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The Constitutional Court of the Republic of Slovenia Ustavno Sodišče Republike Slovenije

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Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles

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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 the Republic of Slovenia, the Constitutional Court of the Republic of Slovenia performs the review of the constitutionality and legality of laws and regulations.In performing this review, the Constitutional Court often refers to constitutional principles, where the "constitutional principles" are understood as both the principles that are explicitly stated in the Constitution, as well as principles that were developed by the Constitutional Court through its case law and are implicitly contained in particular provisions of the Constitution. Specific principles will be discussed in greater detail hereunder. It should however be noted at the outset that when discussing legal principles it is often difficult to distinguish between legal rules and legal principles. After all, the complete catalogue of

human rights and fundamental freedoms as guaranteed by the Slovene Constitution can be understood as a set of legal principles that limit the power of the state in regulating the relations in society.

The Constitutional Court frequently refers to constitutional principles and applies them regularly, either directly as the major premise– the criterion of review, or as value-oriented criteria for the interpretation of other provisions of the Constitution, especially those guaranteeing human rights and fundamental freedoms. In the process of reviewing the constitutionality and legality of regulations, constitutional principles can thus constitute an independent basis for deciding on the conformity of regulations with the Constitution. In the vast majority of its decisions on the merits in proceedings for the abstract review of constitutionality, the Constitutional Court refers to at least one constitutional principle, as these principles constitute the value-orientedstarting point for all constitutional review proceedings.

The Constitutional Court has also highlightedthe instrumental nature of several constitutional principles. In this sense, it emphasised in several decisions that the constitutional principles mainly serve to protect the rights of individuals against inadmissible infringements by the state. Thus it has, for example, repeatedly emphasised that the essence of the principle of the separation of powers is in its basic function of protecting individuals against the state (see, for example, Decision No. U-I-158/94, dated 9 March 1995;[1] Decision No. U-I-224/96, dated 22 May 1997, and Decision No. U-I-60/06, U-I-214/06, U-I-228/06, dated 7 December 2006[2]) and that the principle of the separation of powers is the principle intended to prevent the abuse of authority which always occurs at the expense of the people or at the expense of the rights of an individual (see above mentioned Decision No. U-I-60/06, U-I-214/06, U-I-228/06). Similarly, the Constitutional Court pointed out that interpretations of the principle of the

[1] Codices SLO-1995-1-005.
[2]Codices SLO-2009-3-006.

separation of the state and religious communities must reflect its purpose: "The aim of this principle is to ensure true freedom of conscience (and, in a broader sense, pluralism as an essential component of a democratic society), and the equality of individuals and religious communities" (Decision No. U-I-92/07, dated 15 April 2010).

While constitutional principles can constitute an independent basis when the Constitutional Court reviewsthe constitutionality of regulations, constitutional principles cannot be independently invoked in constitutional complaint proceedings; namely, according to the established case law of the Constitutional Court, constitutional principles do not regulate human rights directly (e.g. a violation of the principles of a state governed by the rule of law cannot be invoked as an independent violation in a constitutional complaint;*cf*. Decision No. Up-2597/07, dated 10 April 2007). A constitutional complaint can only invoke violations of human rights and fundamental freedoms.

With regard to "specific legal sources within the basic law" applied by the Constitutional Court, international law and European Union law can be mentioned. In accordance with Article 8 of the Constitution, laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. In accordance with the third paragraph of Article 3a of the Constitution, legal acts and decisions of the European Union are applied in Slovenia in accordance with the legal regulation of the European Union.

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 of the Republic of Slovenia, adopted on 23 December 1991, does not distinguish between constitutional principles that are organic and regular principles.

The Constitution contains a number of provisions explicitly consecrating constitutional principles, although it does not necessarily define them by using the term principle. For example, Article 2 of the Constitution provides that Slovenia is a state governed by the rule of law and a social state, from which the Constitutional Court has developed a series of principles of a state governed by the rule of law and the principle of a social state. Some of the fundamental principles are set out in Chapter I of the Constitution, entitled "General Provisions". Although these principles constitute a fundamental value-oriented starting point of the constitutional order, they are not designated as organic and are not formally superior to other provisions of the Constitution, irrespective whether they entail principles or rules. Some other principles are expressly determined in other chapters of the Constitution, however substantively, these are mostly derived from the more general principles contained in the introductory provisions of the Constitution.

The principles which are expressly determined in Chapter I of the Constitution (General Provisions) and that the Constitutional Court applies when deciding on the consistency of laws and regulations with the Constitution are as follows:

- principle of democracy (Article 1 of the Constitution);
- principle of a state governed by the rule of law (Article 2 of the Constitution);
- principle of a social state (Article 2 of the Constitution);
- principle of popular sovereignty (the first paragraph of Article 3 of the Constitution);
- principle of the separation of powers (the second paragraph of Article 3 of the Constitution);
- principle of a unitary state (Article 4 of the Constitution);
- principle of the protection of human rights (Article 5 of the Constitution);
- principle of protection of national minorities (Article 5 of the Constitution);
- principle of the separation of the state and religious communities (Article 7 of the Constitution);
- principle of ensuring local self-government (Article 9 of the Constitution).

