



XVIIth Congress of the Conference of European Constitutional
Courts

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

National Report

Constitutional Court of Montenegro

ENGLISH

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?**
- 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?**

Answer to questions 1 and 2.

1. *General Provisions* of the Constitution¹ (Art. 1-16) set forth the fundamental principles – the characteristics of the state of Montenegro and its organisation. They comprise a meaningful unity linking all provisions of the Constitution and permeating the contents of all of them. The motives of those provisions and the elements of their explanations are also stated in the *Preamble* of the Constitution,² listing the fundamental principles, such as: freedom, peace, tolerance, respect of human rights and freedoms, multiculturalism, democracy and rule of law, freedom and equality of people and members of national minorities that live in Montenegro. In addition to those, the *Preamble* also lists the principles of the preservation of a healthy environment, sustainable development, balanced development of all areas, establishment of social justice and equal cooperation with other nations and states in the European and Euro-Atlantic integration process.

Having in mind the contents of the *Preamble* and of the *General Provisions* of the Constitution of Montenegro, we can distinguish between three groups of fundamental principles established in the Constitution:

- 1) General principles, set out in the constitutional provisions concerning the principle of the rule of law³, sovereignty⁴, legal order⁵, separation of powers⁶, separation of religious communities from the state⁷ and legislation⁸;

¹ Constitution of Montenegro (Official Gazette of Montenegro nos. 1/07 and 38/13-1)

² Mijat Šuković, *Ustavno pravo*, 2009. godine CID str. 175

³ Preamble of the Constitution, Article 1 of the Constitution of Montenegro

⁴ Article 2 of the Constitution

⁵ Article 9 of the Constitution

- 2) Principles concerning the formal features of the state, which include the constitutional provisions on the definition of the state of Montenegro⁹, state territory¹⁰, state symbols (coat of arms, anthem and flag)¹¹, capital city and old royal capital¹², and the relations with other countries and international organisations¹³;
- 3) Principle of protection of human rights and freedoms¹⁴, prohibition of incitement to hatred¹⁵, anti-discrimination¹⁶ and limits of freedoms¹⁷.

The provisions of the Constitution and laws, and the provisions of other regulations, are understood and interpreted in the light of these fundamental constitutional principles of democratic system, and therefore the above principles have “interpretative force”¹⁸. The relevance of the fundamental principles is also reflected in the fact that, although our Constitution does not recognize the immutability clause, it is prescribed that any change in the constitutional provisions related to the fundamental principles requires 3/5 majority of all voters in the state referendum.¹⁹ Whether this is possible in the practice depends on the national political structure and context, and on the substance of the modification proposed. This is surely a high barrier, the effect of which may be equal to immutability.²⁰

The Constitutional Court²¹ ensures the compliance with and the implementation of the Constitution of Montenegro²². The jurisdiction of the Constitutional Court is set forth in the

⁶ Article 11 of the Constitution

⁷ Article 14 of the Constitution

⁸ Article 16 of the Constitution

⁹ Article 1 of the Constitution

¹⁰ Article 3 of the Constitution

¹¹ Article 4 of the Constitution

¹² Article 5 of the Constitution

¹³ Article 15 of the Constitution

¹⁴ Article 6 of the Constitution

¹⁵ Article 7 of the Constitution

¹⁶ Article 8 of the Constitution

¹⁷ Article 10 of the Constitution

¹⁸ Ustavno pravo BiH, Nedim Ademović, Joseph Marko i Goran Marković, Sarajevo 2012. godine, str. 57

¹⁹ Article 157 of the Constitution (see answer under **II 3.**)

²⁰ European Commission for Democracy through Law /Venice Commission/ of the Council of Europe; Report on Constitutional Amendment, Study no. 469/2008, CDL-AD(2010)001, Strasbourg, 19 January 2010. Pg.42

²¹ Jurisdiction of the Constitutional Court is set forth in Article 149 of the Constitution of Montenegro

“The Constitutional Court shall decide:

- 1) on the compliance of the laws with the Constitution and with the ratified and published international agreements;
- 2) on the compliance of other regulations and general acts with the Constitution and law;
- 3) on the constitutional complaint on the account of violation of human rights and freedoms guaranteed in the Constitution, after all other effective legal remedies had been exhausted;
- 4) whether the President of Montenegro has violated the Constitution;
- 5) on the conflict of jurisdictions between courts and other state authorities, between state authorities and local government bodies and between local government bodies;
- 6) on ban on operation of a political party or non-governmental organisation;
- 7) on election disputes and disputes related to referendum that do not fall under the jurisdiction of other courts;
- 8) on compliance of measures and actions of state authorities taken during war times and state of emergency with the Constitution;

Constitution itself, and the legal effect of the Constitutional Court's decisions is laid down in the Constitution and in the Law on the Constitutional Court. When the Constitutional Court establishes that a law is not compliant with the Constitution and with the ratified and published international agreements or that any other regulation is not compliant with the Constitution and law, that law or other regulation ceases to apply as of the publishing date of the Constitutional Court's decision.²³ When, acting upon a constitutional complaint, the Constitutional Court establishes that a contested individual act violates a human right or freedom guaranteed in the Constitution, it upholds the constitutional complaint and abolishes the act, in its entirety or partially, and the case is remanded for retrial to the authority that had passed the abolished act in the first place.²⁴

