3 of the Constitution).

(...)

In short, therefore, the substance of the concepts of the social state, the principle of social justice, even constitutionally recognised social justice, are abstract in nature, although of different levels of abstraction. This can be seen from the fact that the writer of the Constitution left it to the legislator to regulate and elaborate all the constitutionally defined social rights, and this authority is usually explicit because the Constitution explicitly requires the enactment of a law for the application of some 'social' norm. Therefore the constitutional provisions about the social state and social justice, even about constitutionally recognised social rights, cannot be applied directly. For them to be applied, they must first be elaborated in a law and very often they must be further specified in subordinate legislation for the operation of the relevant law.

(...)

15.1. The long-lasting and standard case-law of the Federal Constitutional Court of the Federal Republic of Germany – which is applicable in the Croatian constitutional order because of comparative constitutional foundations – indicates the meaning and scope of the principle of tax equality and equity in relation to legislative activities. It also indicates the boundaries of a constitutional court's powers in the control of these activities:

'The legislator is bound by the principle of taxation justice, which follows from Article 3 para. 1 of the Basic Law (BVerfGE 13, 181 [202]). Every application of this norm of the Basic Law rests on a comparison of real life situations, which are not the same in all elements but always only in some. In principle it is the legislator who decides which elements are relevant for the real life situations that must be regulated so that they can be treated equally or unequally. (…) When prescribing tax bases the legislator has a wide margin of appreciation. This freedom ends only at the point when the equal or unequal treatment of the factual conditions being regulated can no longer be connected with the view that includes an idea of justice, when, therefore, there is no obvious reason for the equal or unequal treatment. The Federal Constitutional Court examines only compliance with those external boundaries of the legislator's freedom (the prohibition of arbitrariness), but not also whether in the specific case the legislator found the most appropriate, most rational and most equitable solution' (BVerfGE 26, 302 (*Einkommensteuergesetz*) – ruling of the Second Senate of 9 July 1969 - 2 BvL 20/65, in the proceedings of reviewing § 23 para. 1 of the Income Tax Act in the version of 15 August 1961 /BGBl. I, s. 1254/).

The Federal Constitutional Court of the Federal Republic of Germany later elaborated these principles in more detail through its case-law. One of the important elaborations of the principle of tax equality and equity is contained in the decision of the Second Senate of 4 December 2002 - BVerfGE 107, 27 (*Einkommensteuergesetz*) - 2 BvR 400/98, 2 BvR 1735/00 [50], which concerned income tax:

'b) The freedom that the legislator in principle enjoys to determine the situation in the professional areas that by law have the same legal effects and which the law, therefore, qualifies as legally identical (cf. BVerfGE 75, 108 [157]; 105, 73 [125 ff.] – there and in connection with the following), is in the field of tax law, and especially in regulations about income tax, limited first and foremost by two closely connected directives: prescribing guidelines for tax burdens according to the principle of financial capability (*durch das Gebot der Ausrichtung der Steuerlast am Prinzip der finanziellen Leistungsfähigkeit*) and providing for consistency (*durch das Gebot der Folgerichtigkeit*). In accordance with these, in the interest of the tax equality (*steuerlicher Lastengleichheit*) required by constitutional law (cf. BVerfGE 84, 239 [268 ff.]), it is necessary to aim at taxing taxpayers of the same financial capabilities equally (horizontal tax equity), while (in the case of vertical tax equity) the taxation of a higher income must be appropriate to the taxation of a lower income (*angemessen*) (cf.. BVerfGE 82, 60 [89]; 99, 246 [260]). The legislator, true, has wide manoeuvrability in establishing tax cases and determining the tax base, but in accordance with the imperative of burdening all the taxpayers maximally proportionally he must, once he has formed the initial factual status in tax law, consistently implement the decision on taxation in accordance with tax equality (cf. BVerfGE 84, 239 [271]; 93, 121 [136]; 99, 88 [95]; 99, 280 [290]; 101, 132 [138]; 101, 151 [155]). A special substantive reason is necessary for exceptions from this consistent implementation (cf. BVerfGE 99, 88 [95]; 99, 280 [290]) ...'

(...)"

Example 4 – Decision and ruling no. U-I-902/1999 of 26 January 2000 (Official Gazette no. 14/00) – abstract review of the Act on the Institutions of Higher Education of 1996 (definition of the autonomy of universities):

> "... the Court has taken the position on a matter of principle noting that Article 67 of the Constitution includes:
>
> - *the constitutional assertion that autonomy is necessary for the very existence of a university*, because a university as an institution that creates new scientific knowledge and introduces students to research can exist only to the extent to which it independently arranges its organisation and work. This can be realised only if the university is organisationally and functionally independent of other bodies vested with governmental or other powers to influence the way in which universities are organised and work;
>
> -*the constitutional assertion that the university has the right to independently decide on its organisation and work in conformity with law*, which means that deciding on its organisation and work is part of university academic self-government (*domaine réservé*) by the force of the Constitution.
>
> In discussing the specific contents of university autonomy, based on the preceding constitutional principles, the Constitutional Court was faced with three issues:
>
> - *first*, in relation to which subjects does the Constitution guarantee university autonomy, i.e., in relation to which institutions and other bodies does the university appear as autonomous;
>
> - *second*, who belongs to the circle of subjects covered by university autonomy;
>
> - *third*, how far does university autonomy stretch in relation to the bodies that founded the university or the bodies that supervise its work or the bodies that support it, and whose powers are inherent in their position of founder, professional supervisor or supporter of the said university.
>
> Considering the first question, the Court holds that university autonomy, guaranteed in Article 67 of the Constitution, includes university autonomy in relation to extra-university institutions and other bodies that arrange the organisation and work of universities or may influence their organisation (e.g. government bodies or other corporate and (more rarely) natural persons who may appear as the founders or supporters of universities). Furthermore, the Court holds that university autonomy also includes the autonomy of each individual university in relation to other universities of the same or different university system in the country, and the autonomy of each individual institution of higher education other than a university (e.g. a faculty within a university) in relation to all other institutions of higher education of the same kind belonging to the same university system, including the right to their own academic self-government in relation to administrative bodies of the university of which they are part.
>
> Considering the second question, the Court holds that autonomy includes the university or other institution of higher education within the university system, and also the autonomy of each individual university member, i.e. each individual faculty or other organisational unit within a university, and the autonomy of all people active within a certain branch of science within the university as a whole and/or research system in the Republic of