Certain specific principles are individually and explicitly determined in other chapters of the Constitution, whereby the substance of these principles constitutes an implementation (concretisation) of the general principles of a state governed by the rule of law and the separation of powers, such as for instance:

- principle of legality (legality of the work of the state administration) (the second paragraph of Article 120 of the Constitution);
- principle of independence of judges (Article 125 of the Constitution);
- principle of constitutionality and legality (Article 153 of the Constitution);
- prohibition of the retroactive effect of legal acts (Article 155 of the Constitution).

In the light of the principle of the protection of human rights and fundamental freedoms, it should be noted that this principle is concretised throughout the entire Chapters IIand III of the Constitution, containing a catalogue of individual human rights and freedoms (Articles 14 through 79 of the Constitution).

With regard to human rights,the following explicitly determined principles that are often applied by the Constitutional Court must be noted:

- general principle of equality (the second paragraph of Article 14 of the Constitution);
- prohibition of discrimination (the first paragraph of Article 14 of the Constitution);
- principle of the highest protection of human rights (the fifth paragraph of Article 15 of the Constitution).

As has already been stated in the answer to question No.I/1, in the case law of the Slovene Constitutional Court the use of these principles is extensive: the Constitutional Court refers to these principles in the majority of its decisions on the merits in the proceedings for review of constitutionality of regulations.

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?

In addition to the principles explicitly determined in the Constitution,as the basis for its decisions the Constitutional Court also draws on the constitutional principles implicitly contained in the provisions of the Constitution. Such implicit constitutional principlesresult from the case law of the Constitutional Court, as they have been developed from certain explicit constitutional principles, as well as from other provisions of the Constitution. A good example of such endeavour of the Constitutional Court are the different (sub-)principles of a state governed by the rule of law. The principle of a state governed by the rule of law is explicitly determined, albeit in very general terms, in Article 2 of the Constitution, which only states that Slovenia is a state governed by the rule of law. On the basis of this provision, the Constitutional Court identified and developed a range of different aspects of the principle of a state governed by the rule of law which in the framework of its case lawfunction as independent constitutional principles, even though all of them find their constitutional basis (origin) in Article 2 of the Constitution. Therefore, case law and academic scholars no longerrefer to the principle of a state governed by the rule of law(in singular) anymore, but to the principles of a state governed by the rule of law (in plural). The principles that the Constitutional Court has inferred from the general principle of a state governed by the rule of law, are*inter alia*:

- principle of clarity and precision of regulations;
- principle of trust in the law;[3]

[3]*Cf.* for instance Decisions No. U-I-123/92, dated 18 November 1993 (Codices SLO-1993-X-048), and No. U-I-60/06, dated 7 December 2006 (Codices SLO-2009-3-006).

- principle that the law must adapt to social relations;[4]
- general principle of proportionality.

The principle of clarity and precision of regulations requires that rules be clear and precise, so that their content and purpose can be determined using conventional methods of interpretation. Suchis true for all regulations, it is however of particular importance regarding statutory provisions containing legal norms that establish rights or obligations of individuals. The requirement of clarity and precision of regulations does not entail that rules should be such that they require no interpretation. The application of rules namely always entails their interpretation. In terms of clarity and precision,a rule becomes problematic when the clear content of the regulation cannot be inferred by using the methods of interpretation.[5]

The implicitly determined constitutional principle of clarity and precision of regulations is further concretised by theexplicitly definedconstitutional requirement in Article 28 of the Constitution that criminal offences must be determined in a clear and precise manner by law before the act at issue was committed (*lex certa*).

There are certain particularities that characterise the principle of proportionality that the Constitutional Court has also establishedas one of the principles of a state governed by the rule of law. The substance of the principle of proportionality is the prohibition of

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[4]*Cf.* with Decision No. U-I-69/03, dated 20 October 2005, in which the Constitutional Court stated that the legislature has not only the right but also a duty to amend the statutory regulation if societal changes require such. The principle that the law must adapt to social relations is one of the principles of a state governed by the rule of law (Article 2 of the Constitution). The Constitutional Court has repeatedly explained this position, see e.g. Decision No. U-I-146/12, dated 14 November 2013 (Codices SLO-2014-3-012), wherein it stated that the legislature must respond to needs in all fields of social life by adopting appropriate statutory regulation, which is even truer if such needs concern the foundations of the functioning of the state or its ability to efficiently ensure human rights and fundamental freedoms (the same position has also been adopted earlier in Decision No. U-I-186/12, dated 14 March 2013).

