

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

**NATIONAL REPORT**

**CONSTITUTIONAL COURT OF THE REPUBLIC OF MACEDONIA**

**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, 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 process of constitutional adjudication the Constitutional Court of the Republic of Macedonia regularly invokes the constitutional principles of separation of powers, rule of law, equality and non-discrimination, free elections and other constitutional principles which are expressly provided for in the Constitution of the Republic of Macedonia and defined as the fundamental constitutional values of the constitutional order of the country. The Constitutional Court of the Republic of Macedonia finds these constitutional principles to be the foundation of the Constitution and all other constitutional provisions derive from them; thus, they are a starting point for the Constitutional Court in its constitutional analysis of the impugned provisions whose constitutionality it evaluates. While the Constitution of the Republic of Macedonia explicitly enumerates the fundamental constitutional principles, it does not determine their content and meaning, thus leaving it to the Constitutional Court in the interpretation of the constitutional provisions in the process of their application, that is, in its decision-making, as well as to the jurisprudence (For more details on this see the answers to the questions below.).

**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 fundamental constitutional principles are an integral part of the Constitution of the Republic of Macedonia and are contained in Part I of the Constitution titled 'Basic provisions'. These include the constitutional provisions concerning the character of the state and the source of sovereignty, and the characteristics of the country. Within these basic provisions, Article 8 of the Constitution stipulates that the fundamental values of the constitutional order of the Republic of Macedonia are:

- the basic freedoms and rights of the individual and citizen, recognised in international law and set down in the Constitution;
- the free expression of national identity and adequate and equitable representation of the citizens belonging to all communities in state government and other public institutions at all levels;
- the rule of law;
- the division of state powers into legislative, executive and judicial;
- political pluralism and free, direct and democratic elections;
- the legal protection of property;
- the freedom of the market and entrepreneurship;
- humanism, social justice and solidarity;
- local self-government;
- proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development of the environment and nature; and
- respect for the generally accepted norms of international law.

Anything that is not prohibited by the Constitution or by law is permitted in the Republic of Macedonia.

The basic constitutional principles or fundamental values of the constitutional order of the Republic of Macedonia are formulated in relatively general and declarative manner and are considered to represent the development of the basic ideas underlying the entire social order. The basic principles constitute the political basis of the Constitution and hence in their content more theoretical and directional, and less strictly normative regulations, but not purely declarative ones either, and even less can be seen as historical" (Prof.Dr. Savo Klimovski, Constitutional and political system, 1997).

The basic principles reveal the substance, meaning and content of the constitution and constitutional norms. Thus, they largely assist the Constitutional Court and other constitutional institutions in the system applying the law to more fully comprehend the very essence and content of the constitutional norms they apply. The fundamental values give a global theoretical, political, legal and philosophical framework of how to interpret the constitutional and other legal norms and in which direction to steer their application (Dr. Vesela Mukoska Chingo).

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

In the theory of constitutional law and constitutional judiciary as a scholarly discipline there are authors who believe that the constitutional court in its work should refer to the so-called universal legal values or general (constitutional) clauses. Dr. Vesela Mukoska Chingo in "Constitutional judiciary - Theory and Practice" (Edition of the Law Faculty in Skopje, 2002) believes that the universal values fall within the scope of achieving the material constitutionality or material concept of constitutionality and that there is an inevitable need for them to be considered in the constitutional court's adjudication on the merits. She thinks that: "It is not possible for the constitutional court to debate on any case without clashing with the concepts or values such as freedom, justice, fairness, truth, peace, humanism, dignity and honor of the person, etc." According to Dr. Mukoska-Chingo, these general clauses fall within the material concept of constitutionality, that is, they are norms of super-positive character as super-positive law. She believes that especially in conditions of the existence of legal gaps, that is, the absence of positive-legal basis in resolving a dispute in the proceedings before the court, the Constitutional Court may invoke these general clauses, adjust and adapt them to the will of the constitution-maker and legislator, that is, to what arises from the constitution itself as basic premises.