Based on the recognized jurisdiction of the Constitutional Court of Montenegro, it has an extremely important role in the process of developing Montenegro as an independent, democratic, ecological state of social justice. Furthermore, the powers of the Constitutional Court reflect in the establishment of European values in the national legal order, in particular in the striving to set up and build the state on the principle of the rule of law. The ratified and published international agreements and the generally accepted rules of international law are integral parts of the internal legal order; they have supremacy over national legislation and apply directly when they regulate matters differently from the national legislation.²⁵ In addition to the direct application of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court has in its practice so far accepted the interpretation of the contents and the scope of certain legal principles and institutes as interpreted through the application of the Convention in the practice by the European Court of Human Rights. The case law of the European Court of Human Rights has served the Constitutional Court to make use of the constitutional interpretation in a number of decisions in the area of abstract control of constitutionality and legality and within it to shape the practice in the application of the Convention's principles (rule of law, proportionality, anti-discrimination, equality, fundamental human rights and freedoms, minority rights...).

1. ***Principle of proportionality*** – Decision U.br.67/09, 17 July 2009 – constitutional review of the provisions of Articles 3 and 5 of the Law on Amendments to the Law on Strike (Official Gazette of Montenegro no. 49/08), the Constitutional Court found that “(...) It is

9) and shall carry out other tasks laid down in the Constitution.

If a regulation has ceased to apply in the course of the constitutional and legal review procedure, and the consequences of its application have not been rectified, the Constitutional Court shall establish whether the regulation was compliant with the Constitution or the law while it was applicable.

The Constitutional Court shall monitor the realization of constitutionality and legality and shall inform the Parliament of any occurrences of non-constitutionality and illegality observed.

²²Article 1 of the Law on the Constitutional Court of Montenegro (Official Gazette of Montenegro no. 11/15)

²³Article 152 paragraph 1 of the Constitution

²⁴Article 76 paragraph 1 of the Law on the Constitutional Court

²⁵Article 9 of the Constitution

derived from the quoted provision of the European Convention for the Protection of Human Rights and Freedoms that it is the sole jurisdiction of the State to regulate the manner of exercise of the right to freedom of peaceful assembly and to freedom of association with other i.e. that the national legislation is to regulate the manner of exercise of the right, whereby it does not prevent the exercise of these rights by the members of the armed forces, police or public administration to be legally restricted, with the aim to protect the public interest, if it would threaten the interests of the citizens, national security, safety of persons and property, and the functioning of government bodies. This is also confirmed by the European Social Charter which sets forth the right to strike, having in mind the obligations arising from national regulations and collective agreements, stating that the internal legal system will establish the conditions and the extent to which the right to strike is to apply to persons employed in the armed forces, the police and the public authorities, and the provision of Article 8 paragraph 1 item d of the International Covenant on Economic, Social and Cultural Rights specifies that the right to strike is recognized by allowing its exercise in accordance with the laws of each country, while Article 8 paragraph 2 sets forth that it is not prevented that the exercise of these rights by the members of the armed forces, police or public administration is subjected to legal restrictions. Based on the above constitutional principles, in the opinion of the Constitutional Court, the contested legal provisions are not in contravention of the Constitution of Montenegro and the European Convention for the Prevention of Human Rights and Fundamental Freedoms. Namely, by laying down restriction of the right to strike for certain categories of employees, the legislator did not go outside the powers laid down in the Constitution and the European Convention, since the scope of the restrictions is proportional to the aim of the prescribed restriction...”.

2. ***Principle of anti-discrimination*** – Decision U. br.111/08, 28 January 2010 – constitutional review of the provisions of Article 8 paragraph 1 item 6 of the Law on Montenegrin Nationality (Official Gazette of Montenegro no. 13/08), the Constitutional Court found that: “...The European Court of Human Rights defines discrimination, according to the general rule developed in the practice, as different treatment of the same or similar cases, without any reasonable or objective justification, i.e. if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. Therefore, according to the practice of the European Court, and of the UN Human Rights Committee, the examination of discriminatory character of a legal or factual act is done in two phases: examination of the establishment of the existence of different standards or treatment of persons in the same or similar situations and the existence of any objective and reasonable justification for such difference of treatment. The contested provision of the Law, in the opinion of the Constitutional Court, does not include the above mentioned discriminatory restrictions in relation to the Constitution of Montenegro, or any restrictions as interpreted by the

European Court of Human Rights, given that it does not constitute any different treatment based on personal features of persons applying for Montenegrin nationality, or based on the language they speak...”