[5] See Decisions No. U-I-32/00, dated 10 July 2003, No. U-I-131/04, dated 21 April 2005, and No. U-I-24/07, dated 4 October 2007. *Cf.* also Decision No. U-I-155/11, dated 18 December 2013(Codices SLO-2014-3-013).

excessive measures when regulating human rights and fundamental freedoms. A particularity of the principle of proportionality is that this principle does not act as a stand-alone basis (the criterion or major premise) of Constitutional Court decisions, but is used as a test for determining whether a certain statutory restriction of a human right is still proportionate and therefore admissible or whether the legislature adopted an excessive (disproportionate) measure and the interference with the right is therefore unconstitutional. The principle of proportionality consequently has no independent role, but is always appliedtogether with individual human rights and fundamental freedoms.

The Constitutional Court first applied the principle of proportionality in its Decision No. U-I-47/94, dated 19 January 1995,[6]and adopted its final version of the proportionality test in Decision No. U-I-18/02, dated 24 October 2003.[7] In thisDecision, the Constitutional Court reiterated its already well-established position that a human right or fundamental freedom can be restricted only if the legislature pursued a constitutionally admissible aim and if the restriction is consistent with the principle of proportionality, which prohibits excessive state interferences.

A review of whether an interference is disproportionate is carried out by the Constitutional Court on the basis of the so-called strict test of proportionality. This test comprises a review of three aspects of the interference:
(1) whether the interference is actually necessary (needed),
(2) whether the reviewed interference is appropriate for achieving the aim pursued,
(3) whether the weight of the consequences of the reviewed interference for the affected human right is proportional to the value of the aim pursued or to the benefits which will arise due to the interference (the principle of proportionality in the narrow sense). Only if an interference passes all three aspects of the test, is it constitutionally admissible.

[6] Codices SLO-1995-1-001.
[7]*Cf.* also Decision No. U-I-218/07, dated 26 March 2009, Codices SLO-2009-2-004.

Otherwise, the Constitutional Court abrogates the statutory provision as unconstitutional or establishes its unconstitutionality.

The manner of application of the proportionality test has been developed by the Constitutional Court through its case law; this development has certainly been influenced by foreign case law, in particular thecase law of the German Federal Constitutional Court and the standards that have been shaped by the European Court of Human Rights (hereinafter referred to as the ECtHR). A similar view of the principle of proportionality, as put forward by the Constitutional Court, also derives from the case law of the ECtHR, which considers this principle as one of the fundamental principles of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR), even though it is not explicitly determined in the provisions of the ECHRor its Protocols.

The principle of protection of human dignity must be singled out as probably the most important implicitly determined constitutional principle. The Constitutional Court developedthis principle from the principle of democracywhich is explicitlydetermined in Article 1 of the Constitution.[8]

The issue of the relationship between the EU law and constitutional principles, as well as the position of international law in the Republic of Slovenia will be discussed in the reply to question No. II/1.

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 the combination thereof is applied by the constitutional court in defining and applying those principles? How much importance falls upon travaux preparatoires*of the*

[8] Decision No. U-I-109/10, dated 26 September 2011, Codices SLO-2012-1-001.

constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognized legal principles gain relevance in this process?

The answers to previous questions are also relevant for this answer. The role of the Constitutional Court in the identification, definition, and application of constitutional principles can bedescribedas crucial; however, the Constitutional Court certainly did not act in a vacuum. When performing constitutional review, the Constitutional Court cannot avoid the method of linguistic interpretation, which is however less suitable for interpreting legal principles due to their loose wording. Therefore, the Constitutional Court commonly usesthe arguments provided by logical, systematic, historical, intentional, or teleological methods of interpretation. It is of particular importance that the Constitutional Court understands and interprets the Constitution in a dynamic manner, sometimes even in a manner that can be described as activist.

The adopted final text of the Slovene Constitution was heavily influenced by several ideas and drafts.The Constitutional Court, however, does not often refer to historical sources; for example, it cited selected documents from the period of the drafting of the Slovene Constitution only in 9 cases (*cf*. Opinion No. Rm-1/02, dated 19 November 2003,[9] and above mentioned Decision No. U-I-92/07 in which it relied on the position of the constitutionframers on the implementation of the principle of the separation of the state and religious communities in the explanatory memorandum for the Proposal of the Constitution).

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[9]In this Opinion, the Constitutional Court quoted the explanation put forward for the proposed wording of Article 7 that does not differ from its present wording: this provision "introduces the principle of a secular state. Due to the point of view according to which church(es) and various other religious communities should be treated equally, the first paragraph is formulated in a more general sense, while in addition to equality of religious communities the second paragraph guarantees free pursuit of their activities."

It must also be noted that the Preamble to the Constitution expressly states that the Constitution proceeds from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia. The Preamble as well as the Basic Constitutional Charter also serve as a source for the interpretation of constitutional principles in the case law of the Constitutional Court. In the above mentioned Decision No. U-I-92/07, the Constitutional Court for instance stated that the "Preamble to the Constitution emphasises that human rights and fundamental freedoms are the fundamental premise that were relied on by the constitution framers in adopting the Constitution. This must be taken into account when interpreting the normative part of the Constitution."