One of the principles not explicitly mentioned in the Constitution and which the Constitutional Court has in particular applied in recent years in its decision-making is the **principle of proportionality**. The application of this principle is the result of the growing influence of the case-law of the European Court of Human Rights on the case-law of the Constitutional Court, in both the sphere of direct protection of individual freedoms and human rights that fall within the competence of the Constitutional Court, and in the abstract control of the laws, especially in the evaluation of certain legislative measures that restrict the human freedoms and rights. Thus, for instance, the Court found a violation of this principle and repealed the provision of the Law on Passports of the Citizens of the Republic of Macedonia which envisaged confiscation of a passport, that is, prohibition to issue a passport or visa to the person forcibly returned or expelled from another country for acting contrary to the regulations for entry and residence in that State<sup>1</sup>.

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<sup>1</sup> In its Decision U.br.189/2012 of 25 June 2014, the Court pointed out that: the contested measure is disproportionate and represents excessive restriction of freedom of movement of the person, that is, the right to travel abroad. This is for a reason that people against whom the contested measure is imposed were already deported, that is, forcibly returned in the Republic of Macedonia, which means that they already suffer a certain effect, so that it would be logical to prohibit their re-entry into the country or countries whose rules for entry and residence they violated, but it should be done by those countries and not by their own country. Instead, the contested measure includes confiscation of the passport for a period of one year, thereby depriving these people completely of the right to leave their country and travel to any other foreign country, and that measure is applied by their home country. This very automatic ban

The Court also found a violation of this principle in the proceedings for assessing the constitutionality of the provision of the Law on Additional Criteria for Performing a Public Office (in the public known as the Lustration Law) which provided public disclosure of personal data of the person who was established as a collaborator<sup>2</sup>.

The Court also found that the provision of the Law on Health Insurance stipulating that compulsory health insurance does not cover health services treatment resulting from a crime or offence that the insured committed is contrary to the Constitution. This provision practically meant that the costs of treatment from the effects of a crime committed by the insured himself should be reimbursed by the insured person<sup>3</sup>.

From the above examples it could be concluded that in the application of the principle of proportionality, the Constitutional Court always applies the teleological interpretation of norms, that is, it takes as a starting point the purpose of the law, whereby it always relates the principle of proportionality to any of the other constitutional principles that are directly, that is, explicitly provided for in the Constitution (such as for instance, the principle of the rule of law, principle of equality, etc.).

In addition to the principle of proportionality, another principle that is not explicitly mentioned in the Constitution, but the Constitutional Court applies in assessing the constitutionality of laws and other regulations is also **the principle of protection of legitimate expectations and acquired rights**. The Decision U.br.74/2014 of 29 June 2016, with which the Court repealed two provisions of the Law on Administrative Officials ("Official Gazette of the Republic of Macedonia" Nos. 27/2014, 199/2014, 48/2015, 5/2016 and 154/2015), can be cited as an example of the latest case-law. The contested provisions envisaged obligation for the already employed administrative officials to provide evidence of proficiency in foreign languages, computer literacy, and if they did not do that the law envisaged that they would be assigned to a lower position or their salary would be reduced salary<sup>4</sup>.

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on persons to travel anywhere abroad makes this measure disputable from the standpoint of the principle of proportionality, and in terms of the principle of the rule of law. "

<sup>2</sup> In its Decision U.br.52/2011 and Decision U.br.76/2011 of 28 March 2012, the Court pointed out: Considering the purpose of the Law which is: "to disable the violators of human rights to hold public functions, which is achieved by notifying the competent authorities and institutions thereof, and public disclosure of the data for these persons is a disproportionate solution exceeding the justification for the stipulation of the special requirement for performing a public office and leads to violation of moral integrity and dignity of the citizen."

<sup>3</sup> In its Decision U.br.60/2006 of 3 December 2006 the Court held that "the contested provision restricts the right to compulsory health insurance. The restriction of the right to health insurance of citizens for committing a criminal offence or a minor offence, regardless of the fact that the person meets the statutory conditions for the exercise of the right to compulsory health insurance is disproportionate and puts these people at a disadvantageous position in respect of the other insured."

<sup>4</sup> The Court pointed out that "Thus-governed contested legislation creates a legal situation of a possible loss of the acquired right from employment (acquired working position, title and salary), which calls into question the exercise of legitimate expectations of already employed administrative officials which they had at the time when they were employed under other terms and conditions, before the adoption of the Law on Administrative Officials."