3. ***Principle of equality*** – Decisions U-I br. 27/10, 30/10 and 34/10, 24 March 2011, constitutional review of the provisions of Article 11 of the General Law on Education (Official Gazette of the Republic of Montenegro nos. 64/02, 31/05 and 49/07 and Official Gazette of Montenegro no. 45/10), the Constitutional Court found that: “The rights and freedoms are exercised in Montenegro based on the Constitution, the ratified and published international agreements and the generally accepted rules of international law and the laws. In the case in question, the contested different treatment, i.e. the prescribed obligation that classes in the communities where the majority or a significant portion of the population is comprised of the members of minority nations or other minority national communities are also to be carried out in the language of the members of those minority nations or minority national communities in fact establishes their equality in the process of general education. In line with the explicit constitutional provision (Article 8 paragraph 2), special measures taken in order to rectify any factual inequality are not considered to constitute discrimination since the measures place the persons or groups of persons that are in not in equal position with others into more favourable position. Since the members of minorities differ from the majority population, consistent application of the principle of equality, in this specific case, would put them into an unequal position. The contested legislative solution, in the opinion of the Constitutional Court, is in accordance with the quoted provision of Article 3 paragraph 1 of the Framework Convention for the Protection of National Minorities, setting forth that each member of national minority has the right to be treated as such, and with the provisions of Articles 1 and 2 of the European Charter for Regional or Minority Languages, defining the territorial and minority languages, i.e. the obligations determined for the states parties to apply the act...”
4. ***Principle of the rule of law*** – Decisions U br. 90-08 and 96-08, 18 July 2013, constitutional review of the provision of Article 230 paragraph 2 of the Criminal Procedure Code (Official Gazette of the Republic of Montenegro nos. 71/03 and 47/06). The Constitutional Court found that the provision of Article 230 paragraph 2 of the Code in the part that reads: “to request the legal person providing telecommunication services to verify whether the telecommunication addresses that had established connection at a specific point in time are identical”, when it applied, was not compliant with the Constitution of Montenegro:

1.14.3. Since the police, as an administration authority, may implement the measures of special investigative actions in preliminary proceedings without previously obtaining the court’s decision, the Constitutional Court found that the contested part of the provision of Article 230 paragraph 2 of the Code violates the inviolability of the confidentiality of telephone conversations (without insight into their contents), i.e. the confidentiality of the

means of communication of communication network users, guaranteed under Article 42 paragraph 1 of the Constitution and allows “arbitrary interference by public authorities” in the right to privacy, contrary to the provisions of Article 8 paragraph 2 of the European Convention.

1.15. In addition, the Constitutional Court found that the contested provision violates the inviolability of the right to confidentiality of telephone conversations, not only for persons for whom there are “grounds for suspicion” (..), but also indirectly for any third person (against whom measures of secret surveillance have not been ordered), with whom that person has contact over the phone.

1.15.1. The European Court adopted a particularly elaborated approach by using evidence obtained with the application of special investigative measures (telephone tapping), in the case of *Kruslin v France*²⁶. The Criminal Division of the Court of Appeal in Toulouse (1985) convicted the applicant (for aiding and abetting a murder, aggravated theft and attempted aggravated theft)²⁷, based on circumstantial evidence (recordings of telephone conversations related to a criminal procedure against another person). The European Court found:

“26. Although it was Mr Terrieux’s line that they were tapping, the police in consequence intercepted and recorded several of the applicant’s conversations, and one of these led to proceedings being taken against him (see paragraphs 9-10 above). The telephone tapping therefore amounted to an “interference by a public authority” with the exercise of the applicant’s right to respect for his “correspondence” and his “private life” (see the *Klass and Others* judgment of 8 September 1978, Series A no. 28, p. 21, paragraph 41, and the *Malone* judgment of 2 August 1984, Series A no. 82, p. 30, paragraph 64). The Government did not dispute this.

Such an interference contravenes Article 8 unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and furthermore is “necessary in a democratic society” in order to achieve them.

27. The expression “in accordance with the law”, within the meaning of Article 8 paragraph 2, requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law.

33. Tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a “law” that is particularly precise. It is essential to have clear, detailed rules on the

²⁶Decision of 24 April 1990

²⁷One piece of evidence was a recording of a telephone conversation the applicant had on the telephone line belonging to a third person, in relation to another proceeding. The European Court held that there was adequate legal basis for such action in the French criminal procedure law.

subject, especially as the technology available for use is continually becoming more sophisticated.

36. In short, French law, written and unwritten, does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. This was truer still at the material time, so that Mr Kruslin did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the Malone judgment previously cited, Series A no. 82 p. 36, paragraph 79). There has therefore been a breach of Article 8 of the Convention.”

1.16. Based on the above, the Constitutional Court found that the police, without a corresponding decision of the court, do not have the right to obtain data from the sphere of private communication, from telecommunication operators about the users of their services – against whom secret surveillance measures had not been ordered (“third persons”), about communication realized, the time when connection was established, because such data also represent integral elements of the protected confidentiality of communication over the phone, which is why the impugned provision of the Law is for that reason as well not compliant with the provisions of Article 42 of the Constitution.

1.17. By accepting the dynamic and evolutionary interpretation of the “criminal” provisions of the Constitution that take into account the altered living circumstances and the need for continuous improvement of the Montenegrin criminal procedure law, in line with the relevant European legal standards and the contemporary state criminal policy, the goals of which are constantly harmonized with the changes at the national, regional and (European) global level, the Constitutional Court found that the part of the contested provision of Article 230 paragraph 2 of the Code, while it was in effect, was not compliant with Article 42 of the Constitution and Article 8 of the European Convention.

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?

The Constitution of Montenegro in its Preamble and the General Provisions list particular general constitutional legal principles *expressis verbis*. Other principles, that are not explicitly indicated, may be derived through systematic and teleological interpretation of the entire Constitution, which makes the constitutional provisions applicable to the current social relations and ensures the consistency in the application. Therefore, the implicit principles originate, primarily, from the explicit constitutional provisions, through contextual interpretation in the practice, in line with international principles. The principle of the rule of law, as a highly general principle, for instance, implies among other the principle of legality, legal certainty, foreseeability, proportionality, prohibition of arbitrariness and the principle of public interest.