The Constitutional Court can perform the review of constitutionality of statutory provisions also on the basis of principles of international law. In its case law, the Constitutional Court has primarily defined the latter as the generally accepted principles of international law recognised by civilised nations (see e.g. Decision No. U-I-266/04, dated 11 September 2006). Nevertheless, they are not often applied as a criterion of review in the case law of the Constitutional Court. Such was, for example, the case in Decision No. U-I-249/96, dated 12 March 1998,[10]in which the Constitutional Court declared that the Yugoslav law adopted in 1945 was not in accordance with the general principles of law recognised by civilised nations at the time of its entry into force to the extent that it enabled individual persons to be proclaimed war criminals or national enemies on its basis without a final criminal court judgment. Another example of a reference to principles of international law is Opinion of the Constitutional Court No. Rm-1/09, dated 18 March 2010, regarding the Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia.[11] In this Opinion, the Constitutional Court stated that in the part in which Section II of the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia

[10]Codices SLO-1998-1-004.
[11] Codices SLO-2010-3-006.

protects the state borders between the Republic of Slovenia and the Republic of Croatia it must be interpreted within the meaning of the international law principles of *uti possidetis iuris* (on land) and *uti possidetis de facto* (at sea).The Universal Declaration of Human Rights must also be mentioned, which in the view of the Constitutional Court is in force in the Republic of Slovenia as customary international law (see Order No. Up-97/02, dated 12 March 2004).

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

In the Slovene legal order, constitutional principles have normative character. Their source (origin) and the basis for their existence is always the Constitution, even if they are not explicitly determined therein. As explained above, in the reasoning of its decisions the Constitutional Court identified, defined, and applied also implicit constitutional principles. The Constitutional Court applies the implicit constitutional principles equally as the explicitly determined constitutional provisions. There are thus no differences between explicit and implicit constitutional principles. They therefore form a constitutional category that represents a criterion, a value orientation of the case law of the Constitutional Court. When deciding on the conformity of laws and other regulations with the Constitution, the Constitutional Court regularly (as a general rule) carries out thisreview also on the basis of constitutional principles (explicitly or implicitly determined

in the Constitution). In the framework of the case law of the Constitutional Court, theconstitutional principles are considered an important element in the genesis of the existing constitutional framework.

As already explained, constitutional principles can serve as an independent basis for the review of the constitutionality of regulations. It was already noted that the Constitutional Court has frequently highlighted their instrumental nature in the sense that the purpose of some of the constitutional principles (e.g. principle of the separation of powers) is to protect the rights of individuals against inadmissible interferences by the state. In addition, these principles can be used as interpretative guidelines when provisions regulating human rights are interpreted. In such cases,the Constitutional Court applies them as an additional criterion when deciding. An example of such review is Decision No. U-I-92/07in which the Constitutional Court provided an explanation of the relationship between the right (freedom) of religion (Article 41 of the Constitution) and the separation of the state and religious communities (Article 7 of the Constitution). In explaining its methodological approach in deciding on the case at issue, the Constitutional Court proceeded fromthe close interlacing and substantive interdependence of Articles 41 and 7 of the Constitution. The Constitutional Court pointed out that in cases where a statutory provision is contested on the basis of aspects that relate at the same time to the substance of one of the constitutional principles of Article 7 of the Constitution (principle of the separation of the state and religious communities) and of the human right determined in Article 41 (freedom of conscience), a review of consistency with the human right is to be performed first of all. Firstly, it must therefore be established which rights stem from freedom of conscience, what the corresponding state duties are, and whether the statutory measure interferes with them. If the statutory measure passes the review of constitutionality in light of Article 41 of the Constitution, a review must then be performed concerning conformity with the first and second paragraphs of Article 7 of the Constitution, i.e. with those of its aspects that do not comprise the core substance of this

human right.[12]It is crucial that the right to freedom of conscience takes precedence over constitutional principles defining the status of religious communities in relation to the state.

In the Slovene legal order, constitutional principles always stem from the Constitution (either explicitly or implicitly), therefore it is not possible that the Constitutional Court establishesan unconstitutionality without connecting it to a violation of a specific constitutional provision.