Croatia. Thus the concept “university autonomy” should be considered to include all the above bodies and persons.

In answer to the third question, the Court holds that a degree of restriction of university autonomy emerges from the fact that in modern states university autonomy is seriously restricted by the authority of those on whom the university depends, i.e. its founders, supporters and bodies that professionally supervise its work. Their influence is usually expressed in rules that each of them imposes on the university, either because they take precedence over the university by law, or because their support or positive reports on the work of the university depends on the university accepting or implementing their rules. Consequently, the Constitutional Court holds that when it evaluates the constitutionality of the disputed provisions of the Act on Institutions of Higher Education it must, at the same time, bear in mind that in actual fact university autonomy is inevitably restricted by the rights and actual powers of its founders, supporters or bodies that professionally supervise the university’s work."

Example 5 – Decision no. U-I-722/2009 of 6 April 2011 (Official Gazette no. 44/11) – abstract review of the Legal Aid Act of 2008 (interpretation of the rule of law, legal certainty and clarity and precision of legal norms):

"1) Principled positions regarding the quality of legal norms in the light of the rule of law:

5. ... the requirements of legal certainty and the rule of law in Article 3 of the Constitution demand that the legal norm should be accessible to and predictable for those it applies to, i.e. such that they can know their real and specific rights and obligations so that they can act accordingly. (...)

5.1. The Constitutional Court deems that the addressees of a legal norm can certainly not know their rights and obligations really and specifically and foresee the consequences of their conduct if the legal norm is not sufficiently definite and precise. The requirement for a definite and precise legal norm is ‘one of the basic elements of the principle of the rule of law’ ... and is crucial for the creation and preservation of the legitimacy of the legal order. It ensures that the democratically legitimate legislator can independently elaborate the basic rights and freedoms in laws, that the executive and administrative powers can draw on clear statutory and regulatory standards for their decisions and that the judicial powers and courts can control the legality of the legal order ... When this requirement is not met, indefinite and imprecise laws delegate some of the powers of legislation to subjective administrative and judicial decision-making, which is impermissible in constitutional law.

5.2. The requirement for the definiteness and precision of the legal norm has both a positive and a negative meaning. In the positive meaning, the definiteness and precision of the legal norm means that its wording must allow citizens to know their real and specific rights and obligations so that they can behave accordingly. If two or more legal norms regulate their behaviour, the bodies that bring them must ensure that they are clear and predictable both in content and in their effect in interrelationship (conclusion of the German Federal Constitutional Court 1 BvF 3/92 of 3 March 2004, § 107).

The positive meaning of the requirement for the definiteness and precision of the legal norm, however, is not fulfilled if citizens, as conscientious and reasonable persons, speculate about its meaning and content, and those who apply it often differ in its interpretation and application to specific cases. A contentious interpretation of a legal norm, which results in

the unequal practice of administrative and judicial bodies, is a sure indication that it lacks definiteness.

The negative meaning of the requirement for the definiteness and precision of the legal norm, with reference to a governmental body, means that its wording must bind the body and not allow it to act outside the purpose its content determines. This is important both for the conduct of governmental and public administration bodies and for the conduct of the judicial authorities. The former may act only on the grounds of sufficiently clear legislative standards that properly bind them or allow them a margin of appreciation (usually in the form of a discretionary decision). Otherwise the freedom of citizens would be threatened by the arbitrariness and malpractice of the governmental authorities, especially in cases when measures and actions are applied to them without their prior knowledge. The latter must on the grounds of clear and precise legal standards control the legality of the acts and actions of the bodies that apply legal norms. In this procedure, the legal norm's lack of precision could prevent supervision over the application of the principle of proportionality, which is decisive in the restriction of citizens' rights or freedoms in constitutional law (Article 16 para. 2 of the Constitution)."

## 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? How are constitutional principles and other constitutional provisions related to international law and/or to the European Union law? Are there any provisions in international or the European Union law that are deemed superior to the national constitutional principles? If yes, how are such higher international provisions applied with regard to the national constitutional principles? 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?**