Academic scholars and other societal groups contribute to the development of constitutionally-implied principles indirectly.

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

The Constitutional Court of Montenegro has an important role in defining the constitutional principles and interprets the Constitution as a whole, having in mind the international agreements and the generally accepted rules of international law. The Constitutional Court also strives to align the decision-making practices with the Convention requirements²⁸, and through application of the democratic necessity test (necessary in a democratic society), the proportionality test, the test of the very essence of the right and the margin of appreciation, to realize the purpose of the said provision in order to protect the rights that are practical and effective (principle of effectiveness), and not theoretical and illusory²⁹. The Constitutional Court, through the application of the above principles and methods, gives flexibility to constitutional and conventional standards that is required having in mind the legal and cultural tradition of Montenegro, thereby achieving a balance between the interests of protection of human rights of individuals and protection of the public interest. We may therefore say that the linguistic interpretation concerning the systematic interpretation and teleological interpretation of the

²⁸Decisions of the Constitutional Court of Montenegro U-I br. 6/14 and 9/14 of 17 April 2014 on the Law on the Protection of the Interest of the State in Mining and Metallurgy Sector

13.2. The above paragraphs of the European Court indicate that for a restricting measure of the State to be considered “lawful”, within the meaning of the European Convention, it has to meet the standard of legality, which requires the fulfilment of four conditions: legal basis in the national law, the quality of law, the requirement of accessibility of the domestic law, the requirements of foreseeability of domestic law and measure of legal protection in domestic law against arbitrary interferences in protected convention right.

13.3. The Constitutional Court considers it indisputable that the addressees of legal norms cannot truly and distinctively know their rights and duties and foresee the consequences of their behaviour, if the legal norm is not sufficiently definite and precise. Contrary to the stated requirements of the European Court, in terms of quality of laws, i.e. standard of legality, the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law, according to the findings of the Constitutional Court, contain a number of uncertainties and inaccuracies as well as internal collision.

13.4. The Constitutional Court found that the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law do not meet the standard of legality, within the meaning of the above positions of the European Court. The Law that allows uncertainty in terms of the ultimate effect of its provisions, in line with the findings of the Constitutional Court, may not be considered as a law that is based on the principle of the rule of law, or a law that establishes the principle of legal certainty and foreseeability. Therefore, the contested provisions of Article 2 paragraph 2 and Article 3 paragraphs 1 and 3 of the Law are contrary to the principle of the rule of law, as the highest value of the constitutional order (Article 1 paragraph 2 and Article 145 of the Constitution).

²⁹Sakhnovskiy v. Russia [GC], par. 99–107

Constitution have priority importance. Other methods of interpretation of the Constitution have secondary importance, and even travaux préparatoires (materials, explanations etc.), although important, have the primarily value in historical interpretation of the Constitution.

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

The constitutional principles contained in the 2007 Constitution of Montenegro have the character of general legal rules. The most general constitutional legal principles which form the basis of the constitutional provisions and the motives and objectives of the adoption of the Constitution are contained in the Preamble of the Constitution. The constitutional principles are also contained in the normative part of the Constitution, in the first five parts.³⁰ Some of the constitutional principles that are contained in the part of the Constitution concerning the general provisions may be considered as the genesis of the existing constitutional framework. This, primarily, refers to the principles stated in Article 1 of the Constitution defining Montenegro as an independent and sovereign state, with republican form of government but also as a civil, democratic, ecological state of social justice, based on the rule of law.³¹ The Constitutional Court of Montenegro highlighted, among other, the assessment of the compliance of the law with the Constitution and the ratified and published international agreements and the assessment of compliance of other regulations and general acts with the Constitution and the law.

The constitutional principles, unlike the legal rules, have the character of guidelines, are general and often include several rules as their manifestations (for instance the principle of the rule of law). The principles indicated in the provisions of the Constitution (for instance the principle of anti-discrimination referred to in Article 8 of the Constitution and of equality of all persons before the law referred to in Article 17 of the Constitution) are binding for all including the three branches of power. Article 10 paragraph 2 of the Constitution stipulates that everybody has the duty to observe the Constitution and the law.

³⁰The normative part of the Constitution is divided into eight parts: General provisions; Human rights and freedoms; Government structure; Economic structure; Constitutionality and legality; Constitutional Court of Montenegro; Constitutional amendment; Transitional and final provisions. The Constitution of Montenegro, available on: <http://www.skupstina.me/index.php/me/ustav-crne-gore> (01.11.2016).

³¹Article 1 of the Constitution of Montenegro, p. 2, available on: <http://www.skupstina.me/index.php/me/ustav-crne-gore> (01.11.2016).

Although the principles of constitutionality and legality (Article 145) are not explicitly related to a particular constitutional right, they may be considered as a precondition for the realization of all other rights guaranteed by the Constitution. Based on the 2015 Annual Report of the Constitutional Court of Montenegro in the part related to deciding on constitutional complaints, it is evident that the Constitutional Court most frequently dealt with the protection of the following constitutional rights and freedoms: right to fair trial (Article 32), right to equal protection of rights and freedoms (Article 19), right of ownership (Article 58), rights of employees (Article 64), right to legal remedy (Article 20). In relation to these special constitutional rights, the Constitutional Court of Montenegro emphasized the following legal principles: principle of equality (Article 17), principle of anti-discrimination (Article 8), principle of presumption of innocence (Article 35) and legal order (Article 9).³² The fundamental principles in the practice of the Constitutional Court of Montenegro are analyzed in relation to the specific constitutional right as an additional means of interpretation.