It must also be noted that in the Slovene legal order there exists a constitutional requirement that judicial acts (court decisions) implement and respect constitutional principles, as guaranteed by the Constitution and developed by the Constitutional Court. In accordance with Article 125 of the Constitution, judges are bound by the Constitution (and laws). As the content of the individual principles as well as their direct applicability in particular cases vary significantly, ordinary courts will refer to certain constitutional principles more often and easily (e.g. the principle of legality in criminal proceedings determined in the first paragraph of Article 28 of the Constitution) than to others (e.g. the principle of the separation of powers determined in the second paragraph of Article 3 of the Constitution). In judicial proceedings, the courts mustof course still consider whether the statutory provisions are consistent with the Constitution also from the viewpoint of constitutional principles. If they deem a law which they should apply in the proceedings at issue to be unconstitutional as it is contrary to a particular constitutional principle, they must interpret the statutory provision in a constitutionally consistent manner; if such is not possible, the courts must follow Article 156 of the Constitution. Such requires that they stay their proceedings and initiate proceedings for a review of constitutionality before the Constitutional Court.

[12] The Constitutional Court referred primarily to the requirements of the neutrality of the state and equality of religious communities.

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 such principle(s)? Please, provide examples from the jurisprudence of the constitutional court.

Considering the fact that the Constitutional Court applies all of the mentioned constitutional principles, it is difficult to assess which principles it applies most frequently. With regard to human rights, it most certainly consistently applies the general principle of equality, which guarantees equality before the law and in the law. The Constitutional Court also frequently applies the principle of clarity and precision of regulations. Furthermore, almost every review of statutory regulations interfering with individual human rights and freedoms applies the principle of proportionality. As mentioned above, the purpose of this principle is to be applied by the Constitutional Court to assess whether a statutory measure interfering with constitutional rights is constitutionally admissible. The contribution of the Constitutional Court in the development and elaboration of the substance of these principles can be described as important.

The case law of the Constitutional Court has crucially influenced the development of all constitutional principles. We can refer to the example of the principle of legality of the work of the state administration that the Constitutional Court has explained in great detail already in Decision No. U-I-73/94, dated 25 May 1995. In establishing this principle, the Constitutional Court also referred to several other constitutional principles: the principle of democracy, the principle of the separation of powers, the principles of a state governed by the rule of law. When reviewing the provisions of a regulation (rules issued by a ministry), the Constitutional Court stated that the principle of legality is essential for the relationship between the legislative and executive branches of power in parliamentary democracies. The principle of legality defines the relationship between the legislative and executive branches of power by means of the obligation of the executive

branch to comply with laws from a substantive point of view. Laws have to constitute the substantive basis for implementing regulations and individual acts issued by the executive branch of power, i.e. the Government and administrative authorities (whereby express statutory authorisation is not required).Such activity also has to remain in its entirety within the statutory framework as regards its content. The second paragraph of Article 120 of the Constitution determines that administrative authorities perform their work independently within the framework and on the basis of the Constitution and laws. With regard to such, the Constitutional Court emphasised that the principle of legality is linked with other constitutional principles and relies thereon. The principle of democracy (Article 1 of the Constitution) contains *inter alia* the requirement that the most important decisions, in particular those relating to rights and obligations of citizens, are adopted by directly elected members of the Parliament. As a result, the executive branch of power (i.e. the Government and administrative authorities) can only operate legally when working on the substantive basis and within the framework of laws, and not on the basis of its own regulations or even on the basis of its own function within the system of the separation of powers. In this respect, the priority of laws as the priority of the legislature also plays an important role in delimiting the competences of the legislative and executive branches of power in accordance with the principle of the separation of powers (Article 3 of the Constitution). The principle of a state governed by the rule of law (Article 2 of the Constitution) requires that legal relations between the State and its citizens be regulated by laws. These do not only determine the framework and basis of the work of the executive power in accordance with administrative law, but its work also becomes known, transparent, and foreseeable for the citizens, thus increasing their legal certainty. The principle of the protection of human rights and fundamental freedoms (the first paragraph of Article 5 of the Constitution) requires that, in accordance with the principles of democracy and a state governed by the rule of law, these may only be limited by the legislature in the instances and to the extent allowed by the Constitution, and not by the executive power. At the same time, this principle is also important for the effective protection of the rights and legal interests of individuals, including the effective control of

the constitutionality and legality of individual administrative acts.In accordance with the Constitution (Article 120), administrative authorities are bound by the framework determined by the Constitution and laws when performing their work, including the issuance of regulations, and may not issue regulations that do not have a substantive basis in law. The principle of the separation of powers also excludes the possibility that administrative authorities could modify or independently regulate statutory subject matter.

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 than the national constitutional principles? If yes, how such higher international provisions are 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?

As we have already explained, constitutional principles do not enjoy supremacy in relation to other provisions of the Constitution. The positions of Slovene legal scholars are not significantly different.