In the same case the Court found also a violation of the **principle of prohibition of retroactive effect of the law** and stated that: "With the retroactive effect of the Law, employed administrative officials, regardless of their previously acquired titles and expertise in their professional work, realised with the years of working experience in the institutions, are placed in a position of uncertainty from further enjoyment of their employment rights, acquired in a legal manner, because of their inclusion in the regime of the new law which provides for new special conditions, which did not exist in previous legislation. The unfavourable effect of the retroactive validity of the Law is seen in the possibility of losing the already acquired employment rights, as a consequence of failure to meet the specific requirements of the new law. Hence, the new special conditions which the law provides as special conditions for employment in the administrative office, in terms of the regulated legislation, gain the meaning of conditions for the retention of the acquired position, title and salary, which leads to threatening legal certainty and legitimate expectations of employees in terms of their acquired rights."

The Constitutional Court dealt with this principle in the case U.br.119/2006 in the assessment of the conditions for exercising the rights to insurance in case of unemployment. The Court found disputable the provision of the Law on Employment and Insurance in Case of Unemployment which stipulated that the applications filed until the entry into force of the new law on exercising the insurance rights in the event of unemployment to be addressed under the new law, which meant that all users of these rights (e.g. the right to pecuniary compensation) who had acquired the rights under the old law that had lapsed would exercise these rights under the terms of the new law<sup>5</sup>.

**4. What role has the constitutional court 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 preparatoires* of the constitution, or upon the preamble of the basic law in identifying and forming the constitutional principles? Do universally recognised legal principles gain relevance in this process?**

Given the fact that in the Republic of Macedonia there are no openly published records of the *travaux preparatoires* of the Constitution that would be available to the general public, it appears that the content of the constitutional principles is determined by the legal doctrine and constitutional jurisprudence. For the case-law of the Constitutional

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<sup>5</sup> In the Decision the court stated: "While the Court finds the right of the legislator when changing the mode of regulation of relations in certain field to regulate the transition from the old to the new regime to be undisputed, the state should this transition provide in a way that will not question or not jeopardise the legal certainty and already acquired rights and interests to which they relate." The Court also pointed out that the contested provision: "calls into question the exercise of legitimate expectations, in the present case of the beneficiaries their rights arising from the Law on Employment and Insurance in case of Unemployment, under the conditions that in the then applicable laws were defined for the exercise of the rights for which they submitted their applications."

Court in the application of constitutional principles see the answers to questions under nos. 3, 5 and 6.

**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?**

The constitutional principles, that is, basic principles reveal the substance, meaning and content of the constitution and constitutional norms. Thus, they largely assist the Constitutional Court and other constitutional institutions in the system applying law to more comprehensively comprehend the very essence and content of constitutional norms they apply. They represent the theoretical, political, legal and philosophical framework of how to interpret the constitutional and other legal norms and in which direction to steer their application. Accordingly, the fundamental values in the normative sense are basic constitutional norms that are a legal framework, legal basis for the interpretation of other constitutional norms. With the very fact that they are an integral and inseparable part of the constitution they also have a normative character as fundamental or basic norms. As an integral part of the text of the Constitution the fundamental values have not only general and declarative meaning and character, but also a deeper constitutional legal and philosophical meaning and character. They have an imperative character not only for themselves as fundamental values, but also in relation to all other constitutional and legal norms as basic and fundamental norms. They impose their imperative on the overall positive constitutional law and their normative dimension and meaning is perceived in this very imperative. The basic principles are the starting point of the Constitutional Court in the interpretation of constitutional norms because in the interpretation of any provision of the Constitution it always takes certain fundamental constitutional principle or value as a starting point. For instance, in assessing the constitutionality of the laws governing the organisation of state powers or in assessing the legality of the bylaws of the executive power, the Constitutional Court always takes as a starting point the constitutional principle of separation of powers (Article 8 paragraph 1 line 4); or in assessing the constitutionality of the provisions of the Electoral Code, the Constitutional Court always first invokes the principle of political pluralism and free, direct and democratic elections (Article 8 paragraph 1 line 5); in the assessment of laws relating to the judiciary the starting constitutional principle is the principle of the rule of law (Article 8 paragraph 1 line 3); in the evaluation of the laws relating to health and pension insurance and health care the starting principle is the principle of humanism, social justice and solidarity (Article 8 paragraph 1 line 8); when assessing the constitutionality and legality of urban planning, the Constitutional Court takes as a starting point the principle of proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development (Article 8 paragraph 1 line 10), etc.