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

The following constitutional principles are applied most by the Constitutional Court of Montenegro in its adjudication: the principle of anti-discrimination, principle of equality before the law, principle of the inviolability of personality, principle of legality, principle of a more lenient law, principle of presumption of innocence, principle of compliance of legislation. The principle of equality before the law is one of the constitutional principles that are mostly applied in the decision-making process by this Court. The Constitution of Montenegro specifies this principle in Article 17 paragraph 2, which reads: “Everyone is equal before the law, regardless of any particularity or personal feature”.³³

Below are examples from the case law of the Constitutional Court.

“Equality before the law in court proceedings includes, among other, equal application of substantive law to a particular dispute to decide, in line with the law, on a right or a lawful interest of the persons, while the right to equal protection of their rights guarantees protection against arbitrary decisions of courts and other state authorities exercising public powers, which is, among other, based on the principle that competent authorities pass the same decisions in the same cases, i.e. that the same factual and legal circumstances may not have substantially different legal outcome. The constitutional guarantee of equality would be violated if it was established that the parties in the proceedings, preceding the contested judgments, did not have

³²Annual Report of the Constitutional Court of Montenegro for 2015, Podgorica, 2016, p. 18, available on: <http://www.ustavnisud.me/upload/praksa.html> (02.11.2016).

³³Constitution of Montenegro, p. 5, available on: <http://www.skupstina.me/index.php/me/ustav-crne-gore> (02.11.2016).

equal position, i.e. that the applicant did not have the right to equal access to court and equal protection of his rights before the relevant court, and that there was a difference in treatment which was discriminatory in relation to the applicant...”³⁴

The principle of equality of arms “According to the position of the European Court, the principle of equality of arms requires that each party is given reasonable opportunity to present their case under the conditions that do not constitute substantially less favourable position in relation to the opposing party (see European Court, among other, *G. B. v France*, application number 44069/98, paragraph 58, ECHR 2001-X). The Constitutional Court indicates that, in case of decision of a higher court, the essential requirement is that the higher court indicates that it has examined the essential matters presented in the complaint, that in case of disagreement with the decision of a lower instance court, the disagreement was based on its assessment (*see European Court, Helle v Finland, 1997-VIII, 26 EHRR 589 GC*) and that the complaint was not dismissed before being examined (*see European Court, Linder and Hammermayer v Romania, HUDOC 2002*).”³⁵

“The principles of the rule of law and legality also include equitable and fair proceeding, i.e. the requirement that specific measures are determined and implemented by the relevant authority within the prescribed procedure and that the measures are not arbitrary... The existence of the legal basis by itself is not sufficient to fulfil the principle of legality, presuming that the applicable provisions of the national law should be sufficiently accessible, precise and predictable in the practice. This principle requires the Court to check whether the manner in which the domestic courts interpreted and applied the provisions of the law led to consequences that are not in accordance with the principles of the Constitution and the Convention...”³⁶

“...The Constitutional Court reminds that, in line with the case law of the European Court of Human Rights, the presumption of innocence, as one of the aspects of the right to fair trial (Article 6 paragraph 2 of the European Convention) is violated if the court decision relating to the applicant reflects the position that he is guilty, before his guilt had been proven according to law, and in particular if he did not have the opportunity to exercise his right to defence. The presumption of innocence in case of criminal charges applies to the proceedings in their entirety, and not only to the examination of the merits of the charge (judgment in case of *Minelli v Switzerland*, 25 March 1983, Series A no. 62, paragraph 30, judgment in case of *Sekanin v Austria*, of 25 August 1993, Series A no. 266-A and judgment in case of *Allenet de Ribemont v France*, of 10 February 1995, Series A no. 308). The European Court in case of *Matijašević v Serbia (application no. 23037/04)* indicates that it has been recorded in the case law on several occasions that Article 6 paragraph 2 of the European Convention governs criminal proceedings in their entirety “irrespective of the outcome of the prosecution”; that there is a fundamental distinction to be made between a statement that someone is merely *suspected* of having

³⁴Decision of the Constitutional Court of Montenegro Už III br.123/13, 10 February 2016

³⁵Decision of the Constitutional Court of Montenegro Už-III br. 57/13, 14 October 2015

³⁶Decision of the Constitutional Court of Montenegro, Už-III br. 350/14, 31 March 2016

committed a crime and a clear judicial declaration, in the absence of a final conviction, that the individual has committed the crime in question”.³⁷

“The Constitutional Court indicates that the provision of Article 34 of the Constitution fully corresponds to the principle of punishment solely on the basis of laws referred to in Article 7 of the European Convention. The scope of Article 7 of the European Convention is essentially determined by the concept of the criminal offence and the concept of “a more severe punishment”. The first paragraph of Article 7 of the Convention includes two fundamental principles that constitute the essential elements of the rule of law: (1) criminal conviction may be based solely on the norm that existed at the time of the incriminated act or omission (*nullum crimen sine lege*) (2) a more severe punishment may not be imposed than the one that was applicable at the time when the criminal offence was committed (*nulla poena sine lege*)”.³⁸

“The Constitutional Court reminds that Article 14 of the European Convention ensures the protection against discrimination in matters falling within the scope of other articles of the Convention (see European Court of Human Rights, *Marckx v Belgium*, judgment of 13 June 1979, Series A, number 31). Discrimination exists if it results in different treatment of individuals in similar situations and if such treatment has no objective or reasonable justification”.³⁹

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?