In the above answers to the questions under I.2, I.5, and I.6, it has already been stated that the values referred to in Article 3 of the Constitution are the basis for its interpretation and that the Constitutional Court has taken the position that individual constitutional provisions must be interpreted in accordance with these values. The impression is that the highest values of the constitutional order are to some extent superior to other provisions of the Constitution. However, the Constitutional Court in its case law always stresses its comprehensive approach to the Constitution and that it always considers its provisions as a whole. Academic scholars have also given their opinion on this issue: "The Constitution of the Republic of Croatia, on the model of some modern European constitutions, in its Article 3, lays down the highest values of the constitutional order of the Republic of Croatia, as a summary of the ethical understanding on which the Constitution is based and thus also as the basis for the interpretation of the entire constitutional text and its individual provisions: (…) Most of these concepts are elaborated in detail in the constitutional provisions guaranteeing specific human rights and fundamental freedoms. The provision of Article 3 itself serves as the basis for the interpretation of other constitutional provisions and instructs the legislator on how to

elaborate individual freedoms and rights. (…) It shows in the best possible way how the protection of human rights cannot be separated from other fundamental principles of the constitutional system and how it depends on the harmonised application of the entire system. In short, the protection of human rights is inseparable from the development of democratic political institutions, an independent judiciary and the requirements of the rule of law in general, encapsulated in the constitutional provisions on the highest values of the constitutional order. In some cases, contradictions appear among fundamental values and it is necessary to find the right measure to achieve balance between them".[28]

The relationship between constitutional principles and constitutional provisions in general and international law, and/or the law of the European Union, can be viewed through the constitutional provisions, legal doctrine and the case law of the Constitutional Court (see the examples in answer to the questions under II.6).

First, in the Croatian legal system, a monistic approach to international treaties is accepted.[29] The Constitution prescribes that international treaties have greater legal force than acts adopted by Parliament. If there is disparity between a national act and a treaty, the courts and other bodies vested with state and public authority are bound to apply the treaty. The same rule applies to the Convention which in Croatia is considered to be a self-executing international treaty. This also applies to international principles that are often contained in treaties (e.g. Article 7 of the Convention), as well as those developed in the case law of international bodies (like the ECtHR) which are competent for the interpretation and execution of a particular treaty.

Second, the Convention in Croatia has a quasi-constitutional position recognised by the Constitutional Court through its case law.

Third, the application of the EU law is laid down in Article 141.c of the Constitution which reads:

"Article 141.c

The exercise of the rights ensuing from the European Union *acquis communautaire* shall be made equal to the exercise of rights under Croatian law.

All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.

Croatian courts shall protect subjective rights based on the European Union *acquis communautaire*.

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[28] Smerdel, Branko, *Ustavno uređenje europske Hrvatske* ["The Constitutional Order of the European Croatia"], Narodne novine d.d., Zagreb, June 2013, pp. 290-291.

[29] Article 134 of the Constitution reads:

"Article 134

International treaties which have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have primacy over [domestic] law. ..."

> State bodies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly."

The CCRC has had no opportunity in its jurisprudence so far to interpret the above-mentioned constitutional provisions. It is considered in legal theory that the "[s]tated principles create specific obligations for ordinary national courts and for the Constitutional Court".[30] The positions of legal theory concerning the significance and achievements of particular provisions of what is today Article 141.c of the Constitution are stated below.[31]

Article 141.c paragraph 1 of the Constitution "constitutes a declaration of two principles formulated in the case-law of the ECtHR – the principle of equivalence and the principle of effectiveness. Both these principles are embedded in the very foundations of the EU legal order and are well established in the case-law of the ECtHR. These procedural principles are binding for ordinary and constitutional courts."

Article 141.b paragraph 2 of the Constitution "can be understood as a norm that implicitly allows for the direct effect and supremacy of EU law over Croatian law. These principles are embedded in the very foundation of EU law and constitute its original and autonomous legal order". Therefore, Article 145 § 2 of the Constitution "must not be superficially understood as a mere conflict-of-law rule, but rather as the acceptance by constitutional law of the fundamental principles on which EU law is based. These principles permeate the national legal orders of the Member States, and without their acceptance, membership in the EU is not possible".

Article 141.c paragraph 2 of the Constitution "opens up the Croatian legal system to the legal order of the EU and, by doing so, differentiates it from the legal order of international law. Among other things, it constitutes the national legal expression of the principle of the direct effect and supremacy of EU law over national law, but also includes the other principles of EU law, which are crystallised in the jurisprudence of European law".

Article 141.c paragraph 3 of the Constitution "should be understood as a special expression and additional elaboration of Article 141 of the Constitution, which lays down that international treaties are a component of the domestic legal order and have primacy over domestic law".

Article 141.c paragraph 4 of the Constitution "prescribes the so-called direct administrative effect". This means that the obligation to apply directly EU law binds not only Croatian courts, but also state bodies, bodies of units of local and regional self-government, and legal persons vested with public authority.

The jurisprudence of the CCRC concerning EU law is still very modest due to the short period in which Croatia has been a full member of the EU. However, in its decision no. U-VIIR

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[30] Ćapeta, Tamara and Rodin, Siniša, *Osnove prava Europske unije* ["The Basics of EU Law"], 2nd edition, Narodne novine d.d., Zagreb, 2011, p. 150.

[31] Ibid., pp. 151-153.

1159/2015 of 8 April 2015 the Constitutional Court explicitly held that the Constitution is by its legal force above EU law.[32]

2. **How are the constitutional principles related to each other? Is there any hierarchy within those principles? 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 does not explicitly determine the mutual relations or the hierarchy of constitutional principles. The principles and values are provided (see the answer to the questions under I.2) in Title II of the Constitution (Basic Provisions, Articles 1 to 13). They are mentioned also in Title III (Protection of Human Rights and Fundamental Freedoms, Articles 14 to 69), such as: the principle of the prohibition of discrimination and equality of all before the law (Article 14), the principle of proportionality (Article 16.2), the principle of legality of administrative acts (Article 19.1), the principle of presumption of innocence (Article 28), the principle of a fair trial (Article 29), the principle of *nullum crimen nulla poena sine lege* and the principle of the imposition of a more lenient penalty (Article 31.1), and the principle of human dignity (Article 35).