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

The Constitutional Court in its constitutional jurisprudence usually invokes the principle of the rule of law, which is considered to be the basis for the existence and functioning of a democratic and ruled-by-law state. At the core of the rule of law is the idea of limiting the state government and subjecting it within the law, that is, the general norms which are obligatory for all, such as the Constitution and the laws are.

The Constitution of the Republic of Macedonia establishes the principle of the rule of law at the level of a fundamental value of the constitutional order in Article 8 paragraph 1 line 3. As such, it represents one of the basic principles upon which the constitutional order of the Republic of Macedonia rests.

The Constitution of the Republic of Macedonia (as the constitutions of most European countries) does not define the principle of the rule of law by constitutional norms, but its content can be indirectly derived from other constitutional provisions (the principle of constitutionality and legality, the principle of publication the laws, the prohibition of retroactive effect of the law, the presumption of innocence, judicial independence, judicial protection of rights, judicial review of administrative acts) or by certain principles that are not expressly set down in the Constitution but for which there is a generally accepted consensus that they represent significant elements of the rule of law (principle of clarity and precision of the legal norms, legal certainty, prohibition of arbitrariness).

Almost all these listed elements are considered to determine the content of the rule of law (Venice Commission Report on the Rule of Law (document *CDL-AD (2011)003rev*, paragraph 41 of the Report).

Considering the fundamental role of constitutional courts in the protection of constitutional values and principles by means of achieving their main role - abstract control of constitutionality and legality, constitutional courts emerge as an important guarantee for the realisation of the principle of the rule of law. In the absence of more direct and more specific definitions of the said principles in the constitutional text, the case-law of constitutional courts appears as an important source for their further development and operationalisation.

The most common cases in which the Constitutional Court of the Republic of Macedonia finds a violation of the principle of the rule of law are those in which the Constitutional Court holds that the legislator, in regulating certain matters, did not respect **the requirement for clarity and precision of legal norms** as an element of the rule of law. This principle, according to the jurisprudence of the Constitutional Court is particularly important in the field of criminal law and the provisions of the laws governing the exercise of human freedoms and rights.

With its **Decision U.br.139/2010** of 15 December 2010<sup>6</sup> the Constitutional Court annulled several provisions of the Electronic Communications Law that regulated the possibility of intercepting citizens' communications and the Court found them to be contrary to the constitutional guarantee of inviolability of correspondence and all other forms of communication.

As to the question of the legal consequences of the conviction, the Constitutional Court of the Republic of Macedonia has a rich constitutional jurisprudence. The Constitutional Court has annulled provisions in many laws in which the exercise of certain right of a citizen has been limited because of a conviction for a criminal offence, which limit occurs automatically, by force of law, not on the basis of a concrete court decision<sup>7</sup>.

In the context of this issue is the accepted view in the case-law of the Constitutional Court, which always insisted on, and that is that **citizens' rights and the conditions for their exercise may be regulated only by law and not by a bylaw**. In the view of the Constitutional Court, by-laws adopted by the Government, ministries and other administrative bodies, as well as the independent regulatory bodies, may only work out the legal provisions in the function of their application, but not determine rights and obligations, nor prescribe new conditions and criteria for their exercise which are

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<sup>6</sup> In its Decision the Court stated: "Although the methods and techniques for interception are secret and are targeting the content of the communication in order to prevent or detect crime, allow the conduct of criminal proceedings or the interests of security and defence of the Republic require that, the Court finds that the impugned provisions of the Law do not contain sufficient safeguards against possible abuse by the authorised body. This is for a reason that the provisions governing the area of monitoring must be sufficiently precise and predictable, would not allow improvisation and interpretation in order not to be a threat for the monitoring of everyone to whom this Law may be applied and to prevent the interference in an unconstitutional and unlawful manner with the respect of the right to freedom of correspondence and communication of the citizens. More specifically, the legislation referring to the application of measures to monitor communications should include a crystal clear idea of the circumstances and conditions under which a public authority is entitled to resort to the use of this measure, the manner in which the interception is conducted, the cases in which interception of communications is justified, the authority issuing the order for interception of communications. Everything else goes in the direction of unlimited power and is contrary to the principle of the rule of law. "