Constitutional principles enjoy certain degree of superiority. This particularly refers to the principle of supremacy of ratified and published international agreements and generally accepted rules of international law in relation to national legislation and their direct application in case when the above rules regulate relations differently from the national legislation.⁴⁰ Experts in the field of law generally take note of the fact of superiority of constitutional principles and it can be

³⁷ Decision UŽ-III br. 464/11, 10 October 2011

³⁸ Decision of the Constitutional Court of Montenegro UŽ-III br. 547/11, 20 February 2015

³⁹ Decision of the Constitutional Court of Montenegro UŽ-III br. 340/13, 30 June 2015

⁴⁰ Constitution of Montenegro, Article 9, p. 2, available on: <http://www.skupstina.me/index.php/me/ustav-crne-gore> (02.11.2016).

concluded that they justify giving greater importance to certain constitutional principles in relation to other provisions of the Constitution or, at least, not to oppose to a similar solution.⁴¹

The Constitutional Court in its practice emphasizes that it takes a comprehensive approach to the Constitution as a basis and that it considers its provisions as a unity. The relation between constitutional principles and generally of the constitutional provisions and international law can be viewed through constitutional provisions, legal doctrine and practice of the Constitutional Court. Montenegrin legal system accepts a monistic⁴² approach to international agreements.

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 Court of Montenegro does not differ between the constitutional principles in terms of hierarchy. This means that there is no hierarchy between the principles themselves. Given the contents of the cases handled, it is possible to conclude that certain principles are applied more frequently than others.⁴³ Implicit principles are derived from the explicit constitutional provisions. In addition, the principles differ in terms of whether they are laid down in the Constitution *expressis verbis* or implicitly, i.e. whether other constitutional principles may be derived from a particular constitutional principle”, see answer under 3.

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?

Constitutional review procedure of the Montenegrin Constitution consists of several stages, and all the provisions that stipulate the procedure of constitutional review are explicitly regulated by the Constitution, and not by a lower level legal act. The manner of amending the Constitution of

⁴¹Mijat Šuković, *Ustavno pravo*, Podgorica, CID, 209, str. 229-234.

⁴²Article 9 of the Constitution of Montenegro:

“Ratified and published international agreements and the generally accepted rules of international law constitute an integral part of the internal legal order, have supremacy over national law and are applied directly when they regulate relations differently from the national legislation”

⁴³Based on the contents of constitutional complaints handled by the Court in 2015, the 2015 Annual Report of the Constitutional Court of Montenegro presented the principles applied. The 2015 Annual Report of the Constitutional Court of Montenegro, Podgorica, 2016, p. 18, available on: <http://www.ustavnisud.me/upload/praksa.html> (02.11.2016).

Montenegro is prescribed in Part VII of the Constitution of Montenegro (“Constitutional Amendment”, Articles 155-158 of the Constitution).

The procedure for the amendment of the Constitution takes place in the Parliament, and is formally divided in two phases: in the first phase, the proposal for the amendment of the constitution is initiated and the deciding on the proposal, while in the second phase the merits of amending the Constitution are decided upon. Therefore, within the constitutional amendment procedure in the broadest sense, we can emphasize the answers to two basic questions:

- 1) who is formally authorised to file a proposal for the constitutional amendment? and
- 2) what are the methods allowed for the formal proponents of the constitutional review to intervene into the contents of the text of the Constitution?

1) In line with the provision of Article 155 of the Constitution of Montenegro, the proposal for the amendment of the Constitution of Montenegro may be filed by the President of Montenegro, the Government or a minimum of 25 Members of the Parliament. It may include a proposal of replacing or supplementing particular provisions of the Constitution or adopting of a new Constitution. The Parliament of Montenegro decides on the proposal for the amendment of the Constitution by a two-thirds majority of its members. If the proposal is not adopted, it may not be repeated prior to the expiry of a period of one year following the date when the proposal was rejected.⁴⁴

2) If the proposal is adopted, the following phase, i.e. deciding on the merits of the constitutional amendment, is proceeded with. The provisions of Articles 156 and 157 of the Constitution of Montenegro set forth that the contents of constitutional review may be adopted in two manners: within a special procedure of deciding by a qualified majority in the Parliament of Montenegro or through cooperation of the Parliament of Montenegro and the people so that the established contents of the constitutional review are presented by the Parliament of Montenegro to the people to obtain confirmation via referendum. Constitutional review of all provisions of the Constitution of Montenegro apart from the ones explicitly stated in Article 157 of the Constitution of Montenegro is done solely within the Parliament of Montenegro and as a rule the constitutional review must be adopted by a two-thirds majority of votes out of the total number of the Members of the Parliament. In case the amendments relate to the previously identified constitutional provisions, specified explicitly in Article 157 of the Constitution⁴⁵ (statehood, sovereignty, state territory, state symbols, Montenegrin nationality, language and alphabet, the

⁴⁴Article 155 of the Constitution “Proposal for the amendment of the Constitution may be filed by the President of Montenegro, the Government or a minimum of 25 Members of the Parliament. The proposal for the amendment of the Constitution may propose an amendment or supplement of particular provisions of the Constitution or adoption of a new Constitution. The proposal for the amendment of particular provisions of the Constitution must include an indication of the provisions for which amendment is sought and the explanation. The proposal for the amendment of the Constitution is adopted in the Parliament if a two-thirds majority of all Members of the Parliament vote for it. If the proposal for the amendment of the Constitution is not adopted, the same proposal may not be repeated prior to the expiry of one year after the proposal is rejected.”

