



**Summary / Synthèse / Kurzfassung / резюме**

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

(Batumi, 29 June to 1 July 2017)

Report of the Constitutional Court of the Republic of Croatia

### SUMMARY

#### I. THE ROLE OF THE CONSTITUTIONAL COURT IN DEFINING AND APPLYING EXPLICIT/IMPLICIT CONSTITUTIONAL PRINCIPLES

Article 3 of the Constitution of the Republic of Croatia (hereinafter: the Constitution) reads: "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." These values are given a regulative role *sui generis*, thus making it possible for the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Court) to interpret the constitutional provisions progressively and dynamically in the light of these "living" and conceptually and methodologically complex value concepts.

The Constitutional Court has taken an active approach in determining and formulating constitutional principles. At the same time the Court has developed its interpretation capacity towards methodological activism and has gradually accepted specific principles of the interpretation of the Constitution (e.g. the principle of the teleological interpretation, the principle of the evolving and dynamic interpretation, and the principle of autonomous interpretation of constitutional concepts). The Court has found the basis for such action in the jurisprudence of the European Court of Human Rights. Academic scholars have given their affirmative opinions regarding the necessity of such approach.

Under the direct or indirect impact of the Constitutional Court, the Croatian Parliament amended Article 4 of the Constitution regarding the separation of powers, Article 16 regarding the principle of proportionality<sup>1</sup>, Article 29 regarding the right to a fair trial, as well as the Constitutional Act on the Constitutional Court of the Republic of Croatia in order to extend the competence of the Constitutional Court with regard to the reasonable duration of court proceedings<sup>2</sup>.

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<sup>1</sup> For example, decision no. U-I-1156/1999 of 26 January 2000 on repealing some provisions of the 1999 Act on the Restriction of the Use of Tobacco Products, the Constitutional Court 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. Afterwards, the principle of proportionality was introduced in the Constitution by Amendments to the Constitution in 2000.

<sup>2</sup> Article 63 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette nos. 99/99, 29/02 and 49/02 - consolidated text).

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 in elaborating rights and freedoms in the legislation it passes, and to guide the judges of ordinary and specialised courts in resolving individual cases (pursuant to Article 115 paragraph 3 of the Constitution, judges adjudicate on the basis of the Constitution, laws, treaties and other valid sources of law).

In its case law, the Constitutional Court invokes constitutional principles to the extent to which the Court itself, as an independent body, finds it necessary considering the particular circumstances of each individual case. The Court in some cases interpreted principles separately, while in other cases it 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. 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. The highest values of the constitutional order do not constitute a direct and independent constitutional basis for providing protection in constitutional complaint proceedings (concrete review), but they must be taken into account in relation to other guarantees of rights and freedoms.

The Constitutional Court decisions (including the ones grounded only on the principles) create obligatory rules of conduct in a social community, by enabling the implementation of values enshrined in the Constitution. 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 (e.g. the principle of democracy and the principles of a social state).

## **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**

The position of the Constitutional Court, taken in accordance with Article 3 of the Constitution, is that each individual constitutional provision must be interpreted in accordance with the highest values of the constitutional order. 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 in its entirety.

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.

Firstly, a monistic approach to international treaties is accepted in the Croatian legal system. Article 134 of the Constitution prescribes that international treaties have greater legal force than acts passed by the 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 international principles that are often contained in treaties, as well as those developed in the case law of international bodies (like the European Court of Human Rights) which are competent for the interpretation and implementation of a particular treaty.

Secondly, the European Convention on Human Rights in Croatia has a quasi-constitutional position recognised by the Constitutional Court through its case law.

Thirdly, the application of the European Union law is laid down in Article 141.c of the Constitution. Article 141.c paragraph 2 of the Constitution provides that all the legal acts and decisions accepted by the Republic of Croatia in the EU institutions shall be applied in accordance with the EU *acquis communautaire*. It is considered in legal theory that Article 141.c paragraph 2 of the Constitution represents the acceptance by constitutional law of the fundamental principles on which EU law is based. The Constitutional Court has had no opportunity in its jurisprudence so far to interpret the provisions of Article 141.c of the Constitution. However, in its decision no. U-VIIR-1159/2015 of 8 April 2015 the Constitutional Court explicitly held that the Constitution is by its legal force above EU law.

The Constitution does not determine the mutual relations or the hierarchy of constitutional principles. 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, paragraph 2) constitute an elaboration of the value of equality referred to in Article 3 of the Constitution. 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.

The Croatian Constitution can be amended by two possible procedures: the first is amending the Constitution on the basis of a decision of the regular legislative representative body, i.e. the Croatian Parliament who renders a final decision on amending the Constitution by a two-thirds majority of all its MPs; the second is to call a facultative constitutional 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. 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 Constitution does not provide for unamendable (eternal) provisions. Nevertheless, 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<sup>3</sup>.

The Constitutional Court is not authorised, either on the basis of the Constitution or the Constitutional Act on the Constitutional Court of the Republic of Croatia, 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. The Constitutional Court held that it does not have jurisdiction to review the constitutional provisions on substantive grounds, but it has jurisdiction to review whether the Constitution is adopted or amended in accordance with the provisions of the Constitution<sup>4</sup>.

In its recent case law, the Constitutional Court has indicated the possibility of changing its position of not having jurisdiction for the review of constitutionality of the substantive content of an act having the force of the Constitution<sup>5</sup>. Moreover, the Constitutional Court in a more recent decision<sup>6</sup> 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 Amendments to the 2010 Constitution. In the decision, the Constitutional Court succeeded in interpreting the constitutional amendment of 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 (in this case: the rule of law).

In conclusion, 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, academic scholars openly advocate the expansion of the Constitutional Court's jurisdiction and its authority to review substantive amendments as well.

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<sup>3</sup> 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. Afterwards, 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.

<sup>4</sup> Ruling no. U-I-1631/2000 of 28 March 2001. The Courts position of not having jurisdiction for the review of constitutionality of the substantive content of an act having the force of the Constitution is expressed in its rulings nos.: U-I-597/1995 of 9 February 2000, U-I-2860/2009 of 13 April 2010 *et al.*

<sup>5</sup> See the case law referred to in footnote 3.

<sup>6</sup> Decision no. U-III-4149/2014 of 24 July 2015.