<sup>7</sup> From the rich constitutional jurisprudence on this issue as an example can be mentioned the Decision U.br.208/2011 of 9 May 2012 in which the Court stated that: "Non-conviction as a condition for a person to be appointed as a member of the Council of the National Bank may exist only for specifically stipulated criminal offenses for which a final court judgment of imprisonment has been pronounced against the offender, and not for an imposed fine and it may last for a specifically defined period rather than to be a permanent ban on the appointment to the post. From the analysis of the contested provision it arises that it generally stipulates that a member of the Council may not be a person who is convicted of a crime to a prison sentence or a fine, regardless of the type of the crime and its nature and irrespective of the time that elapsed since the date of the served, pardoned or time-barred penalty, from where it arises that such prescribed legal consequence of the conviction is not clear and precise and is not in accordance with the general rules and frameworks for determining the legal consequences from a conviction set out in the Criminal Code. Starting from the constitutional principle of the rule of law and the obligation of everyone to respect the Constitution and laws, and given that the wording of the contested statutory provision is not sufficiently clear and precise and as such does not provide legal certainty for the citizens, as an element of the principle of the rule of law, the Court found that Article 50 paragraph 2 item 1 of the Law is not in accordance with Article 8 paragraph 1 line 3 of the Constitution."



beyond the legal requirements and criteria. This leads to a violation not only of the principle of the rule of law, but also of another important principle, and that is the principle of separation of powers which is also a fundamental value of the constitutional order of the Republic of Macedonia<sup>8</sup>.

3. In many of its decisions the Constitutional Court has found breach of the constitutional principle of the rule of law when the legal norms impose certain obligations on the citizens that represent an additional burden on citizens and that the official authorities can realise in a faster and easier way. As an example for that can be cited the obligations for the citizen to submit proof of his conviction, that is, non-conviction as a condition for acquiring certain rights, an obligation for the citizen to submit proof of regular payment of tax liabilities or obligations for reporting unlawful conduct before the inspection bodies<sup>9</sup>.

An important constitutional principle which is at the same time considered to be an integral element of the principle of the rule of law is also the principle of **equality of citizens** and the prohibition of discrimination. The rule of law means that the law and

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<sup>8</sup> With its **Decision U.br.237/2009 of 28.04.2010** the Constitutional Court abolished the provisions of the Law on Salaries of Judges and the Rules of Procedure and Criteria for Monitoring and Evaluating the Performance of Judges adopted by the Judicial Council of the Republic of Macedonia. In its Decision the Court indicated that: "the criteria are determined by law and the bylaw further develops them, which is a principle that is in line with the principle of the rule of law and the separation of powers into legislative, executive and judicial, as the fundamental values of the constitutional order of the Republic of Macedonia. In addition, the Court took into consideration that with the empowerment of the Judicial Council to prescribe the criteria for monitoring and evaluating the performance of judges, the legislator had no equivalent approach in the development of the constitutional powers of the Judicial Council..... According to the Court, this inconsistent approach of the legislator in the regulation of an important issue related to the professional career of judges could not be justified by the constitutional position of the Judicial Council and its autonomy and independence and it may call into question the principle of the rule of law and the separation of state powers into legislative, executive and judicial, as the fundamental values of the constitutional order of the Republic of Macedonia. The Judicial Council has a constitutional obligation to guarantee the independence of the judiciary, and according to the Court it can do that by a professional, responsible and impartial enforcement of the constitutional and legal provisions that govern the judiciary in the Republic of Macedonia and especially its responsibilities, and not by taking a legislative function, as it arises in the case of the determination of the criteria for monitoring and evaluating the performance of judges."

<sup>9</sup> In its **Decision U.br.103/2010** of 22 December 2010 the Constitutional Court found it contrary to the principle of the rule of law for a citizen who as unemployed begins to work without an employment contract to immediately notify the competent inspection authority, for which a minor offence liability and a fine of 200 euros were envisaged. The Court found that: "... this obligation of the citizen is not in accordance with the Constitution of the Republic of Macedonia. This is because such obligations may not be imposed on the citizens as the control of employers in concluding employment contracts may be carried out by competent state institutions only, that is, by the State Inspectorate of Labour, and it may not be a burden of the employee in any case.