⁴⁵Article 157 of the Constitution of Montenegro “Amendments to Articles 1, 2, 3, 4, 12, 13, 15, 45 and 157 are final if at least three fifths of all voters vote for them in the state referendum”

relationship with other countries and international organizations, the right to vote, confirmation in the referendum), decision on their amendment becomes final “if at least three fifths of all voters declare in the state referendum for amendment” established by the Parliament.

Changes to the provisions of the Constitution of Montenegro are made through amendments, and the Constitution may not be changed during the times of war or state of emergency.⁴⁶

On 21 May 2006, the Republic of Montenegro, based on Article 2 paragraph 4 of the Constitution of Montenegro and Article 60 of the Constitutional Charter of the State Union of Serbia and Montenegro⁴⁷, under the procedure laid down in the Law on referendum on the statehood of the Republic of Montenegro⁴⁸, organized a referendum where the nationals voted for the independence of the Republic.

Based on the results of the referendum, on 3 June 2006 the Parliament of Montenegro passed the decision to declare independence of the Republic of Montenegro⁴⁹ and the Declaration of Independence of the Republic of Montenegro⁵⁰, which presented the key principles of its state organisation.

⁴⁶Article 156 of the Constitution of Montenegro “Changes to particular provisions of the Constitution are made through amendments. The draft act on the amendment of the Constitution is composed by the relevant working body of the Parliament. The draft act on the amendment to the Constitution is adopted in the Parliament if a two-thirds majority of all Members of the Parliament vote for it. The Parliament places the adopted draft act on the amendment to the Constitution under public consultation which must cover a minimum period of one month. Upon completion of the public consultation, the relevant working body of the Parliament formulates the proposal for the act on the amendment to the Constitution. The act on the amendment to the Constitution is adopted in the Parliament if a two-thirds majority of all Members of the Parliament vote for it. Amendments to the Constitution may not be made during the time of war or state of emergency.”

⁴⁷“Upon expiry of a period of three years, member states shall have the right to initiate the procedure for the change of the status of the state, i.e. for the withdrawal from the state union of Serbia and Montenegro.

The decision on withdrawal from the state union of Serbia and Montenegro is passed after the referendum.

The Law on Referendum is passed by a member state, taking into account the internationally recognized democratic standards.

The regulation on potential referendum must be based on internationally recognized democratic standards. The member state organizing the referendum must cooperate with the European Union concerning the respect of international democratic standards, as laid down in the Constitutional Charter.

In case the state of Montenegro leaves the state union of Serbia and Montenegro, international documents related to the Federal Republic of Yugoslavia, in particular Resolution 1244 of the UN Security Council, would relate and apply entirely to the state of Serbia, as a legal successor.

The member state that uses the right to leave the union shall not inherit the right to international legal personality, and all disputed matters shall be specially regulated between the state-successor and the state that became independent.

In case both countries vote for the change of state status in a referendum, i.e. opt for independence, all disputed matters shall be regulated in the succession procedure, as in the case of the former Socialist Federal Republic of Yugoslavia.”

⁴⁸Official Gazette of the Republic of Montenegro no. 12/06.

⁴⁹Official Gazette of the Republic of Montenegro no. 36/06.

⁵⁰Official Gazette of the Republic of Montenegro no. 36/06.

The Parliament of the Republic of Montenegro, at its seventh sitting of the first ordinary session of 10 July 2006, passed the Law on the Constituent Parliament⁵¹, based on which, after regular elections for the Members of the Parliament, it was constituted as the Constituent Parliament of the Republic of Montenegro with the task of adopting the Constitution of the independent state and the law on the procedure of its adoption and proclamation, which is to regulate the state and social system of the Republic of Montenegro as an independent state, according to the decision of Montenegrin citizens in the referendum on 21 May 2006 and the Decision of the Parliament of the Republic of Montenegro on the declaration of independence of the Republic of Montenegro.

Based on Article 15 paragraph 1 of the Law on the procedure for the adoption and proclamation of the new Constitution of Montenegro⁵², the Constituent Parliament, at its third sitting of the second ordinary session in 2007, on 22 October 2007, proclaimed the Constitution of Montenegro⁵³, which it adopted on 19 October 2007 by a **two-thirds majority of all votes**.

The 2007 Constitution of Montenegro does not contain explicitly “eternal provisions”, i.e. provisions that cannot be changed and supplemented through amendments.

Based on the provisions of the 2007 Constitution of Montenegro, the changes to the Constitution shall also be decided upon by the Parliament of Montenegro by a two-thirds majority of the total number of the Members of the Parliament, except in cases concerning changes to the provisions governing the most important state matters, explicitly listed in Article 157 of the Constitution of Montenegro. The decision on their amendment becomes final if support of three fifths of all voters is provided in the referendum.