It is obvious that in the Constitution the principles are used at various levels of abstraction, i.e. some principles are additional elaborations of the fundamental principles or "values" referred to in Article 3 of the Constitution. For example, the principle of the prohibition of discrimination and equality of all before the law (Article 14), the equality of citizens of the Republic of Croatia and foreigners before the courts and other state bodies and other bodies vested with public authority (Article 26), and the principle of equality and equity of the tax system (Article 51.2) constitute an elaboration of the value of equality referred to in Article 3 of the Constitution. The principle of legality of administrative acts (Article 19.1) and the principle *nullum crimen nulla poena sine lege* (Article 31.1) are elaborations of the principle of legality referred to in Article 5.1 of the Constitution in various branches of law, and the guarantee[33] of the equality of members of all national minorities (Article 15.1) is a reflection of the value of national equality referred to in Article 3 of the Constitution.

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[32] The relevant part of this decisions reads:

> "45. Finally, the Constitutional Court finds that in these Constitutional Court proceedings it is not necessary to examine the substantive conformity of the referendum question with European Union law because the Constitution is by its legal force above the law of the European Union. In other words, with regard to the points I and II of the operative part of this decision, there are no reasons to carry out an examination also from the aspect of law which in the Republic of Croatia is valid on the basis of the treaties in the light of Article 141.c of the Constitution."

[33] The Constitutional Court explained the constitutional guarantees in its decision no. U-I-763/2009 *et al* of 30 March 2011 (Official Gazette 39/11):

> "16. Constitutional guarantees, ..., are primarily given to protect the rights and freedoms of the individual or of social groups or to protect certain relations that make up the socio-economic foundations of society and its superstructure. They are not an expression of the individuality and human dignity of the individual but an expression of the obligations the State undertook to care about a certain right or freedom of an individual or social group or a particular social relationship and to secure effective legal protection for them. These obligations are built into the basic norm in the form of the State's constitutional guarantee. Thus constitutional guarantees are as a rule assessed with reference to the manner chosen for the effective realisation and protection of the object of the

In addition, principles differ in their scope. The principles of legal certainty, legitimate expectations, the precision and clarity of legal provisions, a fair trial and the prohibition of arbitrariness constitute the core of the rule of law. Since they are a part of a larger whole (of the principle of the rule of law), we can, in relation to that whole, theoretically look upon them as the "principles of a lower hierarchical level".

In its case law, the Constitutional Court has determined, in accordance with the formal structure of the Constitution, which values and principles make up the core of the constitutional order (see footnote 7). The Court has also established that the highest values of the constitutional order permeate the entire text of the Constitution and are used for its interpretation. The Court has further established that individual principles (such as the principle of the prohibition of discrimination and equality of all before the law referred to in Article 14 of the Constitution) are only separate normative aspects of these values (see footnote 24).

**3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How was the constitution 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? Have the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?**

The Constitution explicitly envisages two possible procedures for amendments: the first is amending the Constitution on the basis of a decision of the regular legislative representative body, i.e. the Croatian Parliament (Articles 136 to 139); the second is to call a facultative constitutional referendum (Article 87).

*a) Amendments to the Constitution by a decision of the Croatian Parliament*

A minimum of one-fifth of the Members of the Croatian Parliament, the President of the Republic and the Government of the Republic of Croatia may propose amendments to the Constitution. After the authorised proposer has submitted an initiative, the Croatian

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guarantee, and also with reference to the effectiveness of the institutions that are responsible for this realisation and protection.

The constitutionally guaranteed rights, freedoms and relations are as a rule not absolute but are subject to general restrictions that are provided for in Article 16 of the Constitution, and also special restrictions that are immanent only in some constitutionally protected goods, contained in the constitutional provisions that regulate these goods."

The Constitutional Court reiterated its position on the limitation of constitutional guarantees in its decision no. U-I-722/2009 of 6 April 2011 (Official Gazette no. 44/11):

"25.3. (...) With reference to the first question it must be emphasised that the autonomy and independence of the legal profession guaranteed in the Constitution is not absolute. Like other constitutional guarantees, it has its limits. A constitutional guarantee is a constitutionally determined obligation undertaken by the State to care about a certain constitutional good, social relationship or special social group, and this protection is by the will of the maker of the Constitution raised, in scope and binding nature, to the level immanent to constitutional rights and constitutional freedoms. Constitutional guarantees do not flow from the dignity and personality of every individual; their regulation originates in the will of the maker of the Constitution and his special interests. (...)"

Parliament holds a discussion and decides by a majority vote of all Members whether or not to initiate the procedure for amending the Constitution.

If the Croatian Parliament, in principle, accepts the necessity of initiating the amending of the Constitution, a draft amendment to the Constitution is made and determined by a majority of all Members of Parliament.

A final decision on amending the Constitution is made by a two-thirds majority of all Members of the Croatian Parliament.

Amendments to the Constitution are promulgated by the Croatian Parliament.

*b) Amendments to the Constitution by a voters' decision (constitutional referendum)*

The constitutional provisions provide for the possibility of amending the Constitution by a referendum, i.e. by calling a referendum on a proposal for amending the Constitution when so decided by the Croatian Parliament, or the President of the Republic, or when so requested by ten percent of the total electorate.