The position and effects of international law in the Slovene legal order are regulated by a number of provisions of the Constitution. Article 8 of the Constitution determines that laws and other regulations must comply with generally accepted principles of

international law and with treaties that are binding on Slovenia. Article 153 of the Constitution further elaborates that laws must be in conformity with generally accepted principles of international law and with treaties ratified by the National Assembly of the Republic of Slovenia (whereas regulations and other general legal acts must also be in conformity with other ratified treaties, i.e. those that were, in accordance with the law, ratified by the Government of the Republic of Slovenia). In the contemporary international community, treaties form an ever increasing part of international law. From the perspective of the hierarchy of regulations, it follows from the mentioned provisions of the Constitution that in the Slovene (constitutional) legal order treaties are inferior to the Constitution, but superior to laws, as laws have to be in conformity with them. In addition, it is important to stress that Article 8 of the Constitution clearly determines that ratified and published treaties shall be applied directly. Such entails that provisions of treaties – provided they are, by their nature, self-executing – produce direct legal effects for individuals and they can rely directly on such provisions when invoking their rights. The Constitutional Court, for example, held that the provision of point 3 of Article 9 of the United Nation's Convention on the Rights of the Child is a self-executing provision and applied it in the case at issue.[13]

Among treaties, the ECHR should be specifically mentioned, as it plays an important role in the work of the Constitutional Court, especially when deciding on constitutional complaints, through which individuals invoke violations of human rights and fundamental freedoms in concrete proceedings.[14] By ratifying the ECHR, the Republic of Slovenia adopted the obligation under international law to respect the standards of protection of human rights and fundamental freedoms guaranteed by the ECHR. From the viewpoint of national constitutional law it is undisputable that the ECHR is directly applicable

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[13] See Constitutional Court Decision No. U-I-312/00, dated 23 April 2003.

[14] One of the conditions for lodging a constitutional complaint is the prior exhaustion of judicial protection and all legal remedies before regular courts. Such entails that, as a general rule, constitutional complaints are lodged against decisions of the Supreme Court. An exception to this rule are proceedings in which procedural regulations do not envisage the intervention of the Supreme Court.

(Article 8 of the Constitution). Such entails that the ECHR must be taken into consideration by all authorities of the state, especially the courts, when deciding on the rights and obligations of individuals. This also applies to the Constitutional Court. Therefore, when deciding on whether a law is consistent with the Constitution or whether human rights or fundamental freedoms of individuals were violated in procedures before authorities of the state, the Constitutional Court also regularly considers the ECHR and the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). This is not only an obligation under international law, but also an obligation under internal law stemming from national constitutional law. The Constitutional Court can apply the ECHR directly as the underlying reason of its decision; however, as a general rule, it considers it indirectly through the standpoints of the ECtHR when interpreting the provisions of the Constitution.[15]

In connection with the ECHR (however, the same also applies to other treaties that directly regulate certain rights), the fifth paragraph of Article 15 of the Constitution, which determines that no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that the Constitution does not recognise that right or freedom or recognises it to a lesser extent, must further be mentioned. By this provision, the Constitution established the principle of the highest protection of rights, which entails that a treaty can have priority even over the Constitution if it guarantees a higher level of protection of a human right.

When the Republic of Slovenia joined the EU in May 2004, it thereby transferred the exercise of part of its sovereign rights to the EU and transposed the entire *acquis communautaire* into its legal order. The internal constitutional legal basis for such was provided by Article 3a of the Constitution. The first paragraph of this Article determines

[15] By Decision No. U-I-65/05, dated 22 September 2005 (Codices SLO-2005-3-003), the Constitutional Court specifically underlined that when assessing the constitutionality of a law it must take into consideration the case law of the ECtHR, regardless of the fact that it was adopted in a case in which the Republic of Slovenia was not involved in the proceedings before the ECtHR.

that, pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law. The constitution framers adopted such an abstract and general diction with the EU in mind, even though such is not specifically expressed in this provision.

The third paragraph of Article 3a of the Constitution is relevant for the position of EU law in the legal system of the Republic of Slovenia: legal acts and decisions adopted in the framework of the EU apply in the Republic of Slovenia in conformity with the legal regulation of the EU. This provision establishes the internal constitutional legal foundation on the basis of which all authorities of the state, including the Constitutional Court, must, when exercising their competences, take into account EU law, including the case law of the Court of Justice of the European Union, namely in conformity with the principles and rules of EU law.

It should further be highlighted that the Constitutional Court held that the fundamental principles of EU law are at the same time also constitutional principles. In above mentioned Decision No. U-I-146/12, it stated that from the third paragraph of Article 3a there follows the requirement that in the exercise of its competences also the Constitutional Court must apply EU law in accordance with the legal order of the European Union. Due to the third paragraph of Article 3a of the Constitution, the fundamental principles that define the relationship between internal law and EU law are at the same time also internal constitutional principles that have the same binding effect as the Constitution. As internal constitutional law principles, these principles also bind the Constitutional Court in the exercise of its competences in the framework of legal relationships that concern EU law. In the cited Decision, the Constitutional Court listed the following examples of such principles: the principle of the primacy of EU law, the principle of sincere cooperation, including the principle of consistent interpretation (the

third paragraph of Article 4 of the Treaty on European Union, hereinafter referred to as the TEU),the principle of the direct applicability of EU law, the principle of the direct effect of EU law, the principle of conferral of competences (the first paragraph of Article 5 of the TEU), the principle of subsidiarity (the third paragraph of Article 5 of the TEU), and the principle of proportionality (the fourth paragraph of Article 5 of the TEU).