The Court held that although the purpose of the measure is legitimate - disabling unconscientious employers to carry out the exploitation of labor and not trick the obligations stipulated by the Law: "according to the Court the specific way by which the legislator wanted to achieve the goal of establishing social discipline is disproportionate and at the same time a burden on the citizen, that is, employee. Hence, the obligation imposed on the employee by the Law is a violation of the constitutional principle of the rule of law and legal certainty of citizens because this obligation is not aimed at providing greater certainty in the area of labor relations. "

legislation apply equally to all, without any privileges for certain individuals or groups. The Constitutional Court of the Republic of Macedonia in its constitutional jurisprudence has found a violation of the principle of the rule of law when the legal norms have put certain categories of citizens unduly into a privileged position compared to other citizens in terms of the exercise of the same rights (e.g. right to pension, the right to salary, etc.). One of the most important decisions is the Decision U.br.191/2005 of 12 April 2006, with which the Constitutional Court repealed provisions from the Law on Representatives which envisaged more favourable and privileged conditions for acquiring a pension for the Representatives in the Assembly of the Republic of Macedonia.<sup>10</sup>

Concerning the relationship between the principle of the rule of law and the **protection of human freedoms and rights by independent courts**, the Constitutional Court pointed out in its Decision U.br.77/2008 and Decision U.br.42/2008 of 24 March 2010<sup>11</sup>, repealing several provisions of the Law on Determination of Additional Criterion for Carrying Out a Public Office ("Lustration Law"), that is, those provisions that referred to the time scope of lustration and stipulated that it included the period after 1991 as well, that is, after the establishment of the democratic system of independent Republic of Macedonia.

The principle of the rule of law in its content includes the elements such as the right of appeal, that is, the right to an **effective remedy and the right of citizens to judicial review of the legality of administrative acts**, which in the legal system of the

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<sup>10</sup> In its Decision the Court stated: "The right to equality is one of the fundamental legal principles enshrined in the Constitution of the Republic of Macedonia. This right encompasses two elements: first, that all citizens have the right to be treated equally before the laws, and, secondly, that the law applies equally to all citizens by the state bodies. In other words, the right to equality before the law means protecting the citizens from any kind of discrimination in the enjoyment of rights and in the fulfillment of the obligations. The constitutional principle of equality obliges the legislator in the regulation of the relations to perceive the principle of equality in a concrete rather than the abstract manner through the rule that equals should be treated equally, and unequals should be treated unequally. Hence, considering the above, the Court finds that with the impugned legal provisions the legislator has defined different conditions and manner of realisation of early old-age retirement that basically cannot be anything other than acquiring rights under privileged conditions which apply to Representatives only, not to all holders of public mandates who are of the same social status or to all citizens without giving justified grounds. Thereby, the legislator puts citizens in an unequal position, which is in direct contradiction with Article 9 of the Constitution of the Republic of Macedonia."

<sup>11</sup> In its Decision the Court indicated that "... lustration may not apply to the period when the state built a different social and political system, which is based on human rights and their protection. The principle of the rule of law in democratic societies requires human rights violations to be sanctioned within a relatively permanent legal system, not with measures of occasional and temporal character, as in the existing historical circumstances the disputed law is. In a situation of an established democratic system and legal institutions, the only right way to solve them is through the institutions of the system and that is the only way to ensure the rule of law and protection of the rights and freedoms of the individual and citizen, and lustration as a process that aims to deal with the past may and should apply only to the previous social and political system. .... The Court holds that the determination in the Law for lustration to apply also to the period after 1991, when this Constitution was adopted, until the adoption of the Law essentially leads to a denial of the values and institutions established in the Republic of Macedonia under this Constitution, which leads to a violation of the principle of the rule of law as a fundamental value of the constitutional order."

Republic of Macedonia is carried out through the institute of administrative dispute, which is decided on by the Administrative Court. With its **Decision U.no.231/2008**<sup>12</sup> of 16 September 2009 the Constitutional Court repealed a provision of the Law on Administrative Disputes which regulated the right of appeal in proceedings upon administrative disputes incompletely and selectively.