The Parliament decides on calling a referendum independently, and for this decision, the Constitution does not prescribe any particular majority. For a decision pursuant to Article 82 of the Constitution, a majority of votes is required, provided a majority is present at the session. In the case of a citizens' initiative for amending the Constitution, it is the duty of the Croatian Parliament to call a referendum on amending the Constitution if a minimum of ten percent of all voters in the Republic of Croatia have added their signatures requesting a referendum.

The President of the Republic may call a referendum on a proposal for amending the Constitution but only on the proposal of the Government and when this is countersigned by the Prime Minister. At a referendum for amending the Constitution, decisions are made by the majority of voters taking part in the referendum. Referendum decisions are binding.

The present Constitution of the Republic of Croatia was adopted on 22 December 1990 (Official Gazette no. 56/90) and has so far been amended five times. The first four times it was amended by a decision of the Croatian Parliament and the fifth time by a referendum.

The Constitution does not explicitly provide for unamendable (eternal) provisions. However, in its Notification no. Sus-1/2013 of 14 November 2013, the Constitutional Court for the first time indicated the possibility of changing its position with regard to the fact that there is no eternal provision in the Croatian Constitution and that it does not have jurisdiction for a substantive review of the constitutionality of constitutional amendments (in the concrete case, in the form of a referendum question).[34] The relevant part of the notification reads:

[34] In Article 125, indent 9 of the Constitution, it is laid down that the Constitutional Court "monitors the constitutionality and legality of elections and referenda", and in Article 2.1 of the Constitutional Act on the Constitutional Court it is provided that "the Constitutional Court guarantees compliance with and application of the Constitution of the Republic of Croatia". On these foundations, the Constitutional Court, in its case law, has developed the doctrine of its "general monitoring powers" in protecting the Constitution. Namely, the competence of the Constitutional Court is to monitor the constitutionality and legality of conducting national

> "5. Pursuant to Article 125.9 of the Constitution and Article 2.1 in conjunction with Article 87.2 of the Constitutional Act, the Constitutional Court has the general constitutional task to guarantee respect of the Constitution and to oversee the conformity of a national referendum with the Constitution, right up to the formal conclusion of the referendum procedure.
>
> Accordingly, after the Croatian Parliament had rendered a decision to call a national referendum on the basis of a citizens' constitutional initiative, and it had not prior to that acted on Article 95.1 of the Constitutional Act, the Constitutional Court's general supervisory authority over the conformity with the Constitution of a referendum called in this way does not cease.
>
> However, out of respect for the constitutional role of the Croatian Parliament as the highest legislative and representative body in the state, the Constitutional Court believes that it is only permissible to make use of its general supervisory authorities in that situation as an exception, when it establishes the formal and/or substantive unconstitutionality of a referendum question, or a procedural error of such severity that it threatens to destroy the structural characteristics of the Croatian constitutional state, that is, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution)."

Later, in its decision no. U-VIIR-1159/2015 of 8 April 2015 (where it found that the referendum question on so-called outsourcing was not in compliance with the Constitution), the Constitutional Court more directly stated its principled legal position noting that the Constitution contained provisions expressing the constitutional identity of the Croatian State and that it could exceptionally invoke its general monitoring powers if the structural features of Croatian constitutional state were threatened:

> "33.4. In the constitutional legal order of the Republic of Croatia, as in force today, the Constitutional Court decides whether referendum questions are in compliance with the Constitution…, where the framer of the Constitution has failed to explicitly list the issues that are matters under exclusive jurisdiction of a body of representative democracy. They are derived from the Constitution as a whole.
>
> Moreover, when we speak of amendments to the Constitution, it is the obligation of the Constitutional Court not to allow, based on its general powers of monitoring, any referendum 'when it establishes such formal and/or substantive unconstitutionality of a referendum question, or such a severe procedural error threatening to disrupt the structural features of the Croatian constitutional state, i.e. its constitutional identity, including the

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referenda and to undertake the necessary measures by applying provisions that authorise it to monitor the constitutionality and legality of elections. Within these powers, the Constitutional Court is also competent for the preliminary review of the (substantive) constitutionality of the referendum question when a referendum is sought by a sufficient number of voters, i.e. 10% of the total number of voters in the Republic of Croatia (the so-called citizen-initiated referendum, or a national constitutional referendum). Referendum questions posed by authorised state bodies (the Croatian Parliament and the President of the Republic) are excluded from the review of the substantive constitutionality of the Constitutional Court, regardless of whether this is a legislative or a constitutional referendum. In these cases, the jurisdiction of the Constitutional Court is limited to formal constitutional monitoring.

> highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution)' (see point 5 of the Communication of the Constitutional Court on the Citizens' Constitutional Referendum on the Definition of a Marriage, no. SuS-1/2013 of 14 November 2013, Official Gazette no. 138 of 18 December 2013). In these cases the Constitutional Court in its review, also takes into consideration the Constitution in its entirety."

"In conclusion, it seems that the Constitutional Court, indirectly, through its powers to monitor the constitutionality of referendum questions, has succeeded in arriving at constitutional interpretation, opening the door to the thesis that in the Croatian Constitution there are values that must be considered as an eternal Croatian clause, although this is not explicitly contained in the constitutional text."[35]

The Constitution was originally adopted by a decision of the Croatian Parliament.