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 constitutional principles form a system in which all parts are co-dependent and each of them influences the others. No formal hierarchy exists among them. If a conflict between different constitutional principles arises in an individual case, the Constitutional Court must carry out a substantive review to determine which of the principles has to be given precedence in the circumstances of the case at issue.[16]

However, it should be noted that in Decision No. U-I-109/10, dated 26 September 2011,[17] the Constitutional Court emphasised that the principle of respect for human dignity lies at the centre of the Slovene constitutional order. Its ethical and constitutional significance already proceeds from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, wherein certain principles that demonstrate the fundamental constitutional quality of the new independent and sovereign state are outlined. Human dignity is the fundamental value which permeates the entire legal order and therefore it also has an objective significance in the functioning of authority, not only in individual proceedings but also when adopting regulations. As the fundamental value,

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[16] *Cf.* Decision No. U-I-141/01, dated 20 May 2004.
[17] Codices SLO-2012-1-001.

human dignity has a normative expression in numerous provisions of the Constitution and it is especially concretised through provisions which guarantee individual human rights and fundamental freedoms. As a special constitutional principle, the principle of respect for human dignity is directly substantiated in Article 1 of the Constitution, which determines that Slovenia is a democratic republic. The principle of democracy in its substance and significance exceeds the definition of the state order as merely a formal democracy, but substantively defines the Republic of Slovenia as a constitutional democracy, namely as a state in which the acts of authorities are legally limited by constitutional principles and human rights and fundamental freedoms. This is because individuals and their dignity are at the centre of its existence and functioning. In a constitutional democracy, the individual is a subject and not an object of the functioning of the authorities, while his or her (self)realisation as a human being is the fundamental purpose of the democratic order.

3. How is the constitution amended in your jurisdiction? What is the procedure for the constitutional amendment set out in the basic law? How the constitution was established originally and does it explicitly provide for unamendable (eternal) provisions? Is there any difference between the initial manner of constitutional adoption and the existing procedure of the amendment to the basic law? Has the constitutional principles ever been subjected to change in your jurisdiction? If yes, what were the reasons behind it?

The Constitution was adopted on 23 December 1991 in the process of the Republic of Slovenia acquiring its independence. Its adoption also marked a definitive break with the former Socialist Federal Republic of Yugoslavia and completed the process of establishing the new sovereign and independent state. In order to implement the Constitution, a special constitutional act that regulated the harmonisation of the legal order with the Constitution and the transition to the new organisation of the state was

adopted. The Constitution is introduced by a preamble that is followed by the normative part which is divided into ten chapters.

While the Constitution does not regulate a procedure for the adoption of a new Constitution, it does regulate the procedure for adopting amendments to the existing Constitution. In the twenty-five years since independence, the Constitution has been amended six times with nine constitutional acts (in 1997, 2000, 2003, 2004, 2006, and 2013).

The Constitution does not regulate different procedures for amending its individual provisions according to their scope, importance, or role. The amendment procedure is uniform. The Constitution further does not impose any absolute or relative prohibition or other formal restriction for amending its provisions. Article 177 of the Rules of Procedure of the National Assembly and Article 8 of the Referendum and Popular Initiative Act, which determine moratoria, entail specific forms of a temporary prohibition of amending the Constitution. If the National Assembly rejects a proposal for an amendment of the Constitution, a moratorium thus prevents that the same amendment would be proposed anew before the end of the parliamentary term, while the second moratorium prevents that, following the rejection of a constitutional amendment in a referendum, a constitutional act with a content that would be contrary to the referendum decision is adopted within a period of two years following the referendum. The Constitution also does not regulate a specific technique for amending the Constitution. However, in practice the technique of change through amendments has been used. The adopted changes thus directly affect the original text of the Constitution and supplement, amend, or repeal its provisions.

The procedure for amending the Constitution is regulated in Chapter IX of the Constitution, more precisely by Articles 168 through 171. The phases of the procedure for amending the Constitution are determined by the Rules of Procedure of the National

Assembly, namely by Articles 172 through 183. The procedure for amending the Constitution is subject to more complex and stringent conditions than the procedure for adopting laws and other regulations. Therefore, legal theory classifies the Slovene Constitution as a so-called rigid constitution. The procedure for amending the Constitution is uniform regardless of the scope and nature of the constitutional amendments. The National Assembly is competent to adopt acts amending the Constitution. However, citizens can also participate in the process by means of popular initiative or referendum. An amendment of the Constitution comprises two mandatory and one optional phase: (1) the proposal to initiate the procedure for amending the Constitution and the decision regarding the proposal, (2) the adoption of the constitutional amendment, and (3) the confirmation of the constitutional amendment in a referendum. These phases are elaborated in the Rules of Procedure of the National Assembly.