These examples are just a small part of the rich constitutional jurisprudence of the Constitutional Court of the Republic of Macedonia in which it has given a full affirmation of this principle, through the interpretation of the constitutional provision under which the rule of law is a fundamental value of the constitutional order of the Republic of Macedonia. Ensuring the supremacy of the Constitution, the Constitutional Court has an important role in creating a single, coherent and consistent constitutional and legal system. Thus, through its work what is created are realistic preconditions for the constitutional values and principles, including the principle of the rule of law, to be felt directly in the practical application in all fields of social life. By removing the normative acts which violate human rights and freedoms, the Court aims at contributing to the universal values of the legal, democratic, civil and social state become a reality and an integral part of the everyday life of citizens.

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

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

Yes, the constitutional principles enjoy some degree of superiority over other provisions of the Constitution. Starting from their legal character (the answer to question no.5) they determine the essence and meaning of constitutional norms and give direction for the interpretation of other norms of the Constitution. The higher value of the constitutional principles in relation to other provisions of the Constitution in a certain way is explicitly

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<sup>12</sup> In its Decision the Court pointed out: "To fully exercise the right to appeal it is not enough for the same to be simply envisaged as a remedy; it should be further regulated with regard to the deadlines for lodging, the reasons for which it may be filed, and the court which is competent to deal with it. ... The impugned Article of the Law on Administrative Disputes has constitutional defects which do not comply with the principle of the rule of law as a fundamental value of the constitutional order under Article 8 paragraph 1 line 3 of the Constitution. This is because the right of appeal may not be exercised restrictively, or only as a "naked" right, through arbitrary norms that do not regulate the specific right fully or regulate the right selectively. The principle of the rule of law in itself contains the principle of legality, which obliges the legislator to formulate precise, unambiguous and clear norms that will eliminate any possibility of confusion, and he based on the constitutional provision is obliged to establish the right of appeal everywhere where it can serve as a corrective to the improper and unlawful decisions of the courts that finally decide on the rights and obligations and interests of citizens."

recognized by the Constitution itself, with that that under the Constitution the change in Article 8 of the Constitution, which establishes the constitutional principles, requires special so-called double majority votes (see more details on this in the answer to question no. 3 below).

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

From the constitutional jurisprudence it may be concluded that the Constitutional Court gives a higher status to the constitutional principles over the other provisions of the Constitution. The basic principles are the starting point of the Constitutional Court in the interpretation of constitutional norms because always in the interpretation of any provision of the Constitution it starts from certain constitutional principle that is fundamental value (see for more details on this in the answer to question 1/5).

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

The Constitution of the Republic of Macedonia is amended by constitutional amendments (Article 129 of the Constitution of the Republic of Macedonia).

Under Article 130 of the Constitution, the proposal for amendment of the Constitution of the Republic of Macedonia may be submitted by the President of the Republic, the Government, at least 30 Representatives or 150,000 citizens.

Under Article 131 of the Constitution, the decision on amending the Constitution is taken by the Assembly by a two-third majority vote of the total number of Representatives.

The draft amendment to the Constitution is determined by the Assembly by a majority vote of the total number of Representatives and then it submits it to public debate. The decision to amend the Constitution is taken by the Assembly by a two-third majority vote of the total number of Representatives. The Assembly declares the amendment of the Constitution.

The 1991 Constitution of the Republic of Macedonia so far has been amended seven times: 1992, 1998, 2001, 2003, 2005, 2009 and 2011.

From these constitutional changes more important are considered to be the constitutional amendments nos.IV through XVIII adopted in 2001 as a result of the so-called Ohrid Framework Agreement, which political agreement resolved the armed conflict in 2001. These constitutional amendments strengthened the constitutional position and rights of the members of the minority communities in the Republic of Macedonia.

These amendments introduced a new constitutional principle, that is, a new fundamental value of the constitutional order of the Republic of Macedonia - the principle of **adequate and equitable representation** of citizens belonging to all communities in the bodies of state government and other public institutions at all levels. This constitutional principle is intended to reflect the population structure in the area of state government and public institutions.