After the first free multiparty elections held in 1990 in the Republic of Croatia and the transfer of power to the winning party, the Croatian Parliament, in accordance with the provisions on the Changes to the Constitution, in July 1990 adopted some amendments (amendments 64-71, Official Gazette no. 31/90) to the then valid Constitution of the Socialist Federative Republic of Croatia of 1974 (Official Gazette no. 8/74). On 25 July 1990, the President of the Republic, Franjo Tuđman, submitted a formal initiative to the Parliament to start drafting a new Constitution of the Republic of Croatia. The Parliament accepted this initiative. The work on the preparations for the new constitutional text was carried out on two tracks: the activities of the Parliament of the Republic of Croatia, that is the Parliamentary Commission for Constitutional Issues, and the activities of the Presidency of the Republic of Croatia. A Draft Constitution was prepared by experts, and after a public discussion regarding the Draft, the Croatian Parliament passed the Constitution and promulgated it on 22 December 1990 on the basis of the then valid Constitution of the Republic of Croatia (Official Gazette nos. 8/74 and 31/90).

The amendments to the Constitution included, among others, provisions dealing with values and principles. As for the constitutional principles, the following changes to the Constitution in 2000 are significant:

- Article 3 of the Constitution was amended[36] in such a way that the highest values of the constitutional order were described as the "basis for the interpretation of the Constitution" and one more value was added – "gender equality";
- Paragraph 2 was added to Article 4 of the Constitution[37] laying down that the principle of separation of powers included forms of mutual cooperation and mutual checks of the holders of authority prescribed in the Constitution and in the laws (*checks and balances*); and

[35] Omejec, Jasna, *Veliki njemački ustav i nepromjenjiva ustavna načela u praksi Saveznog ustavnog suda* ["The Great German Constitution and the Inalterable Constitutional Principles in the Case-Law of the Federal Constitutional Court"] (in print) pp. 30-31.

[36] Article 2 of the Amendments to the Constitution of the Republic of Croatia (Official Gazette no. 113/2000).

[37] Article 3.2 of the Amendments to the Constitution of the Republic of Croatia (Official Gazette no. 113/2000).

– the principle of proportionality was explicitly introduced (in the new paragraph 2 of Article 16 of the Constitution).[38]

In connection with the *travaux preparatoires* to amend Article 3 of the Constitution, it must be pointed out that during the preparations for amending the 2000 Constitution, the authors of the Expert Grounds for a Proposal to Amend the Constitution noted the following with regard to values:

> "The whole of the constitutional values listed in Article 3 of the Constitution are the basic framework of the existence of the constitutional law of the Republic of Croatia. Thanks to these constitutional values ('freedom', 'equality', 'a multiparty system', etc.), citizens of the Republic of Croatia showed in the last elections not only a clear commitment to the reconstruction, affirmation and real emancipation of the dignity of citizens who make free decisions but also their commitment to confirm Croatia as a constitutional and democratic state which deserves the best attributes in this domain. In that regard, the constitutional values are the source and driving force of the civil virtues of individuals, and the source of the constitutional and legislative activities of state and other bodies whose primary tasks are the realisation of the Constitution. The constitutional functions of state bodies, such as legislative and executive ones, as well as the functions of other public law entities are nothing but the realisation of the orientations and significance that must be given to constitutional values in all circumstances.
>
> The amendment to Article 3 of the Constitution, laying down that 'constitutional values …. are the basis for interpreting the Constitution and law, aims at strengthening constitutionalism and at facilitating its general implementation. This amendment will also facilitate the constitutional competences of the Constitutional Court of the RC and in particular its right to decide on the 'compliance of laws with the Constitution'."[39]

The amendments to the 2000 Constitution also harmonised the content of Article 29 of the Constitution (the right to a fair trial) with that of Article 6 of the Convention.[40]

The principle of the prohibition of discrimination laid down in Article 14.1 of the Constitution was twice subjected to minor linguistic changes which did not affect its content or meaning.[41]

Some constitutional rights which are elaborations of the values referred to in Article 3 of the Constitution also underwent some linguistic improvements, such as, for example, Article 26 of the Constitution laying down that all citizens of the Republic of Croatia and foreigners are equal before the courts, state bodies and other bodies vested with public authority.[42]

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[38] Article 8 of the Amendments to the Constitution of the Republic of Croatia (Official Gazette no. 113/2000).

[39] The materials of the President's working group developing the Expert Grounds for a Proposal to Amend the Constitution in 2000 (see at http://www.predsjednik.hr/Download/2003/09/10/radna_skupina.doc)

[40] Article 10 of the Amendments to the Constitution of the Republic of Croatia (Official Gazette no.113/2000).

[41] Article 3.1 of the Constitutional Act on the Amendments to the Constitution of the Republic of Croatia (Official Gazette no. 135/1997) and Article 4 of the Amendments to the Constitution of the Republic of Croatia (Official Gazette no. 28/2001).

[42] Article 6 of the Amendments to the Constitution of the Republic of Croatia (Official Gazette no. 28/2001).

4. **Should the 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?**

The position of the Constitutional Court regarding judicial review of the constitutional amendment procedure is given in the answer to the questions under II.6.

Academic scholars and groups actively engaged in protecting democracy, the rule of law and human rights, judging by their published articles (e.g. the quotation given in our answer to the questions under II. 7) are of the opinion that the procedure of amending the Constitution must be subject to the review of the Constitutional Court rather than being entirely left to political actors.

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?**

The Constitution does not provide for the constitutional review of amendments to the Constitution.

6. **Is the constitutional court authorised to check constitutionality of the amendment to the basic law on a substantive basis or is it only confined to review on procedural grounds? In the absence of explicit constitutional power, has the constitutional court ever assessed or interpreted constitutional amendment? What has been the rationale behind the constitutional court's reasoning? Has there been a precedent when the constitutional court elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is the legal effect of a decision of the constitutional court finding a constitutional amendment in conflict with the constitution? Please provide examples from the jurisprudence of the constitutional court.**

The Constitutional Court is not explicitly authorised, either on the basis of the Constitution or the Constitutional Act, to review the constitutionality of amendments to the Constitution whether on substantive or procedural grounds. Lacking such constitutional power, the Constitutional Court has on several occasions decided on its jurisdiction to review the constitutionality of amendments to the Constitution.