A proposal to initiate the procedure for amending the Constitution may be submitted by 20 deputies of the National Assembly, the Government, or at least 30,000 voters. Due to their specific nature, constitutional acts have to be drafted by a special working body of the National Assembly, i.e. the Constitutional Commission. The Commission prepares and adopts proposals for constitutional acts and drafts the decisions of the National Assembly. The adoption of a decision on the initiation of a procedure for amending the Constitution is a precondition for considering the proposal for a constitutional amendment. Before the National Assembly decides on a proposal to initiate the procedure for amending the Constitution, the proposal has to be considered by the Constitutional Commission. In this, i.e. the first phase, the National Assembly only decides on whether it will initiate the procedure for amending the Constitution. If it decides to initiate the procedure, it then proceeds to decide on the constitutional amendment in the second phase. The draft constitutional act is prepared by the Constitutional Commission on the basis of the decision and the standpoints of the National Assembly. The National Assembly debates and votes on the individual Articles

separately and on the draft constitutional act in its entirety. If the draft constitutional act is not adopted, the procedurefor amending the Constitution is terminated. A constitutional amendment is adopted if at least 60 deputies of the National Assembly vote for its adoption. The third phase of the procedure for amending the Constitution, in which the constitutional amendment is submitted to the voters for approval at a referendum, is optional. However, the National Assembly must submit the proposed amendment to the voters for approval at a referendum if such is required by at least 30 deputies. The Constitution determines that the constitutional amendment enters into force upon its promulgation in the National Assembly.

The Constitutional Court has already held that a constitutional act has the same legal status as the Constitution, irrespective of its content and the nature of its provisions, and therefore its provisions have the character of constitutional norms (see, in particular, Order No. U-I-214/00, dated 14 September 2000;[18] *cf.* also Orders No. U-I-332/94, dated 11 April 1996,[19] No. U-I-204/00, dated 14 September 2000, and No. U-I-242/00, dated 10 April 2003). In accordance with Article 160 of the Constitution the Constitutional Court has the power to review constitutionality and legality, but it is not competent to review the Constitution and regulations of constitutional character. The provisions of a constitutional act that amend the Constitution are categorised as constitutional provisions. The provisions of a constitutional act that regulate the transition to the new constitutional order also have the character of constitutional norms. Therefore, the Constitutional Court is neither competent to review the former nor the latter, as it lacks the power to review constitutional provisions. The Constitutional Court would only be competent to review a constitutional act if the act were adopted by the constitution framers with a different intention and different content, i.e. not with the intention and content of amending constitutional provisions. Only with regard to this kind of constitutional act a substantive

[18]Codices, special bulletin.
[19]Codices SLO-1996-X-003.

criterion – i.e. the content and nature of the provisions of the constitutional act – would be decisive for determining the jurisdiction of the Constitutional Court.

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?

As has been clarified in the answer to the previous question, the procedure for amending the Slovene Constitution lies in the hands of the National Assembly. The National Assembly decides on the adoption of the constitutional acts by the prescribed majority of votes. A proposal to initiate the procedure for amending the Constitution may be submitted by twenty deputies of the National Assembly or the Government as well as at least thirty thousand voters. An initiative for submitting a proposal to initiate the procedure for amending the Constitution can be submitted by any voter, political party, or other association of citizens. The Constitutional Court already held that it is not competent to review the procedure for amending the Constitution (see the above cited Order No. U-I-242/00 and Order No. U-I-262/00, dated 13 March 2003). The Constitutional Court further already held that a resolution by which the National Assembly commences the procedure to amend the Constitution is not a regulation, but a procedural act marking the completion of the first phase of the procedure for amending the Constitution (Order No. U-I-176/97, dated 10 July 1997). The Constitutional Court lacks the competence to review such acts.

The prevailing position among Slovene legal scholars does not oppose the existing manner of amending the Slovene Constitution.

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?

As has already been clarified, the Constitution does not provide for the constitutional review of constitutional amendments.

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

The Slovene legal order does not accord the Constitutional Court the power to review the constitutionality of the Constitution and constitutional amendments. The answer to question II. 3 regarding case law – the decisions in which the Constitutional Court clarified that it lacks the competence to review the challenged constitutional acts, is also relevant in this respect.

7. Is there any tendency in your jurisdiction towards enhancing constitutional authority in respect of the constitutional court's power to review amendments to the basic law? Do academic scholars or other societal groups advocate for such development? How is judicial review observed in this regard? Would an expansion or recognition of the constitutional court's authority encourage the realization of constitutional ends or threaten its viability? Please, elaborate on existing discussion in your jurisdiction.

Neither the prevailing positions of legal scholars nor practitioners indicate the possibility of a future amendment of the competence of the Constitutional Court that would extend its competence to also include the review of constitutionality of adopted constitutional acts that amend constitutional subject-matter.