The Constitution of Montenegro, currently in effect, has so far been changed once, by a decision of the Parliament of Montenegro in 2013.⁵⁴

Amendments I to XVI to the 2013 Constitution of Montenegro included, among other, the provisions governing the values and principles, and aimed at strengthening of independence and sovereignty of judiciary, public prosecution and the Constitutional Court.

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

⁵¹Official Gazette of the Republic of Montenegro no. 44/06.

⁵²Official Gazette of the Republic of Montenegro no. 66/06.

⁵³Official Gazette of Montenegro no. 1/07.

⁵⁴Amendments were published in Official Gazette of Montenegro no. 38/2013 of 2 August 2013, and took effect on 31 July 2013.

Certain academic scholars and other societal groups involved in the protection of democracy, legal state and human rights, according to their works published believe that the constitutional amendment procedure should be subject to control by the Constitutional Court, and not left entirely up to the political actors.

The positions of the Constitutional Court of Montenegro concerning the matter of constitutional judicial control of amendments to the Constitution are given in the answer to questions under II. 6.

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 provisions of Article 149 of the Constitution of Montenegro give an exhaustive list of the competences of the Constitutional Court concerning the constitutional review and review of the legality of general acts, and therefore the Constitutional Court decides on the compliance of laws with the Constitution and with the ratified and published international agreements (paragraph 1 item 1) and on the compliance of other regulations and general acts with the Constitution and law (paragraph 1 item 2). The mentioned provisions of the Constitution do not indicate or stipulate the competence of the Constitutional Court to assess the compliance of norms having constitutional-level effect with the Constitution, generally accepted rules of international law and ratified international agreements.

6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? 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 had elaborated on its authority to exercise the power of judicial review of constitutional amendments either on substantive or procedural grounds? What is legal effect of a decision of the constitutional court finding the constitutional amendment in conflict with the constitution? Please, provide examples from the jurisprudence of the constitutional court.

The Constitutional Court of Montenegro, in line with the provisions of Article 149 of the Constitution, from the aspect of abstract control of constitutionality, does not have the competence to assess the constitutionality of constitutional norms on substantive grounds. However, the procedure of adoption and amendment of the Constitution in terms of whether the Constitution was adopted, modified or supplemented in accordance with the provisions of the Constitution may be subject to constitutional judicial review.

In its practice, the Constitutional Court of Montenegro has expressed the position concerning the legal character of the constitutional norms and the competences of the Constitutional Court for their assessment.

In Decisions U-I br.18/13, 20/13 and 22/13 of 24 July 2015, the Constitutional Court of Montenegro dismissed the proposal and the initiatives for constitutional review of Article 5 paragraph 2 of the Constitutional Law for the implementation of Amendments I to XVI to the Constitution of Montenegro, with the following explanation:

“... The hierarchy of legal norms in the constitutional system of Montenegro recognizes four levels: constitution, law, bylaw, and the norms of international agreements incorporated between the levels of constitution and law. The constitutional law for the implementation of the amendments to the Constitution is not a special level in the hierarchy of legal acts, nor is it stipulated by the Constitution in the provisions on the mutual relation between general acts, i.e. it is an act on implementation of already regulated relations, and not an act creating and regulating those relations. Therefore, the constitutional law, as an implementing act, according to the opinion of the Constitutional Court, is not a normative act that has its independent legal existence and autonomy in relation to amendments to the Constitution, nor does it originally govern matters of constitution or laws, although it is a special act in its form, it is in fact an act governing the transition to the new constitutional system. The constitutional law for the implementation of amendments to the Constitution, as interpreted by the Constitutional Court, only regulates the issue of the implementation and application of the amendments to the Constitution...

... As the Constitutional Law for the implementation of the amendments to the Constitution is an integral part of the amendments to the Constitution, therefore, in the opinion of the Constitutional Court, the challenged provision of Article 5 paragraph 2 of that law, which by its nature is a transitional constitutional provision with limited time application, cannot be subject to constitutional review before the Constitutional Court and is outside the domain of constitutional control. Since the Constitution is the fundamental and supreme legal act of a state there is no legal or factual possibility for assessing substantive compliance of the above provision of the Constitutional Law with any higher legal act. Consequently, we cannot speak about anyone’s competence to decide on the substantive constitutionality of such provisions, including the Constitutional Court. Constitutional review may include the procedure of enacting and amending the Constitution, or the constitutional law for the implementation of the Constitution, but only in relation to the assessment of whether those acts are passed, amended or supplemented in accordance with the procedure and in the manner prescribed by the Constitution.”

Furthermore, in decisions U br. 20/09 of 12 March 2009 and U–I br. 17/11 of 28 February 2014, it also stated its position concerning the legal character of the Constitutional Law for the implementation of the Constitution and the competence of the Constitutional Court for its review:

“Constitutional Law (...) is an act outside the domain of constitutional judicial control, since the Constitution does not provide the basis to establish the competence of the Constitutional Court for its review although it is in the form of a special act (...)”

In case U-VI br. 2/13 of 15 February 2013, the Constitutional Court of Montenegro emphasized that “...constitutional power is original and not limited by law...”.

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

There is tendency towards enhancing constitutional authority in respect of expansion of Constitutional Court’s authority to control amendments to the Constitution.

In Montenegro, there have been several initiatives so far for the review of basic laws before the Constitutional Court, which the Constitutional Court rejected with the explanation that Montenegrin Constitution does not provide for the jurisdiction of any state authority to review the constitutionality of constitutional norms. (see answer to question II-6).