"In its ruling no. U-I-207/1990 of 20 July 1990, the Constitutional Court held that it did not have jurisdiction to review the provisions of the Constitution and its amendments 'either in terms of their content or in terms of the manner of their adoption'. However, the Constitutional Court later changed its position and in its ruling no. U-I-1631/2000 of 28 March 2001, it first found that the Constitutional Court did not have jurisdiction to review the constitutional provisions on substantive grounds because there was 'no legal or factual possibility of reviewing the substantive compliance of constitutional provisions with any superior legal act because the Constitution was the fundamental and the highest legal act of the State', but the Court also added: 'however, the procedure of the adoption and changes to the Constitution may be subject to constitutional review in terms of whether the Constitution

is adopted or amended in accordance with the provisions of the Constitution' (...). In its ruling no. U-I-597/1995 of 9 February 2000 (where the subject of review was the CACC), the Constitutional Court expressed its position of not having jurisdiction for the review of constitutionality of the substantive content of an act of law having the force of the Constitution. The same position was also taken in the following rulings: U-I-699/2000 of 14 April 2000, U-I-729/2001 of 6 June 2001, U-I-778/2002 of 10 July 2002, U-I-2860/2009 of 13 April 2010",[43] as well as in ruling no. U-I-453/2015 of 17 February 2015 (Official Gazette no. 27/15),[44] where it dismissed the proposal to institute proceedings for the review of the constitutionality of the Constitutional Act on the Constitutional Court of the Republic of Croatia.

However, "the Constitutional Court in a more recent decision no. U-III-4149/2014 of 24 July 2015 for the first time spoke about constitutional amendments which had already become integral parts of the Constitution. Having a holistic approach to the constitutional text, the Court interpreted the scope of Article 5 of the Changes to the Constitution of 2010 (Official Gazette 76/10). By this amendment to Article 31 of the Constitution (the principle of *nullum crimen, nulla poena sine lege*), a new paragraph 4 was added laying down that criminal offences of war profiteering and those perpetrated in the course of economic transformation and privatisation were not subject to the statute of limitations.

In the above Decision, the Constitutional Court pointed out that the 'constitutional provisions, and in particular the constitutional amendments subsequently incorporated in the constitutional text, must be interpreted in the spirit of the entire legal order enshrined in the Constitution, so that their interpretation stems from the overall relations established in it' (point 80). It is, therefore, 'necessary to precisely determine the scope of Article 5 of the Amendments to the Constitution/2010 (a new paragraph 4 of Article 31 of the Constitution), so that neither the interpretation nor the application of the amendment of 2010 contradicts the highest values of the constitutional order, in this case the constitutional principle of legality in criminal law as an essential element of the rule of law in a democratic society (Article 31.1 in conjunction with Article 3 of the Constitution)' (point 81). In brief, the new paragraph 4 of Article 31 of the Constitution cannot 'be considered alone and separate from paragraph 1 of the same Article because these two paragraphs only when taken together make a normative whole. Neither can it be excluded from the text of the Constitution as a whole' (point 154).

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[43] Krapac, Davor, *Postupak pred Ustavnim sudom Republike Hrvatske*, *Ustrojstvo i proceduralni elementi ustavnog nadzora* ["Proceedings before the Constitutional Court of the Republic of Croatia: Organisation and Procedural Elements of Constitutional Review"], Narodne novine d.d., Zagreb, 2014, p.155.

[44] The relevant part of this ruling reads:

> "4. The Constitutional Court, in its present jurisprudence, takes the position that it does not have jurisdiction to review the substantive provisions of the Constitution or of an Act that has the force of the Constitution. This is so because there is no legal or factual possibility of reviewing the substantive compliance of constitutional provisions with any superior legal act because the Constitution is the fundamental and the highest legal act of the State. Therefore, we cannot speak about the jurisdiction of any decision-making body to decide on the substantive constitutionality of such provisions, including the Constitutional Court. In line with the above, subject to constitutional review may be the procedure of the adoption and amendments to the Constitution or a Constitutional Act only in terms of assessing whether these acts were adopted or amended in accordance with and in the procedure prescribed by the Constitution. These legal positions were taken by the Constitutional Court, for example, in the following rulings: no. U-I-597/1995 *et al* of 9 February 2000, no. U-I-699/2000 of 14 June 2000 and no. U-I-1631/2000 of 28 March 2001 ('Official Gazette' no. 27/01)."