The Constitution of the Republic of Macedonia does not contain explicit provisions for the eternity of some of its provisions. In the theory of constitutional law it is considered that the prohibition on amending the constitution has political rather than legal value. The political value of the ban is that the creator of the constitution has the moral right to deem that certain principles of state governance are eternal and that they have universal significance. However, the ban on constitutional revision has no legal value, that is, the prohibition cannot legally bind the future creator of the constitution, since the last is equal to the previous one. The constitutional government, as the highest authority, may not be restricted by the lower legislative power, the previous constitutional power or itself (Prof.Dr. Svetomir Shkaric, Prof.Dr. Gordana Siljanovska-Davkova, Constitutional Law, Kultura, 2009, p.193). Similarly, Prof.Dr. Savo Klimovski believes that the constitutional government as the highest authority has the right to modify, supplement, and even abolish the valid Constitution. If it does not have this right, it would not be a constitutional power (Savo Klimovski, Constitutional Law and Political System, Prosvetno delo, 2003, p.99).

However, although the Constitution of the Republic of Macedonia does not contain bans on changing the constitutional provisions, Amendment XVIII established the constitutional provisions the amendment of which requires so-called Badinter majority or double majority. Namely, in accordance with the said amendment, the decision to amend the Preamble, the articles on local self-government, Article 131, any provision relating to the rights of members of the communities, including in particular Articles 7, 8, 9, 19, 48, 56, 69, 77, 78, 86, 104 and 109<sup>13</sup>, as well as a decision to add any new provision relating to the subject-matter of those provisions and articles will require a two-third majority votes from the total number of Representatives in which there must be

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<sup>13</sup> It concerns provisions from the Constitution of the Republic of Macedonia relating to the rights of the members of the communities, especially those pertaining to the official use of languages, the fundamental values of the constitutional order of the Republic of Macedonia, equality of citizens, freedom of religion, the rights of communities, historical and artistic heritage of Macedonia, the Ombudsman, the Committee on Relations with the Communities, the Security Council, the Judicial Council and the Constitutional Court.

a majority of the votes of the total number of Representatives who belong to the communities that are not the majority in the Republic of Macedonia.

From this it can be concluded that special rules apply to amend certain constitutional provisions, that is, it requires a double majority because of which in a particular way these constitutional provisions are more difficult to be amended in terms of others. This includes of course the provisions relating to the fundamental values of the constitutional order of the Republic of Macedonia, the amendment of which also requires a double-majority (2/3 majority of the total number of Representatives which must include a majority vote of the total number of Representatives belonging to the minority communities.

**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?**

This question is not the subject of debate between academic scholars and other societal groups.

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

The Constitution of the Republic of Macedonia does not provide for constitutional review of constitutional amendments. Constitutional amendments are considered to have constitutional effect, at the moment of their adoption, that is, declaration they become an integral part of the Constitution, and the task of the Constitutional Court is to assess the conformity of general acts (normative acts) which in the hierarchy of the legal acts are under the Constitution, but not to assess the very Constitution and constitutional amendments.

With its **Decision U.br.188/2001 of 24 October 2001**, the Constitutional Court dismissed the application of a citizen for initiation of proceedings for assessing the constitutionality of the text of the draft amendments to the Constitution of the Republic of Macedonia. In the reasoning of the Decision, invoking its jurisdiction laid down in Article 110 of the Constitution as well as the competence of the Assembly of the Republic of Macedonia to adopt and amend the Constitution, the Constitutional Court held that: "...the adoption and amendment of the Constitution is within the exclusive competence of the Assembly of the Republic of Macedonia; thus, the content and scope of constitutional matter depends on the will of the creator of the constitution. The Constitutional Court has no jurisdiction and cannot appreciate the Constitution as the

highest legal act and expression of the political will of the entities in the country. Namely, the Constitution for the Constitutional Court is an act in respect of which the Court assesses the constitutionality of all other lower acts. Hence, the assessment of the constitutionality of the text of the draft amendments to the Constitution is not within the jurisdiction of the Constitutional Court. "

**6. Is the constitutional court authorised to check constitutionality of the amendment to the basic law on substantive basis or is it only confined to review on procedural grounds? 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? Please, provide examples from the jurisprudence of the constitutional court.**

The Constitutional Court of the Republic of Macedonia is not competent to review the amendments to the Constitution, neither on substantive nor on procedural grounds.

**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 are no discussions about this issue among academic scholars and among other societal groups.