By analysing the disposition 'are not subject to the statute of limitations' of the new paragraph 4 of Article 31 of the Constitution (incorporated in the constitutional text through Article 5 of the Amendments to the Constitution/2010), as well as a later disposition (elaborating this constitutional provision) that prosecution for criminal offences of war profiteering 'may also be brought after the expiry of the time limits specified in the statute of limitations', the Constitutional Court, in its decision no. U-III-4149/2014 held:

> '117. (...) these dispositions (both constitutional and legislative) must be interpreted and applied in such a way that they are wholly harmonised with the fundamental values enshrined in the national Constitution, so that their final outcome does not lead to unconstitutional consequences.
>
> This means that the context and the time of the adoption of the new paragraph 4 of Article 31 of the Constitution must be taken into consideration and that the starting point in the interpretation and application of the constitutional disposition 'are not subject to the statute of limitations', together with the later legislative disposition stating that prosecution 'may also be brought after the expiry of the time limits specified in the statute of limitations' (Article 1 of the Act on the Exemption from the Statute of Limitations of Crimes of War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatisation) must be a rule: the rule of law requires the State not to interfere retroactively in cases where the application of the statute of limitations for the prosecution has already begun. Here we speak of the guaranteeing function of criminal legislation which is an inherent part of the constitutional principle of legality (Article 31.1 of the Constitution) and is incorporated as such in the very foundation of the Croatian constitutional order.
>
> Otherwise, this would be an unacceptable encroachment by the State into the objective sphere of the legal foreseeability of prosecution, adjudication and penalisation, and in concrete circumstances also into the constitutional guarantee of a fair trial against individuals accused of criminal offences referred to in the new paragraph 4 of Article 31 of the Constitution.'

In this decision, the Constitutional Court succeeded in interpreting the constitutional amendment of 2010 (Article 5 of the Amendments to the Constitution/2010) in a way that does not threaten the structural features of the Croatian constitutional State or its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (in this case: the rule of law). It is not known what the Constitutional Court would have done had it established the opposite, i.e. that this constitutional amendment undermined the structural features of the Croatian constitutional State and it could not be kept within the framework of the Constitution by any method of constitutional interpretation."[45]

**7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of the constitutional court's power to check amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How is the judicial review observed in this regard? Would the expansion or recognition of the constitutional court's authority encourage the**

[45] Omejec, Jasna, *Veliki njemački ustav i nepromjenjiva ustavna načela u praksi Saveznog ustavnog suda* ["The Great German Constitution and the Inalterable Constitutional Principles in the Case-Law of the Federal Constitutional Court"] (in print) pp. 31 - 32.

**realisation of constitutional ends or threaten its viability? Please elaborate on existing discussion in your jurisdiction.**

Yes, there is a tendency of enhancing the authority of the Constitutional Court in terms of its jurisdiction to review amendments to the Constitution. Beside the evolution of the positions of the Constitutional Court regarding the review of amendments, contained in the answer to the questions under II. 6, academic scholars and institutions that are active in protecting democracy, the rule of law and human rights also openly advocate the expansion of the Constitutional Court's jurisdiction and its authority to review substantive amendments, as well. In the opinion of some authors, this would help achieve constitutional goals and protect the constitutional identity of the Republic of Croatia. Within the context of contemporary constitutional doctrine and when looking at the examples of other countries where constitutional courts already perform such review, academic scholars in Croatia openly call for such developments in the work of the Croatian Constitutional Court. Biljana Kostadinov, DSc, Professor of Law at the Faculty of Law in Zagreb, is one of them:

> "We believe that the constitutional identity of the Republic of Croatia, the Croatian Constitution's own structural principles, is not behind or above but *within the Constitution of the Republic of Croatia*. (...)
>
> Constitutional acceptance of the obligation to respect human dignity as a fundamental constitutional principle and the highest value of the Constitution, together with the inviolability of the principle of the rule of law and a free democratic order (Article 17.3), represents the reasons why our Constitution belongs to the community of constitutions of free states of Europe and the world. In the Republic of Croatia, Article 17.3 of the Croatian Constitution is the foundation for the interpretation of the Constitution, as well as for deciding on the material constitutionality of its amendments. The Croatian Constitutional Court may perform a review of the material constitutionality of constitutional amendments by invoking Article 17.3 of the Constitution and by interpreting its jurisdiction according to the Constitution and the Constitutional Act on the Constitutional Court in the same manner exercised by the Federal Constitutional Court of Germany in the example described above.
>
> When our Constitutional Court will make this step towards a review of the material constitutionality of constitutional amendments and at whose request (on the initiative of constitutional judges themselves or at the request of the Croatian Parliament) remains a contemporary Croatian enigma.
>
> We point out that European constitutional courts (e.g. those of Italy, Germany, Austria and the Czech Republic) review the material constitutionality of constitutional amendments, although such competence is not explicitly determined in the constitutions of those countries.
>
> (...)
>
> We hold that the purpose of the 'material core of the constitution', to which the 'command of immutability' is linked as the *legal and political guarantor of the Constitution,* hinders tactical changes to the Constitution for the purpose of the daily politics of the current parliamentary majority and it represents the constitutional identity whose protection in constitutional democracy – unlike traditionally understood democracy – is entrusted to the Constitutional Court itself. The constitutional identity of the Republic of Croatia has been established in the Constitution of the Republic of Croatia and it does not depend on the understanding and

perception of the Constitution by the Croatian Parliament when it passes constitutional amendments.

We cannot invoke the constitutional tradition of Croatia in the elimination of such review since modern constitutional doctrine claims – as we have shown in the introduction to this paper – that the review of the constitutionality of constitutional amendments is a result of the contemporary development of various political systems: democracy understood as the protection of fundamental rights, whose natural protector is the constitutional judiciary.

The power of the authentic interpretation of a constitution and constitutional identity enable the imposing of a political view on the development of the Constitution and on politics as a whole."[46]

[46] Kostadinov, Biljana, *Ustavni identitet* ["Constitutional Identity"], Round Table organised on 16 December 2010 in the Academy Palace of the Croatian Academy of Arts and Sciences in Zagreb on the occasion of the 20th Anniversary of the Constitution of the Republic of Croatia, the Croatian Academy of Arts and Sciences, Scientific Council for State Administration, Judiciary and the Rule of Law, Zagreb, 2011, pp. 320 - 322.